Was the respondent's conduct a material cause of the harm to the claimants?

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***Mr A and Ms B v C Ltd and Others* [2025] EAT 165**

Summary

1. The Employment Appeal Tribunal (EAT) allowed the appeal in part against a remedy decision following successful claims of harassment, victimisation, and constructive dismissal. While the tribunal had awarded compensation for injury to feelings and limited pecuniary loss, it refused claims for personal injury and significantly curtailed the loss-of-earnings periods. The EAT identified multiple errors of principle, most notably in the tribunal's flawed approach to medical evidence and causation for psychiatric injury, and its failure to award an ACAS uplift. The case illustrates the complexity of assessing psychiatric injury in discrimination claims and the importance of applying correct legal tests.

Background

2. Mr A and Ms B were long-serving employees of C Ltd. In 2018, Ms B raised a grievance alleging serious sexual harassment by her supervisor, Mr E. Despite partial disciplinary action, the grievance was not properly investigated, and Ms B was later isolated and suspended. Mr A, who supported her, was also suspended on unfounded allegations. Both claimants experienced significant distress, were denied quarterly bonuses, and ultimately resigned in November 2018.

3. In 2021, the tribunal upheld multiple Equality Act complaints: Ms B succeeded in twelve harassment claims, three age-related harassment claims, victimisation, and constructive dismissal; Mr A succeeded in victimisation and constructive dismissal. The tribunal found that their resignations were driven by a "campaign" of harassment and victimisation. At the 2022 remedy hearing, the tribunal awarded modest sums for unfair dismissal and compensation for discrimination, including injury to feelings, but rejected claims for personal injury and awarded

only short periods of loss of earnings (26 weeks for Mr A, 12 months for Ms B). Both claimants appealed.

Appeal to EAT

4. The claimants argued that the tribunal erred in concluding that there was a "broad degree of compliance" with the ACAS Code, which conflicted with multiple findings in the liability decision, including the finding that Ms B's first grievance was not taken seriously, with "no meeting" and "no investigation". The ET had also found that both claimants had faced "trumped-up" allegations of misconduct and remained suspended even when these allegations were found to be untrue.

5. A further ground concerned an allegation that the tribunal had failed to recognise that the respondent bore the burden of showing an unreasonable failure to mitigate, even though the tribunal found that the claimants had not mitigated their losses despite being designated unfit to work.

6. It was also argued that the tribunal erred in concluding that it could not determine causation of either claimant's ill health without expert medical evidence; and, secondly, by failing to apply the principle that it could make a percentage allocation in a case where the harm suffered was divisible.

Legal analysis

7. The EAT observed that, given the tribunal's findings regarding Ms B's first grievance and its conclusion that both claimants had faced "trumped-up" allegations, it was impossible to reconcile those findings with the conclusion that there was a "broad degree of compliance" with the ACAS Code.

8. In respect of mitigation, the EAT held that although the tribunal was entitled to consider whether the claimants had unreasonably failed to mitigate their losses by seeking work, its reasoning lacked clarity. The EAT emphasised that mitigation and causation are distinct: respondents are not liable for losses unrelated to their wrongdoing, but tribunals must clearly explain the basis for any counterfactual assessment. As it was undisputed that neither claimant took any steps to look for work, the burden shifted to them to explain why this was not unreasonable.

9. Both claimants contended that the reason they had not looked for work following termination was that they were unfit to work throughout the relevant period. They further argued that the discriminatory treatment not only led them to resign but also affected their ongoing fitness for work.

10. The EAT distinguished between issues of causation and mitigation, holding that where the tribunal found that a claimant was unfit for any work during a given period, it would then need to consider whether that unfitness had been caused or contributed to by the discriminatory treatment. It also needed to consider whether the unfitness would, or might, have occurred in any event, since a respondent cannot be held liable for losses not caused by its wrongdoing. This was a causation issue, not one of mitigation.

11. The EAT also ruled that the tribunal had applied an incorrect test to the question of whether Ms B had suffered personal injury, asking whether the ill health was "solely or mainly attributable" to discrimination, rather than whether it was a material cause. The EAT held that the tribunal had failed to engage with evidence of deterioration post-suspension and GP records showing anxiety and depression linked to workplace events. It treated an earlier disability finding at a preliminary hearing as determinative, overlooking its limited scope and the fact that Ms B's condition worsened after the discriminatory acts. It ignored principles in *Olayemi v Athena Medical Care* [2016] ICR 1074 and *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188, which require tribunals to consider whether harm is divisible and, if so, to apportion damages. Instead, the tribunal assumed that the absence was entirely due to historic PTSD, despite evidence of new and/or exacerbated symptoms. The EAT confirmed that expert medical evidence is helpful but not essential; tribunals must evaluate all available evidence and attempt apportionment where multiple causes of harm exist.

Outcome

12. The case was remitted to a differently constituted tribunal, which was asked to reassess Mr A's period of unfitness for work and the losses arising from it; to reconsider Ms B's claims for lost remuneration and personal injury damages, applying the correct causation principles and addressing any apportionment; to determine whether any ACAS Code uplift should apply; and to recalculate the parties' losses to take account of quarterly bonuses.

Comment

13. Claims for personal injury in the Employment Tribunal, particularly those involving psychiatric harm, demand a more robust evidential approach than awards for injury to feelings. In this case, the EAT confirmed that expert medical evidence is not invariably required, but it becomes highly relevant where causation, apportionment, or the effect of pre-existing conditions is disputed. Tribunals must avoid speculation and base findings on reliable material, whether contemporaneous records or expert opinion. Practitioners should consider at an early stage whether such evidence is necessary to support the claim or defence, as its absence may lead to error and increase the risk of appeal.

14. In assessing a potential personal injury, the correct approach is to ask whether the respondent's conduct was a material cause of the harm, rather than the sole or predominant cause. Where the injury is divisible, tribunals will seek to apportion damages rather than dismissing claims entirely, and should avoid conflating mitigation with causation. Earlier disability determinations do not settle causation for remedy purposes; subsequent deterioration must be considered. Practitioners should ensure that medical evidence addresses causation directly and consider instructing experts where multiple factors are involved.

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