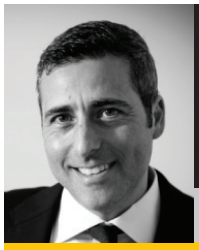

Apportioning liability for psychiatric injury after BAE Systems: a boon for employers?

HOWARD HYMANSON, Harbottle & Lewis

Consequential psychiatric injury is often the hallmark of high-value discrimination claims. In BAE Systems, the Court of Appeal reminds us that compensation should never become a windfall and sets out the required approach to apportioning compensation where a psychiatric injury has multiple causes.

Causation

Where psychiatric injury has arisen in the context of compensation claims for the statutory tort of discrimination or damages for negligence, it is necessary to demonstrate that it was the particular discriminatory conduct or breach of the common law duty of care that actually caused or materially contributed to the injury.

Demonstrating this causal connection is often problematic in psychiatric injury cases, as in the vast majority of situations there is a tangled web of potential alternative causes/stressors, such as pressures at home or indeed at work, which are not based on wrongful acts of the employer, but may be said to have contributed towards the employee falling ill. Where there are a number of different extrinsic causes of a psychiatric illness, what should the approach be to the issue of apportionment?

Conflicting (obiter) Court of Appeal guidance

In *Sutherland*, the 2002 landmark stress-at-work decision, Hale LJ provided the leading Court of Appeal judgment, setting out a number of principles intended to act as guidance in the area of workplace psychiatric injury claims. In doing so, Hale LJ suggested (*obiter*) that where there are multiple causes of psychiatric illness then, unless the harm is truly indivisible, the court should make a 'sensible attempt' (para 41) at apportionment between them so that the 'employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing' (para 43).

However, at the Court of Appeal in *Dickins*, Smith LJ expressed her doubts (also *obiter*) as to the correctness of Hale LJ's approach in relation to this aspect of causation. In short, Smith LJ's opinion (para 46) was that it should not be the default setting for a judge to attempt to apportion damages where the tort had made a material contribution, merely because there had been other non-tortious causes in play and it was not scientifically possible to say what their impact was on the injury. Instead, Smith LJ suggests that any injustice to an employer could potentially be overcome by applying a discount to take account of any pre-existing vulnerability that might have led the employee to suffer a breakdown at some time in the future.

Sutherland guidance preferred by court in BAE Systems

In *BAE Systems*, the Court of Appeal had to arrive at a judgment as to which *obiter* guidance (*Sutherland* or *Dickins*) was correct in the context of findings of discrimination that had resulted in a compensation award of £360,178.60, a large element of which related to psychiatric injury. The employer had appealed against this compensation award and there was medical evidence before the tribunal that the claimant had mild anxiety symptoms that had deteriorated over time. It was argued on appeal that the psychiatric illness was capable of being divided between the statutory torts and other alleged incidents for which the employer was not liable.

In delivering the leading judgment in the Court of Appeal, Underhill LJ supported the approach in *Sutherland* and endorsed the EAT's approach in *Thaine*, that in multiple cause cases an attempt at least should be made to make the best estimate possible, however imprecise, to apportion damages, as otherwise it would not be fair to an employer to make them pay for an impairment occurring before any breach or wrongful act committed by them.

Seeking to divide liability (in multiple cause cases) for psychiatric injury, was not 'mutually exclusive' with applying a

'parties will be expected, with the benefit of medical expert opinion, to at least have a genuine stab at unravelling an employee's medical history and range of potential diagnosable psychiatric illnesses'

discount if prior vulnerability is present. It is open to the court to reduce compensation to take account of prior vulnerability, as both 'propositions are tools which enable a tribunal to avoid overcompensation in these difficult cases' (para 62).

The Court of Appeal went as far as suggesting (paras 92 and 93) that it will be necessary to consider, with assistance from relevant experts, whether a less serious but nevertheless established and defined disorder, can be identified as having occurred prior to 'the diagnostic end-state' so that the court can avoid unjustly pinning 100% liability on the employer for the psychiatric injuries that have arisen.

Despite accepting the guidance in *Sutherland*, the Court of Appeal in *BAE Systems* was satisfied that the tribunal's decision was not perverse in deciding that there was insufficient medical expert evidence to conclude that there was a transition to a diagnosable mental disorder before the key events occurred upon which the findings of discrimination were made. The damages were not therefore apportioned. The employer also received no discount to take account of any prior mild anxiety symptoms.

The apportionment test as applied in BAE Systems

'The tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused … the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm' (para 71).

In preferring the approach set out in *Sutherland* over *Dickins*, Underhill LJ clarified that it makes no difference when addressing issues of apportionment in multiple cause cases whether the court was concerned with common law causes of action rather than the statutory tort of discrimination: 'That difference has no bearing on the question of principle' (para 70).

Is the position any clearer?

The Court of Appeal has clarified that parties involved in this type of litigation will be expected, with the benefit of medical expert opinion, to at least have a genuine stab at unravelling an employee's medical history and range of potential diagnosable psychiatric illnesses in order to ascertain whether there may be a rational basis upon which to apportion responsibility for extrinsic causes behind the development of a psychiatric illness. Simply declining to engage in this difficult process is no longer an option.

In applying the new apportionment test, the Court of Appeal is requiring the focus to move away from deciding the proportion of the liability to impose on an employer by reference to the extent that their unlawful conduct may be regarded as having contributed towards the development of a diagnosed illness such as depression. Rather, the focus is now on trying to identify more than one diagnosed illness, by reference to the internationally recognised classification of diseases – ie the Diagnostic and Statistical Manual for Mental Disorders and the International Classification of Diseases – which can be attributed to one or more of the alternative causes of the illness.

Accordingly, a psychiatrist instructed as an expert will look back at GP records, all related medical notes such as those made by any therapist and also importantly the factual record of the events, much of which will be in dispute. The aim is firstly to detect the presence of any significant prior psychiatric history and then to see if they can unpick the symptoms in order to align the development of any separate diagnosable illnesses with key events in the factual matrix of a case. To the extent that this may be possible, the elements that make up the psychiatric illness will be divisible.

In these sorts of cases, it is typical for a significant psychiatric disorder to occur alongside other disorders. For instance, depression and anxiety may often occur with chronic fatigue syndrome. It will be for the experts to point the way as to which causes have triggered these separate diseases and which of the symptoms have been the most disabling for the employee. In so doing, the court can begin to make an attempt at apportioning liability. While this process can never be an exact science, it does at least offer the possibility of a rational basis to award damages in these difficult cases.

Implications

Based on the approach adopted by the Court of Appeal in *BAE Systems,* the direction of travel is clearly in favour of the employer. It is rare for an employee who develops a psychiatric injury, which is blamed on circumstances at work, not to have at least a trace in their medical records suggestive of some pre-existing vulnerability, or whose descent into mental illness

'there can be little excuse now for employment lawyers not to adopt a personal injury lawyer's mindset and, perhaps, their aggressive approach'

has not also been strongly influenced by factors other than the alleged discriminatory acts.

Personal injury litigators are skilled in the art of poring over medical records with a fine-tooth comb in search of such nuggets, employment lawyers dealing with discrimination cases are less so. But given the commonality of approach to apportionment between the common law and discrimination claims, there can be little excuse now for employment lawyers not to adopt a personal injury lawyer's mindset and, perhaps, their aggressive approach.

Failing to do so will be costly as BAE Systems discovered in the Court of Appeal, which confirmed that it was just the kind of case where a substantial discount may have been justified, because there was evidence that the employee may have become ill in any event (para 83). However, as BAE Systems simply failed to argue this point before the tribunal or the EAT, the Court of Appeal was unwilling to let them have another bite at that cherry and no discount was allowed for the perceived injustice arising from the rule that a wrongdoer must take his victim as he finds him, eggshell skull and all.

However, this common approach to apportionment in discrimination and negligence claims, mapped out by the Court of Appeal *BAE Systems*, pays too little regard to the fundamental differences that exist between High Court litigation processes and litigating discrimination issues in the tribunal, where medical issues are not always front and centre of a case. While an employee commencing a duty-of-care claim in the High Court needs to produce a medical report setting out an opinion on condition and diagnosis, no such equivalent duty exists for a discrimination claim in the tribunal. Even at a tribunal remedies hearing, as confirmed by the EAT last year in *Hampshire County Council,* there is no formal requirement for a claimant to have an expert medical report to address the issue of causation in order to be awarded compensation for personal injury.

Another significant distinction in the tribunal is, of course, that a claimant is unable to recover their costs, should they succeed, unlike in the High Court. Many tribunal litigants will not wish to invest in obtaining forensic medical evidence until they have at least succeeded on liability. This means that issues of medical expert evidence are, in many cases, inevitably pushed back until late into the litigation journey, making it difficult for the parties to ascertain the potential value of a case at an early stage, as may be needed to facilitate any early settlement. A further practical challenge thrown up by the emphasis placed by the Court of Appeal on experts trawling medical records to establish whether and when diagnosable illnesses have occurred, is that they may connect the illness to events at work that pre-date the findings of discrimination. It is only by the stage of reaching the tribunal that the events constituting discrimination are mapped out. Obtaining a positive diagnosis of illness too early from a GP can be damaging for an employee's compensation award.

The difficulties do not stop there. It is always important to keep in mind that references in GP records to employees having a 'low mood' or 'being depressed' are often bandied around too liberally. The danger is that this leads to employees being unfairly depicted as having a long history of mental ill health when that is not the case.

Conclusion

The Court of Appeal's judgment in *BAE Systems* is likely to have the greatest impact on litigation conducted in the tribunal. It will lead to an inevitable increase in the attention directed towards an employee's medical history and personal life, higher costs and prolonged and even more complex proceedings.

KEY:

BAE Systems	*BAE Systems (Operations) Ltd (appellant) v Koncza (respondent)* [2017] EWCA Civ 118
Sutherland	*Sutherland v Hatton* [2002] IRLR 58 CA
Dickins	*Dickens v O2 plc* [2009] IRLR 58 CA
Thaine	*Thaine v London School of Economics* [2010] ICR 1422 EAT
Hampshire County Council	*Hampshire County Council v Wyatt* UKEAT/0013/16