Recent developments regarding non-pecuniary awards in the Employment Tribunal

By Karen Moss, Barrister

It has long been the case that it is within the jurisdiction of employment tribunals, to award personal injury damages to employees where they can demonstrate that their employer's unlawful discrimination caused psychiatric or physical injury. In ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** [1999] IRLR 481, CA, Mr Sheriff claimed that he had suffered a nervous breakdown as a result of a campaign of race discrimination at work. The Court of Appeal found that it was within employment tribunals' jurisdiction to award personal injury compensation where causation was proved. Stuart-Smith LJ endorsed the view that in such a situation it would be wise for a complainant to obtain a medical report to show the extent of his or her injuries.

Difficulties arise for claimants where there are a number of acts complained of which caused an injury (usually a psychiatric injury, such as depression), but a tribunal find that only some of those acts constituted unlawful discrimination. A tribunal must bear in mind any competing causes and only award damages for the effects of the unlawful action. This sometimes means the compensation awarded can be discounted by such percentage as reflects the apportionment of that responsibility – (***Thaine v LSE*** [2010] ICR 1422) but they need not apply a blanket percentage reduction in every case. In ***Olayemi v Athena Medical Centre and another*** [2016] ICR 1074, the Employment Appeal Tribunal found that, although the claimant was predisposed to post-traumatic stress disorder, this injury was not divisible, between that predisposition and the unlawful acts of the respondent, for the purposes of applying an overall percentage reduction to the non-pecuniary award. The discriminatory acts were the only trigger to the resultant harm, and therefore a blanket reduction was not justified on the facts.

Additionally, in ***Hampshire County Council v Wyatt*** UKEAT/0013/16 (13 October 2016) – the president of the Employment Appeal Tribunal, Mrs Justice Simler DBE, considered that expert medical reports were, although advisable for claimants seeking personal injury damages, not an absolute requirement. If a tribunal is considering a case where an expert has not given a medical opinion as to whether certain acts in isolation caused an injury, a tribunal is nevertheless able to decide issues of causation for themselves. It is permissible for generous personal injury and injury to feelings awards to be upheld, even where there is no expert medical report, as long as the results are not perverse. Claimants would nevertheless be wise to suggest the production of a joint expert report at a preliminary stage in proceedings.

The tribunal must also beware of double-counting between the awards for injury to feelings and personal injury (as confirmed in ***HM Prison Service v Salmon*** [2001] IRLR 425). Where tribunals are considering both a claim for injury to feelings and a personal injury claim, respondents would be well-advised to remind them that the combined award should be broadly in line with personal injury damages recoverable in the county courts. **Section 124(6) of the Equality Act 2010** states that the awards in the employment tribunal should "*correspond*" with amounts which could be awarded by the county court; consistency is therefore required between the tribunal and county court awards. The Judicial College *Guidelines for the Assessment for General Damages in Personal Injuries* (currently in the 13th edition, to be updated in September 2017) are a useful reference point. The EAT in ***Al Jumard v Clwyd Leisure Ltd*** [2008] IRLR 345 also cautioned tribunals against enabling double-recovery where there are multiple claims or simply different heads of loss in one claim of unlawful discrimination; tribunals *"at the end of the exercise… must stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate, and that there is no double counting in the calculation*." (paragraph 51).

Section 124(6) EqA 2010 was the main justification for requiring tribunals to apply the 10% uplift to general damages, just as it is applied by county courts in personal injury cases. The Court of Appeal's decision in ***De Souza v Vinci Construction (UK) Ltd*** [2017] EWCA Civ 879 CA confirms this, resolving a long-running division within the EAT since ***Simmons v Castle*** [2012] EWCA Civ 1039 altered the rate of general damages to be paid to compensate a victim of a tort.

There are, however, differences in the recoverability of personal injury damages in the civil courts and employment tribunals which should be borne in mind by practitioners. Unlike the approach in tort, there is no requirement that the loss suffered be *"reasonably foreseeable"*. The cases of ***Essa v Laing*** [2004] IRLR 313, CA and ***Abbey National plc and Hopkins v Chagger*** [2009] IRLR 86, EAT are authorities for the proposition that compensation can be awarded in respect of all harm that arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt (and direct, rather than indirect).

We can soon expect some new guidance from the President of the Employment Tribunals and/or the President of the Employment Appeal Tribunals setting out new parameters to replace the ***Vento*** bands for awards to compensate injury to feelings. In addition there may be further guidance as to how tribunals are to deal with personal injury awards in light of the decision in ***De Souza***. In the meantime, claimants are not bound by the uprated figures quoted by the then President HHJ McMullen QC in ***Da'Bell v NSPCC*** [2010] IRLR 19, (the lower band of up to £6,000; the middle: £18,000; and the upper band of £30,000). Kerr J has made clear in ***AA Solicitors Ltd Trading v Majid*** UKEAT/0217/15 (23 June 2016, unreported), that it was open to a tribunal to take inflation into account (and increase the level of any award accordingly) without waiting for explicit up-rating by higher courts.

There are a number of lessons to be learnt about personal injury claims in the employment tribunal from the cases heard in the last year or so.

First, when pleading a discrimination claim, it is wise to give careful consideration to whether the acts complained of caused or exacerbated an injury. It is better to plead a handful of allegations which are very likely to have caused or exacerbated an injury, rather than 20 allegations which *might* have caused an injury. If a tribunal find that only five of the allegations amount to unlawful discrimination, but all twenty allegations cumulatively caused the injury, a claimant is likely to face arguments relating to divisibility, as per ***Thaine*** and ***Olayemi*** – should such a claimant only receive 25% of the damages which would otherwise be recoverable if all the acts complained of were unlawful?

Secondly, if a tribunal is reluctant to award substantial damages for personal injury, or even injury to feelings, in the absence of an expert medical report, or of an expert opinion on the injuries attributable to certain acts, ***Wyatt*** can be used to persuade a tribunal that the appellate courts do not always disapprove of such action, as long as there are no perverse results.

Tribunals continue to enjoy a fairly wide discretion in how they decide to assess compensation in discrimination cases, and of course enjoy unlimited jurisdiction. It is a relatively common occurrence for medical reports to be either non-existent or insufficient in many discrimination cases before employment tribunals. Representatives for both employers and employees should be ready to guide tribunals into making awards which are most beneficial to their clients, whilst staying within the parameters set out by the recent case law.

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