

Calculating the value of employment law claims

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Unfair Dismissal Remedies

- the Order

- Reinstatement
- Re-engagement
- Compensation

Basic Award

- Statutory maximum per week (£538 p w for EDT from 6 April 2020)
- Calculating the weeks: max 20 weeks
- .5 week (below age 22) or 1week (over 22, below 41) or 1.5 weeks (not below 41)
- Deductions (contributory conduct or unreasonably refusing reinstatement)

Compensatory Award

- Immediate loss
- Future loss
- Statutory industrial rights e g £400
- The order of deductions/adjustments - later
- Statutory cap - the lesser of £88,519 (from 6 April 2020) or 12 months gross wages - it does not apply to whistleblowing and most automatically unfair dismissals

Mitigation

- The principle covers credit for sums received i.e. actual mitigation
- and what C could have expected to receive if they had taken reasonable steps to mitigate their loss
- To achieve a reduction for failure to mitigate R must produce evidence that the loss could have been mitigated by reasonable efforts

Future loss

- ET must assess the loss to C in future
- Judgment based on evidence but inevitably speculative e g as to period of unemployment or lower earnings
- ET will take into account e g the state of the job market, C's health, age and skills
- It then comes to a broad brush conclusion as to future loss

The *Polkey* Principles

- Laid down in *Polkey v AE Dayton Services Ltd* [1987] IRLR 50 HL
- If a dismissal is unfair, the fact that it would have made no difference if the employer had followed a fair procedure does not make it fair
- But the tribunal may reduce compensation to reflect a finding that following a fair procedure would still have resulted in dismissal
- Could be a percentage reduction or compensation up to a stated date
- Basic award is not affected
- Avoid double penalty where there is an overlap with deduction for contributory conduct

Contributory conduct

- If C's conduct was culpable/blameworthy and contributed to the dismissal, ET may reduce the compensatory award
- It may also reduce the basic award, even if the conduct did not contribute to dismissal

Uplift for Failure to Comply with ACAS Code

- Where there is an unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures, the ET may increase or reduce the award by up to 25%
- The Code (and hence the uplift) does not apply to redundancy
- It applies in cases where there is 'culpable conduct' or performance correction or punishment
- Hence in misconduct dismissals and some capability cases
- It also applies where the grievance procedure is relevant

Order of Deductions/Adjustments (1)

- deduction for any payment already made by the employer as compensation for the dismissal e.g. payment in lieu of notice or an ex gratia payment
- deduction of any sums earned by way of mitigation (or sums which ought to have been earned if the claimant had taken reasonable steps to mitigate) - s 123(4) ERA
- “just and equitable” reductions in accordance with s 123(1) ERA, including any *Polkey* reduction
- an increase/reduction of up to 25% for unreasonable failure by either employee or employer to comply with the provisions of the ACAS Code of Practice - s 207A TULR(C)A 1992

Order of Deductions/Adjustments (2)

- addition of two or four weeks' pay in respect of employer's failure to provide full and accurate written particulars in accordance with s 1 ERA - s 38 EA 2002
- percentage reduction for employee's contributory fault
- deduction of any enhanced redundancy payment in so far as it exceeds the basic award - s 123(7) ERA
- gross up to allow for taxation
- application of the statutory cap - £88,519 (from 6 April 2020) or 12 months gross wages

Recoupment

- The state recovers the value of certain benefits received by the claimant from an unfair dismissal award by the ET
- DWP recoups job seeker's allowance, income related employment support allowance, income support or universal credit
- ET will specify the recoupment period and the amount of the award which relates to it
- The employer must then withhold the specified amount until notified;
- Then pay DWP amount claimed, and the remainder to the claimant
- Note incentive to settle as a result

Remedies for Discrimination

- ET can issue a declaration of rights, order compensation and make recommendations
- Discrimination is a statutory tort, so apply tortious principles to calculating compensation
- Put C in the position they would have been in without the discriminatory act(s)

Future Loss

- *Wardle v Credit Agricole* [2011] IRLR 604 CA (July) - in calculating future loss, the cut-off point is when the employee is likely to secure another job on similar terms
- certainty that the employee will acquire such a job is not required
- the tribunal's prediction may not be accurate, but finality as to assessment for future loss should be achieved

Injury to feelings

- The bands in *Vento v Chief Constable of West Yorkshire (No 2)* [2003] IRLR 102 CA have been updated by Presidential guidance as follows:
- Higher band £27,000 to £45,000 e g a lengthy campaign of discriminatory harassment
- Middle band £9,000 to £27,000 serious cases, not in the highest band
- Lower band £900 to £9,000 less serious cases - eg an isolated occurrence
- Awards of over £45,000 “only in the most exceptional cases”

Psychiatric Injury

- *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 CA
- distinguish from injury to feelings
- desirability of medical evidence
- guidelines from Judicial College for general damages in PI cases apply
- Practical note - beware of terms of compromise for discrimination claim
 - may curtail a PI claim

Interest

- Interest is awarded in discrimination cases
- It runs at current rate (8% at present) from the date of the discrimination for injury to feelings awards
- For past financial loss, it runs from the mid-point between the date of discrimination and the date of hearing

Joint and Several Liability

- where respondents are jointly liable for discrimination, there will not usually be a basis for apportionment
- compensation for discrimination should usually follow the ordinary principles of the law of tort
- where employer and employee are jointly liable for the loss caused, each is usually liable for the whole

Contact details

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