

Compensation Review

Limits on awards for wrongful dismissal in the Tribunal

Since 1994, when the Employment Tribunal was given jurisdiction to deal with breach of contract claims arising out of incidents of wrongful dismissal, awards for this type of claim have been capped at £25,000. This has meant that, where an employee has sought to recover more than this amount, they have often brought actions for wrongful dismissal in the Tribunal (where the process of recovery is cheaper and quicker) for the first £25,000 and have followed these up with yet more litigation in the High Court for the balance. However, since the judgment in *Fraser v HMLAD Ltd* [2006] IRLR 687 this practice is no longer appropriate.

In the *Fraser* case an employee claiming for both unfair and wrongful dismissal, who had expressly reserved his right to pursue in the High Court any amount awarded for wrongful dismissal in excess of £25,000, was refused permission to do so by the Court. The Court ruled that, “If the Claimant wishes to recover over £25,000, the wrongful dismissal claim should only be made in the High Court.”

In short, once the Tribunal has actually ruled on the breach of contract issue, that issue is decided in law and may not then be re-opened in another forum.

Compensation where a fair procedure has not been followed

The case of *Software 2000 Ltd v Andrews* [2007] IRLR 668 addressed some important issues regarding the murky business of calculating the compensatory award in circumstances in which there had been a failure by the employer to follow a fair procedure but where the employer argues that it would have dismissed the employee in any event.

In such cases, the Tribunal should hear any evidence from the employer that the employee would have been dismissed even if fair procedures had been followed. Whilst such evidence might be unreliable, this should not be a reason to discount it entirely. Having considered the evidence in this way, the Tribunal may then determine:

- That if the employer has satisfied it that the dismissal would have occurred when it did in any event then the dismissal will then be fair (regardless of whether a fair procedure was actually undertaken)
- That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly as per *Polkey v A E Dayton Services Ltd* [1988] AC 344.
- That employment would have continued but only for a limited fixed period.
- That employment would have continued indefinitely (however, this finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored).

The message for employers from this case is that it is important to retain, or collect, any evidence that would show that an employee would have been dismissed in any event. Such evidence need not relate to the particular employee’s circumstances but may relate to other factors that would show this, such as the changing needs of the business or evidence to show how other employees were treated in circumstances where fair procedures were followed.

No duty to mitigate in notice period

In the case of *Burlo v Langley* [2007] IRLR 145 the Court of Appeal held that an employee who is unfairly dismissed without a full payment in lieu of notice does not have to account

for wages earned in other employment during what would have been his or her notice period. In other words, this would suggest that employees are under no duty to mitigate their loss during notice periods, as they should always receive their full notice pay.

Whether this position can be supported is arguable at least, as it seems opposed to previous thought. It may be, therefore, that we see this decision overturned at some point in the near future. In the meantime, however, employers must expect to make a full payment of notice upon a finding of unfair dismissal, even when the ex-employee has found new employment within the notice period.

Increase of compensation for delayed receipt

Interest on sums awarded at the Tribunal for loss of past earnings is not permitted under the Employment Rights Act 1996. However, it has long been the case that employees receiving lump sum payments in respect of future loss of earnings should have these payments discounted, as they are worth more to the employee as a lump sum than they would be as wages over a period of time (an idea known as accelerated receipt).

This position seemed somewhat iniquitous and, thanks to the plain thinking of Mr Melia (a litigant in person in the Court of Appeal), has recently been addressed in the case of *Melia v Magna Kansei Ltd* [2006] IRLR 117, CA. The Court held that in circumstances in which an employee is awarded compensation for both past and future loss of earnings, it is only fair that the two losses be treated in a consistent way, so that, if a deduction is made for accelerated receipt, there should be a corresponding increase in respect of delayed receipt (although this is not interest!).

Tribunals have a broad discretion to decide on uplifts

In *Cex Ltd v Lewis* UKEAT/0013/07 the EAT confirmed that tribunals have a broad discretion when assessing the amount of uplift to award for a failure to follow the statutory Dismissal and Disciplinary Procedures and that appellate courts should be reluctant to interfere in this discretion.

Unfortunately, the EAT declined to give general guidance to the Tribunal on how to assess the percentage by which to uplift compensation. However, the EAT did say that in deciding to fix the uplift at just 10%, the Tribunal had been entitled to take account of the fact that the employer's failure to comply with the statutory dismissal and disciplinary procedures was due to ignorance rather than deliberate disregard.

Average awards (Maximum Median Average)

- Unfair dismissal £250,470 £3,800 £7,974
- Race discrimination £123,898 £7,000 £14,049
- Sex discrimination £64,862 £6,724 £10,052
- Disability discrimination £138,648 £8,232 £15,059

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