

‘Counter-factuals’ - Don’t reduce compensation without an evidential basis

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[Gourlay v West Dunbartonshire Council \[2025\] EAT 29](#)

In *Gourley* C was employed by R from 2008 to 2015 when he was dismissed. C succeeded with complaints of victimisation, failure to make reasonable adjustments and unfair dismissal.

C was off sick with depressive episodes at various points from 2013 onwards until his employment ended. At the time of the remedy hearing the parties agreed that by the time of his dismissal C had developed a severe depressive episode which meant he was likely to be permanently unable to work.

At the remedy stage, the ET had evidence from a consultant psychiatrist called by C. The uncontradicted evidence was:

- The initial onset of C’s illness was the result of the failure to make reasonable adjustments from 2013 onwards
- The illness was made worse by the continuing failure to make adjustments and the victimisation in 2015
- The Claimant’s severe depressive episode caused him to be unfit for work for the foreseeable future
- He would be unfit for work until his normal retirement age.

In those circumstances it may seem obvious that the losses flowing from the discriminatory act should be the Claimant’s lost earnings until normal retirement age. However, the tribunal reduced the award by 80% to take account of two possibilities:

- i) C’s employment may have been terminated fairly due to irretrievable breakdown in working relationships, or by agreed mutual termination

- ii) C may have taken ill health retirement at some point before reaching normal retirement age due to his pre-existing MS and his type II diabetes which was diagnosed in 2015.

Possibility of lawful termination

The tribunal reduced the sum by 80% on the basis that it concluded there was an 80% chance that the Claimant's employment would have lawfully terminated by reason of irretrievable breakdown in working relationships or mutually agreed termination by 31 March 2017.

The EAT said that the key question, which had not been considered, was what effect a lawful termination would have had on C. Would C have been in the same position as he was after the unlawful termination? Put simply: would a lawful termination have left C with an inability to work due to a career-long psychiatric injury? If not, then compensation should not be reduced.

The EAT recapped the legal principles in these circumstances, as follows:

- 1) Compensation for discriminatory conduct should be assessed in the same way as damages for a statutory tort, save that there is no requirement that the loss should have been reasonably foreseeable (*Hurley v Mustoe (No 2)*, *Essa v Laing Ltd*)
- 2) The tribunal's task is to put C in the same position which he would have been but for the unlawful conduct of R (*MOD v Cannock*)
- 3) It is necessary for the ET to consider and, if appropriate, take into account the chance that the employer might still have caused the same damage lawfully if it had not discriminated. Part of that may include considering whether the employee might in any event have been dismissed lawfully (*Livingstone v Rawyards Coal Co*, *Abbey National plc v Chagger*)
- 4) In assessing the point above, the tribunal must look at any effect the discriminatory dismissal has had on the ability of the employee to seek work elsewhere. It must compare the effect of the two scenarios of the discriminatory dismissal and a non-discriminatory dismissal. A reduction of compensation will only be appropriate if a lawful dismissal would have resulted in a similar impediment to that which occurred with the unlawful dismissal.

Possibility of ill health retirement

The tribunal also concluded that it was likely that C would have taken ill health retirement at some point prior to normal retirement age, as he had pre-existing MS and had been diagnosed with type II diabetes in May 2015, and ill health retirement had been discussed pre-termination in January 2015.

The EAT pointed out that there was no evidential basis for the ET to conclude that the Claimant's MS would have caused him to stop work at any time prior to his normal retirement age. There were no findings of fact as to what degree of impediment would be required before C would be eligible for ill health retirement, and no medical evidence as to the condition and its likely progression. The finding could not therefore stand; it was 'pure speculation'.

The key take-away from this is that in cases where R wishes to assert that ill health retirement would probably have occurred absent any unlawful dismissal then the ET will expect to see expert evidence on the underlying condition, its likely progression, and evidence as to when ill health retirement criteria would have been satisfied.

Divisibility of injuries

The EAT also gave a brief recap of the approach to take on divisibility of harm where mental injury is caused by both discriminatory and non-discriminatory conduct. In short:

- 1) The first step is to make a factual finding that there was more than one factor which caused or materially contributed to the harm
- 2) The tribunal should then consider whether the evidence allows a rational conclusion to be drawn that some part of the illness was caused by the employer's conduct and some part by some other factor
- 3) If so, the tribunal may apportion the harm between discriminatory conduct (for which the employer is responsible) and non-discriminatory conduct (for which the employer is not responsible)

Key take-away points:

- When an argument arises that a lawful dismissal could have occurred in any event (a 'counter-factual') make sure that the harm caused by the unlawful conduct and the potentially lawful dismissal are the same. They will not be the same if the unlawful conduct has caused a long-term psychiatric illness (unless a lawful dismissal would have done the same).
- If an argument arises that ill health retirement would have occurred in any event, the ET will expect to see expert evidence on the condition, and evidence as to when IHR criteria would have been satisfied.

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