Pondering the Imponderables: Future Loss of Earnings Claims Post-COVID

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The significant uncertainties in the economy and the employment market caused by the pandemic may lead to an upsurge in defendants arguing that damages for future loss of earnings should be assessed by way of a *Blamire* and/or a *Smith v Manchester* award rather than using the multiplier/multiplicand method. It could be contended that, applying the pre-COVID guidance, the extraordinary nature of those uncertainties creates too many imponderables for assessment using the standard multiplier/multiplicand basis. Conversely, the same uncertainties may make it easier for claimants to obtain *Smith v Manchester* awards and in higher amounts than before.

Three Methods of Calculating Future Loss of Earnings

There are essentially three methods of calculating damages for future loss of earnings in personal injury claims.

1. The multiplier/multiplicand approach;
2. A *Blamire* award (*Blamire v South Cumbria Health Authority* [1992] EWCA Civ 20);
3. A *Smith v Manchester* award (*Smith v Manchester Corporation* (1974) 17 KIR 1).

Pre-COVID Guidance

In November 2019 the Court of Appeal gave guidance on when the above methods should be used to assess the Claimant's damages for future loss of earnings. In *Khuzan Irani v Oscar Duchon* [2019] EWCA Civ 1846 Hamblen LJ, with whom Holroyde LJ and Sir Terence Etherton MR agreed, held:

- The general method of assessment of future loss of earnings is to use a multiplier/multiplicand methodology and the current Ogden Tables and guidance;
- This method is to be preferred to the broad-brush approach of awarding an overall lump-sum figure after consideration of all the circumstances as in *Blamire.* It should be adopted unless the court is "*driven to conclude*" that there is "*no real alternative*" to a *Blamire* award;
- There will be "*no real alternative*" to a *Blamire* award where:
  - There are "*too many imponderables for the judge to be able to make the findings necessary to support the multiplier/multiplicand approach*", rather than just "*some degree of uncertainty…about the future*"; and/or
  - The Claimant is unable to establish, on the balance of probabilities, (i) the but for earnings and/or (ii) the residual earnings;
- *Ward v Allies and Morrison Architects* [2012] EWCA Civ 1287 provides an example of a case where the court was "*driven to conclude*" that there was no real alternative to a *Blamire* award. The Court of Appeal in that case held that the trial judge was entitled to conclude that there were "*too many imponderables to enable him to hold, on a balance of probabilities, what the likely career pattern and earning capacity of the appellant would have been but for the accident and what it was likely to be as a result of the accident or that she would be likely to suffer a loss of earnings in the future*". In such circumstances the Court concluded that the judge was justifiably "driven" to adopt the *Blamire* approach.

In January 2020 Chamberlain J in *BXB v (1) Watch Tower and Bible Tract Society of Pennsylvania (2) Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 156 (QB) approved the *dicta* of Browne LJ in *Moeliker v A.*

Reyrolle & Co. Ltd [1977] 1 WLR 132 that:

- In order to make a *Smith v Manchester* award, a Court must be satisfied there was a *"real"* or *"substantial"* risk that the claimant would lose his current job before the end of his working life; and
- If a Court were satisfied of the above, it would go on to assess the level of such an award by considering a number of factors, including: "*how great this risk is*" and "*when it may materialise–remembering that he may lose a job and be thrown on the labour market more than once*" as well as "*the general employment situation in his trade or his area, or both*".

Post-COVID Application of Pre-COVID Guidance

Context

Whilst the above guidance was given just over a year ago, it is something of an understatement to say that, since then, the world has become a very different place. As a result of the COVID-19 pandemic, the economic and employment outlook is extremely uncertain and is likely to remain so for the foreseeable future.

We are currently in the middle of the Country's worst recession for 300 years. GDP is expected to still be below its 2016-2019 trend at the end of 2024. Data published by the Office of National Statistics ['ONS'] last month showed that in January 2021 there were 2.6 million people unemployed in the UK, almost double the figure for March 2020, just before the first lockdown. Average earnings fell sharply during 2020 but then rose by 3.8% in the latest set of published figures.

The ONS predicts unemployment will peak in mid-2021 at about 7.75% of the population or about 2.8 million people. However, with about 6 million people still furloughed in January 2021, this figure could be higher. It is not anticipated that the unemployment figures will reduce rapidly after the peak. The ONS figures also show that those working in certain sectors – hospitality, retail and entertainment – and those in certain age groups – 18- to 24-year-olds – have been, and are likely to continue to be, particularly badly affected.

The above statistics and forecasts raise a number of questions in respect of the post-COVID application of the pre-COVID guidance on when to use the above methods to calculate future loss of earnings.

- Are there "*too many imponderables*"?
- Is the Claimant unable to prove the but for earnings and/or the residual earnings?
- Therefore, is there "No Real Alternative" to a *Blamire* Award?

The above statistics and forecasts suggest that, for the foreseeable future, substantially more people will be unemployed than has been the case for many years, especially the young and those working in certain sectors. Therefore, for an indefinite period, the population in general but specific groups in particular are likely to find it significantly more difficult than at any other time in the recent past to obtain, retain and develop a career.

Multiplier/multiplicand v broad-brush

In the above circumstances, it would be open to a defendant to argue that, applying the pre-COVID guidance to the post-COVID reality, there are now "*too many imponderables*", as opposed to just "*some degree of uncertainty*", in respect of the claimant's likely career path and earning capacity for the judge to be able to assess future loss of earnings using the multiplier/multiplicand approach.

In addition, it could be argued that the claimant is unable to prove, on the balance of probabilities, in light of these extraordinary uncertainties, their but for or residual earnings. Therefore, there is "*no real alternative*" to a *Blamire* award, which should thus be used, perhaps in conjunction with a *Smith v Manchester* award, to assess future loss of earnings instead of the multiplier/multiplicand approach. This argument could have particular force in relation to younger claimants working in badly affected sectors of the economy.

A lump-sum broad-brush *Blamire* award for future loss of earnings, even if made in conjunction with a lump-sum *Smith v Manchester* award for loss of earning capacity/handicap on the labour market, is usually considerably lower than an

award calculated using the multiplier/multiplicand approach. Therefore, if such an argument were successful, it would be likely to represent a substantial saving for a defendant's insurer.

Whether or not such an argument would succeed would depend, as in all cases, on the evidence before the Court. Simply citing the above statistics would be insufficient. However, in an EL case it should be relatively straightforward to obtain evidence in respect of what would have happened to the claimant's employment, had the accident not happened, as a result of the pandemic; at least in the short-term. The employer should be able to give evidence in respect of what happened to the claimant's (comparable) co-workers – and thus what would have happened to the claimant – as a result of the pandemic.

- Were they furloughed?
- If so, for how long?
- Did the employer 'top up' the 80% of their salary paid by the government?
- What happened when furlough was brought to an end – did they return to work for the employer or were they made redundant?
- Did they find alternative work?
- When?
- At what rate of pay?

The last three questions are likely to be difficult for an employer to answer. However, consideration should be given, in higher value loss of earnings claims where the defendant is considering running a '*Blamire* argument', to contacting the claimant's former co-workers to try to answer some of these questions. Should the answer be that, had the accident not happened, the claimant, like his co-workers, would have been furloughed, made redundant then remained unemployed for a period and/or taken lower-paid work, it would be open to the defendant to argue that the same shows there are "*too many imponderables*" to use the multiplier/multiplicand approach to assess future loss of earnings. Accordingly, applying the above Court of Appeal guidance, there is "*no real alternative*" to a *Blamire* award for future loss of earnings.

If the Multiplier/Multiplicand Approach is Retained should it be Amended?

Alternatively, if, in a given case, a Court finds that it is able to assess the claimant's damages for future loss of earnings using the multiplier/multiplicand approach, the defendant could still argue that the Court should make amendments or adjustments to this method to allow for the above exceptional uncertainties.

Increased Use of Split Multipliers?

An obvious adjustment would be the use of split multipliers to allow for the period (if it is still in the future at the time of calculation) when, had he not been injured, the claimant would have been furloughed or perhaps, post-furlough and/or post-redundancy, in lower paid employment for a period of time. It is arguable that, in light of the current economic uncertainty, the claimant would have been likely to have remained in such lower paid employment for a number of years before returning to their pre-pandemic level of pay. Arguably, a split multiplier, allowing a lower multiplicand for this likely period of lower paid employment, would be an appropriate adjustment if the multiplier/multiplicand approach is used. The same evidence as set out in the bulleted points above would need to be obtained to support such an argument.

Adjustments to the Reduction Factors and/or Reductions to the Figure Obtained by the Multiplier/Multiplicand Approach?

In *Billett v MOD* [2015] EWCA Civ 773 the Claimant submitted that in order to calculate the future loss of earnings in that case Court should use the multiplier/multiplicand approach but make adjustments to the reduction factors ['RF'] in Tables A-D of the Ogden Tables to account for the uncertainties about the future, instead of making a *Smith v Manchester* award. In rejecting that submission Jackson LJ held that: "*Determining an appropriate adjustment to the RF is a matter of broad judgment. In the present case that exercise is no more scientific than the broad-brush judgment which the court makes when carrying out a* Smith v Manchester *assessment*".

In *Irani* the Claimant argued that, instead of making a *Blamire* award, the trial judge could and should have dealt with any uncertainties about the future by discounting the figure for loss of earnings obtained by the multiplier/multiplicand

approach (by 50%). This argument was rejected.

On the basis of the above *dicta,* it would be open to the defendant to argue that, in the context of the uncertainties created by the pandemic:

- An adjustment to the reduction factors or to the figure obtained by the multiplier/multiplicand approach to account for the uncertainties created by the pandemic would be "*no more scientific*' than the broad-brush approach of a lump-sum *Smith v Manchester* and/or *Blamire* award. Therefore, the Court should assess future loss of earnings and/or earning capacity using those methods rather than the multiplier/multiplicand method;
- Alternatively, if the Court took the view it was able to use the multiplier/multiplicand approach, either the reduction factors or the figure for loss of earnings calculated on that basis should be significantly adjusted to allow for such extraordinary uncertainties.

Will *Smith v Manchester* Awards be Easier to Obtain and of Higher Value than Pre-COVID?

Logically, for a claimant who is disadvantaged on the open labour market because of his injury, the significant uncertainty in the employment market for the foreseeable future created by the pandemic could or should mean that a Court should be:

- More likely than before the pandemic to be satisfied there is a 'real' or 'substantial' risk that the claimant would lose their current job before the end of their working life; and
- Therefore, applying the guidance in *Moeliker,* most recently approved in *BXB,* more likely than before the pandemic to make a *Smith v Manchester* award;
- Considering the various factors set out by Browne LJ in *Moeliker,* including "*the general employment situation*" in the claimant's "*trade or...area, or both*", more likely to find that the claimant's disadvantage on the open labour market would be greater than before the pandemic due to the uncertainty in the "*general employment situation*" and thus to make a higher award for that disadvantage than it might have done prior to the pandemic.

The Future

How the Courts will approach these knotty questions remains to be seen. As with so many aspects of life, COVID has unsettled things that appeared fixed and immoveable just twelve months ago. Guidance given pre-pandemic may now look out of step with the reality of the post-COVID World.

No doubt their Lordships in *Irani* did not anticipate quite how uncertain the immediate future would turn out to be from their late-2019 vantage point. The disruption of the last year opens up the possibility of looking at future loss of earnings through a new lens. It remains to be seen, of course, whether we are now in a situation where in many more cases there are "*too many imponderables*" for future loss of earnings to be assessed using the multiplier/multiplicand method, such that a *Blamire* award will be made instead. Similarly, we will have to wait and see whether, going forward, more, and larger, *Smith v Manchester* claims will be received by claimants.

It would be prudent, however, for both claimants and defendants to keep the issues above in mind when looking at future loss of earnings as we all navigate through these uncertain times.