

EMPLOYMENT LAW - PRACTICE AND PROCEDURE

(2) Compensation

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Agenda

- Schedule of Loss: an overview
- Compensation: selected issues
- Negotiation
- Settlement
- Questions
- Useful reference book: *Employment Tribunal Remedies Handbook 2022-23* (Bath Publishing) <https://bathpublishing.com/products/employment-tribunal-remedies-handbook-2022-23> (£50 for print and digital version)

Schedule of Loss

- Standard requirement at start of proceedings
- Can be revised and should be updated prior to hearing
- See the precedent for unfair dismissal
- Note division into prescribed and non-prescribed elements: reason?
- See precedent for discrimination
- Questions re detail in relation to Schedules at end of this session

Order of deductions - compensatory award

1. What would C have lost if not dismissed?
2. Deduct receipts (not recoupment benefits or earnings in notice period: *Norton Tool v Tewson* [1973] 1 All ER 183)
3. Make any *Polkey* deduction
4. Acas uplift up to 25% for unreasonable breaches of Code of Practice
5. Add 2 or 4 weeks pay for any breach of s1 or s4 of ERA 1996
6. Make any contributory fault reduction
7. Deduct any enhanced redundancy pay
8. Gross up if award is over £30,000
9. Apply statutory cap of £93,878 (if EDT after 5/4/22 or 12 months gross wages)

Compensation: selected issues- unfair dismissal

- *A E Dayton v Polkey*: the principles
- Polkey arguments for the claimant
- How would a fair dismissal have made a difference?
- Contributory conduct (blameworthy and causative)
- ss 122(2) basic and 123(6) compensatory - ERA 1996
- Avoid double counting

Compensation: selected issues- unfair dismissal (cont)

- Mitigation: the principle - note the burden is on R to show (1) unreasonable (2) income lost as a result
- Need to prepare mitigation evidence
- Recoupment: process and relevance to negotiation
- Relevant benefits: job seeker's allowance, income related employment support allowance, income support, universal credit
- Tax: first £30,000 tax free, tax at marginal rate thereafter.
- Grossing Up?

Compensation - selected issues- discrimination

- What would have happened if no discrimination? (compare to Polkey)
- State benefits (compare to recoupment)
- Psychiatric and personal injury
- Injury to feelings - Vento bands
- Upper £29,600 to £49,300; Middle £9,900 to £29,600; Lower £900 to £9,900
- Aggravated damages (contrast exemplary)
- Interest at 8%: when does it start to accrue? - injury to feelings from act of discrimination, financial loss at halfway point

Negotiation and mediation

- Advantages of settlement
- When negotiation takes place
- Taking instructions
- Privilege attaches
- Negotiating position, fall-back position, counter-offers
- Judicial assessment: what is it and how useful is it?
- Judicial mediation: the process and its advantages

Settlement via Acas

- Acas: conciliation officer has distinct role from early conciliation
- Acas duty to promote settlement so representative should take part in dealings
- What is said is likely to be passed on to R
- Be clear whether any offers discussed are subject to final confirmation
- If conciliation is successful COT 3 can be agreed provided Acas has been involved
- ET must then be informed and will close the case
- C may be asked by R to withdraw but make sure this is not done before payment
- Some employers settle with no intention of paying

Other settlements

- Where settlement is reached directly between the parties, s 203 ERA1996 applies
- The resulting written agreement relates to the claim(s) before the ET
- It states that employee has received advice from a qualified lawyer or other person certified to advise
- A settlement reached at the ET should be written out and signed on the spot
- ET can be asked to make a judgment by consent on terms written out and agreed by the parties
- It may include a schedule attached to the order
- ET is asked to stay the claim pending payment, C having “liberty to restore”

Questions

- On Schedule of Loss for unfair dismissal
- On Schedule of Loss for discrimination
- Generally
- ?