

## **Provision which may increase or reduce an award once a finding of Unfair Dismissal has been made.**

This article takes as its starting point the situation where an employee has been unfairly dismissed and the amount of award falls for consideration. It does not pretend to deal with any aspect in depth and makes no apology for its concentration on statute and case law. For those who do not wish or need to consider matters in such a manner it is hoped they will nevertheless provide some insight into the potentially extensive subtractions and additions which can be made to an award. When a claim for unfair dismissal is made Claimants and Respondents would be well advised to consider the potential for increases and decreases in the event they succeed in their claim or fail to successfully defend a claim as the case may be. A clear understanding of the relevant factors is useful should negotiations take place and is vital at a Tribunal hearing.

Many of the readers of this article will be familiar with the method of calculating the amount of the basic award in the event of a successful claim for unfair dismissal – one week's gross pay for each complete year of continuous employment ending with the effective date of termination (Section 142(2) of the Employment Act 2006 ("the Act")) subject to the cap on a week's pay [£480], which applies.

### **Basics**

Many will no doubt also be familiar with the basic principles applicable in respect of calculation of a compensatory award, namely an amount considered just and equitable having regard to the loss suffered as a consequence of dismissal attributable to the action of the employer (Sections 143 to 145 of the Act) again this is subject to a cap [£50,000]. This is based on net pay and divided into the relevant heads namely immediate loss, future loss, expenses, loss of statutory rights and pension loss.

Non payment of accrued holidays and non payment of statutory or contractual notice period may fall for consideration.

What many may not be so familiar with are the factors which can add to the total award and those that can reduce that award.

### **Reductions**

Turning to the reductions first, Section 143(4) of the Act indicates a reduction can be made if a Claimant has failed to mitigate his loss. The subsection states that the same principles apply as apply at common law in claims for damages. Suffice to say one of the most common failures to mitigation is a lack of realistic effort to obtain alternative employment. In short, an unfairly dismissed person cannot simply sit back making no effort to find work believing their erstwhile employer will have to provide the equivalent of their wage by way of compensatory award.

A further reduction may be made where the unfairly dismissed employee contributed to his dismissal by his own actions (Section 143(6)). That is not to say of course that the dismissal can turn from being determined as unfair to fair but it can result in a significant reduction in the amount of an award. The relevant section provides no further guidance other than to state "reduce the amount of the compensatory award by such proportion as it considers just and equitable....."

Each case will turn on its own circumstances. Note it is only the compensatory award which can be reduced by this subsection. Section 142(6) of the Act permits a reduction of the basic award if the Tribunal considers the Claimant's conduct to be such that it is just and equitable to reduce the award.

The landmark decision in *Polkey v A E Dayton Services Limited* (1988) ICR 142 and reductions in awards in terms of the *Polkey* case is the most common type of reduction. This case centres on the situation where an employer has been unfair in its procedures in dismissing the employee – for example failing to investigate or failing to give the employee a chance to answer an allegation about him. As the reader will know, procedural unfairness will nearly always result in a finding of unfair dismissal irrespective of the conduct of the employee. An employer cannot evade a finding of unfair dismissal by pleading that a failure in his procedure made no difference to the outcome – for example whether he had given the employee a chance to speak it would not have resulted in the employee not being dismissed. But the Tribunal, when assessing the compensatory award payable, is entitled to consider whether a reduction should be made on consideration of whether the lack of a fair procedure made any practical difference to the decision to dismiss. A detailed consideration of *Polkey* reductions and the extent of such reduction is beyond the scope of this article. The case of *Software 2000 Ltd v Andrews and others* [2007] ICR 825 summarizes the principle derived from *Polkey*.

There is a potential interplay between a "Polkey reduction" and a reduction because of the contributory conduct of the Claimant under Section 143(6) of the Act. Case law provides help in this respect.

Where the unfair dismissal arises from an alleged redundancy situation, in a case where the Claimant has received a redundancy payment, the award shall be reduced by the amount paid by the employer for redundancy (Section 142(7) of the Act).

The basic award can be reduced where a Claimant has unreasonably refused an offer by the employer which if accepted would have had the effect of reinstating the Claimant. The reduction is a mandatory reduction of the basic award to such an extent as the Tribunal considers "just and equitable" (Section 142(5) of the Act).

In the event a successful Claimant has been receiving benefits (Jobseeker's Allowance/Income Support) from the State after the dismissal the Tribunal is required to issue a statement to the relevant government department so that the recoupment of such benefits can take place.

## Increases

Now I turn to the facts which may increase an award.

If the employer has failed to provide the dismissed employee with written particulars of terms of employment that comply with Section 8 of the Act such employer will suffer the effects of an additional award. Section 18 of the Act makes it mandatory that an additional award is made equivalent to 2 weeks' pay. A further sum equivalent to 2 weeks' pay can be awarded additional to the aforesaid 2 weeks' pay if the Tribunal believes it to be "just and equitable". It is not unusual for an employer to fall foul of Section 18. Even if written particulars have been supplied quite often they do not include all the vital ingredients set out in Section 8. Section 18 also catches employers who have failed to comply with Section 10 (changes in the terms of employment).

Section 140 of the Act gives the Tribunal the opportunity to make an additional award for injury to feelings to a maximum sum of £5,000. There is again little guidance in the Act as to when this should be applied. It simply states "If it [the Tribunal] considers it just and equitable in all the circumstances to do so." Unlike the other elements of an award there is no U.K. case law which provides guidance for the simple reason this provision does not apply in the U.K. The Isle of Man Tribunal has been slow to make awards under Section 140. The Isle of Man Employment Tribunal case of *Collins v Parkview Holdings Limited t/a Open All Hours* (No.09/99) sets out some useful guidance. In essence all unfairly dismissed employees can argue they have suffered injury to their feelings. To attract an award under Section 140 there must be conduct on the part of the employer which is exceptionally unsatisfactory in the circumstances of the case.

## Re-engagement & Reinstatement

Sections 134 to 139 of the Act relate to the possibility of re-engagement or reinstatement of the unfairly dismissed employee. Details of those provisions are not provided here as they would make this article prohibitively long but readers would be well advised to gain familiarity with them as Section 139(3)(b) provides for an additional award of compensation (over and above the general basic and compensatory awards) of up to 52 weeks' pay.

There is an abundance of case law on most of the aspects I have highlighted. Detailed consideration of which is beyond the scope of this short article but further reading of case law is always illuminating and helpful for those needing more depth.

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