WHERE ARE WE AFTER BILLETT?

[2015] EWCA Civ 773

Julian Benson, Guildhall Chambers

1. "The principal issue is how the court should assess damages for loss of future earning *capacity* in circumstances where the claimant suffers from a minor disability, is in steady employment and is earning at his full pre-accident rate. Should the court follow the traditional *Smith v Manchester* approach, or should the court use the Ogden tables, suitably adjusted?

2. At the date of the appeal the claimant was 30. He had left school at 16 with modest grades but joined the Army, where he succeeded in achieving an LGV licence (in several categories), a BTech equivalent to A or AS level, and a promotion, shortly before his injury, to Lance Corporal. After 7 years in service he suffered a 'non-freezing cold injury' (NFCI) to his feet on a training exercise which led to him leaving the Army in June 2011. Within a week he had obtained employment as an HGV driver and remained in that employment at the time of trial in July 2014.

3. Liability was split 75:25, and the only medical evidence was an agreed report from Major General Craig, formerly of the Royal Army Medical Corps.

4. The medical report indicated that "he seems to be settled in his present job and his condition is not causing him problems" (§27). The claimant's oral evidence was that the only problem he had at work was difficulty pulling down the shutters of his lorry in cold weather, which related to the condition of his hands, not his feet (a claim was brought specifically in relation to his feet) and Major General Craig's evidence was that the less severe symptoms in his hands "probably did not amount to NFCI" (§20).

5. The claimant was earning £21,500 at the date of the trial, which would have been the same whether he had NFCI to his feet or not. The respective employment experts agreed that he would have to "avoid jobs that require him to work outside and therefore will be more limited in terms of choice" (§29).

6. Jackson LJ also noted that the defendant's employment expert (Mr Cameron) considered that the claimant had "an excellent driving qualification", and that his experience as a military driver and five years' settled employment to date would give him a "very good CV for finding future work" (§30).

7. When Jackson LJ came to assess the damages for "future earning capacity" the first section was titled 'Loss of Future Earnings and Future Earning Capacity'. He explained the difference

between loss of future earnings (calculated upon a multiplier / multiplicand basis) and then 'handicap on the labour market'. He reviewed *Smith v Manchester Corporation* [1974] 17 KIR 1 and *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132.

8. In *Smith* itself, the claimant was a 51 year old part-time cleaner in a residential home who suffered an injury to her arm, and subsequently developed a causally related frozen shoulder. She returned to work after two months but then had another 14 months off work with 13 months of treatment. The judge described her restriction as causing "a very severe disability" (page 2) in her job, she could not manage to do any mopping or any bilateral work. She was assisted in those and other duties by colleagues. The Court of Appeal noted that she was "anchored to her job" (Scarman LJ) (*part of his judgment follows this article) because she looked after her 79 year old mother and her 26 year old daughter also lived with her, making it very difficult for her to look further afield than the residential home where she worked. The trial judge had awarded £300, or about 4 months of her annual earnings (she was paid £16.50 per week). The judge described the damages he awarded of £300 as notional, whereas George Carman, and then indeed Scarman LJ, described that award as "derisory". It was replaced by the sum of £1,000, or 61 weeks of net earnings, which took into account the fact that the defendant had committed itself in open court at the trial to continue employing her in the future, and the fact that her state retirement age was then 60 (there was some question that she might have continued to 65).

9. The anatomy of the *Smith* award was then fleshed out in considerably greater detail in *Moeliker*, so that there is now a well known hierarchy of questions: Is there "a real or substantial risk that the claimant would lose his current job before the end of his working life?" ('Real' means 'identifiable' even if 'unlikely': *Robson v Liverpool CC* [1993] PIQR Q78). If so:

   (a) The court should look at the amount the claimant is earning at the time of the trial and estimate the length of the rest of his working life.

   (b) How great is the risk of the claimant losing his job?

   (c) When might that risk materialise (and once or more than once)?

   (d) How far would he be handicapped if he was thrown onto the labour market – in other words, what would be his chances of getting an equally well paid job?

   (e) What variable factors might apply, for example the claimant's age, skills, nature of disability, whether he is only capable of one type of work, or is or could become capable of others, whether he is tied to work in a particular area, the general employment situation in his trade or his area or both.

10. Browne LJ then indicated that the court would have to "make the usual discounts for the immediate receipt of a lump sum and for the general chances of life", and in his judgment Jackson LJ reminds us that awards for *Smith* compensation "usually range between 6 months and 2 years' earnings" (2002, *Journal of Law and Society*, vol 29, pages 406-435).

11. Jackson LJ then reviewed the trial judge's approach, which was that the claimant was aged between 25 and 29, in the middle range of educational attainment, and employed. Uninjured, his reduction factor under the Ogden tables would be .92 but because the judge found him to be disabled (albeit "only just"), the reduction factor governed by table B would be .54. The judge adjusted that factor to .73 because he regarded the claimant's disability as minor. That resulted in a multiplier for future loss of earnings of 4.62 and an award of c£99,000.

12. The Defendant argued that the claimant was not in fact disabled, because the claimant's injury did not limit his ability to carry out normal day to day activities within the meaning of the Equality Act. Guidance on the interpretation of the Act was recently given by Langstaff J in *Aderemi v London & South Eastern Railway Ltd* [2013] ICR 591. In determining what constituted "a substantial adverse effect" on a person's ability to carry out normal day to day activities within the meaning of section 6, Langstaff J stated that the phrase meant "more than minor or trivial" (§14). He made the point that the Act did not create "a spectrum running smoothly" so that "unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".

13. In adopting that approach, Jackson LJ went on to review the claimant's restrictions, which included DIY and gardening in cold weather, playing rugby and swimming regularly, and playing with his children outside when it is cold (§90). On that basis the court found that the judge was entitled to find that the claimant was "disabled" for the purposes of the Equality Act.

14. The second attack on the judge's conclusion was that, notwithstanding any considerations of "disability", the judge ought to have adopted the *Smith* approach in any case. Jackson LJ then commented that the bands used in Tables A-D are "of necessity extremely wide", and that by reference to a disablement scale of 1 to 10 (see generally *Ogden reduction factor adjustment since, v Bradman: Part I* [2013] JPIL, D219) the natural inference would be that the claimant would fall towards the bottom of category 1. Given that without any adjustment the claimant would have been awarded £200,000 for future earning capacity, it was obvious to the court, looking at the man and his circumstances, that "in order to bring a sense of reality to the present exercise, it is necessary to make a swingeing increase to the RF shown in Table B (.54)".

15. Jackson LJ described the claimant as on the "outer fringe" of the disability spectrum, noted that the disability affected his career much less than his extra work activities, and that as a result there was "no rational basis for determining how the reduction factor should be adjusted". He therefore decided that "the best that the court can do is to make a broad assessment of the present value of the claimant's likely future loss as a result of handicap" following the guidance given in *Smith* and *Moeliker*.

16. He then decided that the appropriate award would be about two years' earnings, which he rounded up to £45,000, and which he then compared with a proper application of Ogden 6 in which (because the claimant only just scraped into Table B) the judge "should have taken an RF much closer to that in Table A. That would have resulted in virtually an identical conclusion. [*Fancy that*]

17. The message to the profession is clear.

(a) ensure that your client and expert set out in detail any all restrictions and disabilities material to the Claimant's present employment and alternative working possibilities (ie due to training or experience in other sectors);

(b) Consider formulating the claim under Ogden and also, discretely, as a combination or 'Blamire' and 'Smith' or 'Smith alone'.

(c) Do not just parrot Ogden, and advise accordingly - you will have to be more critical than that and take on board the Court's unanimous approach even where some 'disability' has been proved.

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