

ESSENTIAL EMPLOYMENT LAW FOR
PERSONAL INJURY PRACTITIONERS

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1. There are key areas of employment law, both contractual and statutory, which impact upon personal injury (“PI”) claims and which PI practitioners cannot afford to ignore. This paper will focus on certain issues specifically relevant to quantum and, in particular, claims for future loss of earnings and mitigation.
2. Aspects of employment law particularly relevant to personal injury claims are:
 - (i) the protections afforded to employees by the Disability Discrimination Act 1995;
 - (ii) the employer’s right to terminate the contract of employment where the claimant is unfit for work by reason of injury, in particular where the employee is entitled to the benefit of Permanent Health Insurance (“PHI”);
 - (iii) the employee’s entitlement to certain other benefits;
 - (iv) the impact of the age discrimination legislation;
 - (v) the potential for claims for personal injury in the employment tribunal in claims involving psychiatric illness caused by unlawful discrimination and the pros and cons of bringing a claim in the employment tribunal rather than in the County Court or High Court;
 - (vi) the provisions of the Working Time Regulations 1998 and the National Minimum Wage Act 1998 (and National Minimum Wage Regulations 1999) and their potential application to workers providing care;
 - (vii) the legislative framework governing equal pay, which may affect the calculation of claims for future earnings loss and affect the analysis of statistics relevant to female claimants.

Disability Discrimination Act 1995 (“DDA”)

3. *Why do PI practitioners need to know about the DDA? Because any claimant who is disabled and who has a loss of earnings claim is entitled to certain protections under the DDA which may impact on that claim.*
4. There are two categories of claim in which a basic understanding of the DDA is desirable:
 - (i) where a claimant was already disabled at the time that he was injured; and
 - (ii) where, following the injury, he has become a person who is disabled within the meaning of the DDA.
5. The main impact of the DDA is on employment issues but PI practitioners should also be aware of the applicability of the DDA in other fields: for example, in the field of education and the provision of services and (for those employed in the public sector), the duty under section 49A of the DDA, which came into force on 4th December 2006, which requires all local authorities to actively look at ways of ensuring that disabled people are treated equally. A basic knowledge of the DDA will enable the PI practitioner to evaluate practical options for a disabled claimant relevant not just to earning capacity but also to care needs. For example, is it practicable for the severely disabled claimant to undertake a college or university course? What assistance will be provided by the college/university? What qualification may be obtained and how will that impact on the claimant’s earning capacity?
6. Before looking at the DDA itself, the impact of disability on employment is particularly topical for PI practitioners in the light of the publication of the 6th ed of the Ogden tables in March 2007. At Section B, there are new tables for the deduction for contingencies other than mortality in claims for future loss of earnings. The new tables take into account disability and its impact upon earning capacity. The discount factor applied to a future loss of earnings claim where a person is already disabled at the time of injury is

(as the editors observe, not surprisingly) markedly lower than the discount factor applicable where an individual is not disabled. For example, a male aged between 30 and 34 who is not disabled and who is in the middle category of educational attainment (GCSE grades A to C up to A levels or equivalent) may have his multiplier for loss of earnings to pension age 65 discounted by 0.91. An equivalent male who is disabled may have his earnings discounted by 0.52.

7. The definition of disabled used in the analysis which gave rise to the tables is broader than the definition under the DDA but includes the requirement that the individual satisfies the DDA definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities.
8. The explanatory notes to Section B correctly observe that in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the nature of a particular claimant's disability. For example, an individual with dyslexia may be disabled within the meaning of the DDA but may have been working in a public sector manual job for more than twenty years with an earning capacity equivalent to his non-disabled colleagues. At the other end of the scale, an individual with severe and progressive MS at the time of an accident may have had a very limited future earning capacity even if the accident had not occurred.
9. PI practitioners need to be aware of the definition of disability in section 1(1) of the DDA ("a person has a disability for the purposes of [the DDA] if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities"): a definition which is supplemented by Schedule 1 to the DDA and amplified in relation to past disabilities in section 2.
10. The key parts of the definition are the definition of "long-term effect" (has lasted at least 12 months, is likely to last at least 12 months or is likely to last for the rest of the individual's life) and the definition of "normal day-

to-day activities”. An impairment only affects the ability of a person to carry out normal day-to-day activities if it affects one of the following:

- (a) mobility;
- (b) manual dexterity;
- (c) physical coordination;
- (d) continence;
- (e) ability to lift, carry or otherwise move everyday objects;
- (f) speech, hearing or eyesight;
- (g) memory or ability to concentrate, learn or understand; or
- (h) perception of the risk of physical danger.

11. Where an impairment would have a substantial adverse effect on an individual’s ability to carry out normal day-to-day activities but for the fact that measures were being taken to treat or correct that impairment (e.g. medication, therapy or the use of a prosthesis), the individual is still treated as disabled. Persons who have cancer, HIV infection or MS are deemed to have a disability.
12. Where an individual has a disability, he cannot be treated less favourably for a reason relating to his disability than others to whom that reason does not or would not apply, unless the employer can show that the treatment is justified (section 3A of the DDA). He cannot be treated less favourably on grounds of his disability. And his employer has a duty to take reasonable steps to prevent physical features of the employer’s premises or any provision, criterion or practice applied from placing the disabled person at a disadvantage.
13. The DDA provides valuable rights which should protect disabled employees from having their employment terminated for disability-related

reasons (save where termination of employment is justified). Employers also have a duty to make reasonable adjustments.

14. One question for the PI practitioner is to what extent these rights and protections, valuable as they are, will in practice be complied with and implemented by employers. Like other aspects of discrimination legislation, it is likely to be many years before a real difference is seen. The research upon which the Section B tables were based refers to the Labour Force Surveys from 1998 to 2003. Whilst the definition of disability used in the Surveys is not identical to that used under the DDA, it is clear that persons with disabilities remain at a very substantial disadvantage in the labour market.

Termination of Employment

15. *Why does the PI practitioner need to know about the employer's right to terminate a claimant's contract of employment? Because the PI practitioner needs to be able to assess the loss of earnings claim, which may be affected by the circumstances in which an employer may lawfully terminate the contract and any sums payable on termination.*
16. It is often essential to see a claimant's contract of employment when considering a claim for damages. If the claimant is employed at the time of the accident, the contract will set out the notice period and there may be a sickness policy which will set out the claimant's entitlements and the circumstances in which his employment may be terminated.
17. Practitioners should be aware that as a matter of contract law, although an employer may generally terminate an employment contract by notice, there are constraints on this power. The Courts are, in appropriate circumstances, prepared to imply a term that the employer's power to terminate is restricted where termination would deprive the employee of certain contractual rights. For example, an employee may be entitled under his contract of employment to the benefit of a PHI policy in the case of long-term ill-health but that benefit may only be payable if the contract of employment continues to subsist.

18. In *Aspden v. Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 421, termination of the contract of employment would have prevented an incapacitated employee from qualifying for PHI benefit to which he was otherwise entitled. It was held, in those circumstances, that the employer's power to terminate the contract of employment was qualified by an implied term that the employer would not terminate the contract of employment where to do so would be to prevent the employee from qualifying for the benefit. This was developed further in *Vilella v. MFI Furniture Centres Ltd* [1999] IRLR 468, in which an employer was restrained from giving notice which would deny to an employee PHI benefits which were already in payment.
19. By analogy with *Aspden*, it was held in *Jenvey v. Australian Broadcasting Corporation* [2002] IRLR 520 EAT that where an employee was entitled to enhanced redundancy benefit under an agreed scheme, the employer could not terminate his employment for another reason simply to avoid paying the enhanced redundancy benefits.
20. The test is whether an implied anti-avoidance term can co-exist with an express provision as to termination.
21. All contracts of employment contain an implied term that the employer will not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. In appropriate cases, this term will be enforced, again provided that it can co-exist with an express term, so as to ensure that an employee is not deprived of benefits to which he would otherwise be entitled.
22. Where an employee's employment has been terminated for reasons connected with the injury, both parties will almost certainly wish to see copies of the employee's personal file and occupational health records. Disclosure of such files may assist the claimant in formulating the loss of earnings claim. Defendants may find entries which enable them to argue that employment would or might have been terminated irrespective of the injury.

Other Employee Benefits

23. *Why do you need to know? In order that the claimant is compensated in full for any losses.*
24. Any claim for loss of earnings should include a claim for loss of employee benefits but these can be particularly valuable in high value claims where, for example, the claimant had the benefit of a substantial bonus scheme and/or a share option scheme. Even in lower value claims, disclosure of the contract of employment and employee handbook may demonstrate a range of valuable benefits: travel benefits, for example, or discounts on clothing or the weekly shop for those employed in shops or supermarkets, all of which may add considerable value to a claim. It may be necessary to consider whether benefits are contractual in nature or discretionary and, if discretionary, whether the employee made any contribution to them on what basis they would have been paid. Benefits may or may not be deductible from damages under *Hodgson v. Trapp/Parry v. Cleaver* principles.
25. See in relation to the deductibility of PHI benefits *Pirelli v. Gaca* [2004] PIQR Q49. Where an employee has not paid for or contributed to PHI benefits, they are deductible against an award of damages. The contribution involved in working for an employer who then purchases a PHI policy is insufficient contribution to enable the claimant to fall within the exceptional category where benefits are not deducted.

Age Discrimination

26. *The relevance to PI Practitioners? That previous assumptions and statistics as to retirement age and prospects of finding alternative employment may no longer be reliable when projecting into the future.*
27. The Employment Equality (Age) Regulations 2006 (“the Age Regulations”) came into force on 1st October 2006. Their principal impact on personal injury cases is likely to be in relation to retirement age.

28. Before the implementation of the Age Regulations, employers could operate a “normal” retiring age (whether or not fixed by contract) whereby employees could expect to retire at a certain age, normally either 60 or 65. It is now unlawful to retire an employee before the age of 65 unless retirement at the younger age can be objectively justified.
29. A challenge to the compulsory retirement age has been referred to the European Court of Justice backed by Age Concern. However, in a recent Spanish case (*Palacios de la Valle v. Cortefiel Servicios SA*) the Advocate General has given his opinion that a provision for termination of employment at a particular retirement age, if contrary to the Framework Directive, would be justified on the grounds that such a provision served the legitimate public interest aim of an employment and labour market policy designed to promote intergenerational employment.
30. The PI practitioner should be aware that a provision in a contract of employment which provides for a retirement age under the age of 65 may be unenforceable. A claimant with a contractual retirement age of 60 who asserts that he would have worked to age 65 but for the accident probably has a much stronger claim now than he would have done before the Age Regulations came into force. This will potentially increase the multiplier applied to the future loss of earnings claim.
31. From the Defendants’ perspective, it may be possible to assert with greater force that age will not be a barrier to obtaining alternative employment for an injured claimant now that discrimination in recruitment on age grounds is outlawed (subject to justification).
32. By reason of the Age Regulations, opinions expressed by employment consultants as to an employee’s likely retirement age and prospects of obtaining alternative work based on age may also require more careful scrutiny. Statistics based on periods pre-dating the coming into force of the Age Regulations may be unreliable for that reason.

Psychiatric Injury Caused by Unlawful Discrimination

33. *Why do PI practitioners need to know about this? Because claims for psychiatric injury are no longer in the exclusive province of PI practitioners in those cases where there is a link between psychiatric injury and unlawful discrimination.*
34. Discrimination claims in the employment tribunal now not infrequently involve claims for psychiatric injury. PI practitioners need to know how best to advise their clients when a particular set of facts gives rise to both a “pure” PI claim and to an employment claim in which compensation for PI might be available. Principles of assessment of damages require that practitioners have an understanding of the potential overlap between employment and personal injury claims, so that claims are brought in the right forum and so that double recovery is avoided. It was established in *Sheriff v. Klyne Tugs Lowestoft Ltd* [1999] ICR 1170 that employment tribunals can award damages for psychiatric injury caused by unlawful discrimination but the claimant who brings such a claim must be wary of the potential loss of the right to bring a claim for personal injury in the civil courts.
35. Individuals who have sustained psychiatric injury as a result of unlawful discrimination at work may have the option of bringing a personal injury claim in the civil courts or a claim in the employment tribunal for unlawful discrimination. Either claim, if upheld, will lead to compensation assessed according to the broad tortious measure of damages: aimed at putting the claimant, so far as possible, in the position which he/she would have been in but for the unlawful treatment.
36. A claimant must opt whether to pursue a claim in the tribunal or through the Courts. If a discrimination claim which includes a claim for personal injury is determined by the tribunal or compromised between the parties, the claimant is unlikely to be able to bring a claim for damages for personal injury in the Courts, arising out of the same facts. The same would be true of a claim brought in the Courts but because of the

comparatively short time limits for tribunal claims, the tribunal claim is likely to be determined first.

37. The personal injury practitioner (like the employment practitioner) acting for the claimant must be able to exercise sound judgment as to whether the claim is brought in the tribunal or the civil courts. The relevant factors will include:
 - (i) time limits;
 - (ii) causation;
 - (iii) costs; and
 - (iv) other considerations relevant to the most appropriate forum.
38. The time limits for bringing discrimination claims are generally three months from the act of discrimination (or, if the act is a continuing act, three months from the date when the act of discrimination ceases). Whilst it is now common to have Case Management Discussions (“CMDs” as opposed to “CMCs”) in the employment tribunal in cases of any complexity, it is likely that the tribunal will seek to list the claim within a year. Personal injury practitioners will want to consider whether the case can realistically be “brought to trial” within that period.
39. In cases of direct and intentional discrimination, there is no need to establish foreseeability of injury: *Essa v. Laing Ltd* [2004] EWCA Civ 02. Foreseeability is frequently the most difficult hurdle to overcome in a personal injury claim and this may, therefore, be a compelling reason for bringing a claim in the tribunal. It has not yet been authoritatively decided whether there is a requirement of foreseeability in cases involving indirect or unintentional discrimination. But if proof of foreseeability is likely to be particularly difficult, this may weigh in favour of bringing a claim in the tribunal.
40. The tribunal is generally a “no costs” jurisdiction. Costs awards are exceptional and made only where a party (or a party’s representative) has

acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings or the bringing or conducting of the proceedings was misconceived (rule 40 of the Employment Tribunals Rules of Procedure). Therefore, whilst a claimant will have to pay his/her own costs, there is very little risk of having to pay the Respondent (defendant/employer)'s costs. This may be a relevant consideration in cases where PI practitioners would not be prepared to conduct a case under a conditional fee agreement but where some funding is available for a tribunal claim (there are very few employment barristers, I believe, who will conduct tribunal cases under CFAs, for a variety of reasons including the non-recoverability of costs).

41. Other considerations relevant to the most appropriate forum may include the seriousness of the case. Whilst tribunals have evolved beyond recognition since their inception, they are still comprised of a chairman and two lay members. There is still a risk (even if a diminishing risk) that chairman and/or lay members will have little experience in assessing compensation in high value claims and/or in evaluating expert evidence, particularly where such evidence is contested. Although the principles of compensation are the same in the tribunal as in the Courts, the tribunal claim may include an additional award for injury to feelings and the interest provisions are marginally more beneficial to claimants than in the Courts.

Working Time Regulations 1998 (“WTR”)

42. *Why do PI practitioners need to know about this? It has been unsuccessfully argued in Sayers v. Cambridgeshire County Council [2006] EWHC 2029 that a breach of regulation 4 of the WTR (the 48 hour limit to the working week) gives rise to a cause of action for breach of statutory duty. It is not this provision to which I want to refer but to the requirements in relation to rest periods and their impact on the evaluation of future care.*
43. Under the WTR, workers have a right to:

- (i) a daily rest period of not less than 11 consecutive hours (reg. 10);
 - (ii) an uninterrupted weekly rest period of not less than 24 hours (reg. 11);
 - (iii) a rest break where the working day is more than six hours long (reg. 12); and
 - (iv) adequate rest breaks where the pattern of work is such as to put the worker's health and safety at risk (reg. 8).
44. The WTR are potentially relevant where a care package is recommended which does not appear to permit compliance with the regulations: for example, a recommendation for a single resident carer in circumstances where a claimant requires 24 hour care.
45. Care agencies have argued that a resident care worker is “*employed as a domestic servant in a private household*” and that, as such, falls within one of the exceptions to the Working Time Regulations (regulation 19). There is no appellate authority in the employment sphere on this issue. However, in the health and safety field, there is authority at Court of Appeal level on the meaning of “domestic servant” in *Cameron v. Royal London Orthopaedic Hospital* [1941] 1 KB 450. Parcq LJ, whilst emphasising that he was not providing a definition applicable to every case stated that:

“The phrase “domestic servant” calls up a definite idea to the mind of everybody. To the mind of a man with a small house and of modest means it probably calls up a picture of a maid servant. Others will be more likely to think of a butler, a footman, a chauffeur, gardeners and so forth...If it were not permissible to pay the general servants of a household partly in food and by the provision of sleeping accommodation, the position of the householder would be almost impossible. The reason for that is not merely that the servant is treated as part of the family... but because he assists in the maintenance of the home and does work in and about it which, if it were not done by servants would have to be done either by the employer himself or, at the greatest inconvenience by someone from outside...Where there is what can properly be termed a domestic establishment and some of the work in that establishment is done by a particular person for the purposes of the upkeep of the home and for the convenience of the members of the family, that person is a domestic

servant. Sometimes he is a highly skilled person. There are great houses where a chef is employed...”.

46. It seems unlikely that a professional, resident care worker would be found to be a “domestic servant” within this meaning but, even if he was, regulation 19 of the WTR does not exclude regulations 10, 11 and 12. A resident care worker who works during the day and is on call at night, is regarded as “working” whilst on-call, even if asleep (*E MacCartney v. Oversley House Management* [2006] IRLR 514). The daily and weekly rest periods and regular breaks must still be allowed for. PI practitioners may want to question both the practicability and the lawfulness of the proposed 24 hour care package where a resident carer is the suggested option.

National Minimum Wage Regulations 1999 (“NMWR”)

47. *The particular relevance within the PI context is as for the WTR.*
48. By analogy of reasoning with the WTR, PI practitioners may want to consider whether a care package (and particularly a package involving overnight care) complies with the NMWR. There is no “domestic servant” exception in the NMWR. The present national minimum wage is £5.35 per hour
49. A carer giving 24 hour residential care may have their work treated as “unmeasured work” within the meaning of the NMWR. If so and if there is a “daily average” agreement in writing, which contains a realistic average, requirements of the NMWR will be met if the application of the daily average involves payment of at least the minimum wage: *Walton v. Independent Living Organisation Ltd* [2003] EWCA Civ 199. However, in the absence of any such agreement, the time which counts for assessing the hourly wage may include “on-call” time: *British Nursing Association v. Inland Revenue* [2001] IRLR 659, a case involving employees operating their employers’ emergency booking service from home during night-time hours. The employees had to be available to answer the phone at any time

of night, even though could undertake other activities while waiting for calls.

Equal Pay

50. *Why do PI practitioners need to know about this? Because employment consultants sometimes give opinions based on the statistics demonstrating the gender pay gap. PI practitioners need to know how and when such assumptions may be challenged.*

51. The Equal Pay Act 1970 has now been in force for more than 30 years. At its most simple, it operates so as to imply an equality clause into the contract of employment of a female employee so that her pay is equalised with that of a male comparator. The Act has, up to now, failed to close the gender pay gap for many reasons. However, there has been a recent change. Trade Unions and private providers of legal services have taken up the cases of many women, particularly in the public sector. It is well-known that following the single status agreement, thousands of public sector jobs have been evaluated or re-evaluated with a view to closing the gender pay gap. Therefore statistics relied upon by employment consultants in relation to the pay of a female claimant should be scrutinised with care, as should assumptions, sometimes made by employment consultants, that women will earn less. The gender pay gap may not close but it seems likely to narrow in the future so that assumptions based on the past should be approached with caution.

Finally

52. Double recovery is potentially an issue where there have been claims brought in both the Court and the tribunal. If there has been an employment claim, there are aspects of compensation which may need to be set off against an award for damages for personal injury. For example, compensation for unfair dismissal may include compensation for loss of earnings which overlaps with a claim for damages for loss of earnings as a result of personal injury: or compensation for injury to feelings for

unlawful discrimination may overlap with an award for pain, suffering and loss of amenity in a psychiatric injury case.

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