

Whitepaper – Remedies for Unfair Dismissal

Where a finding of unfair dismissal has been made by a tribunal, specifically, an 'ordinary' unfair dismissal under S.98 Employment Rights Act 1996, it may make an order for reinstatement or re-engagement or an order for compensation. In the vast majority of cases a successful claimant is awarded compensation, however it is worth considering all the possibilities;

Reinstatement

An order for reinstatement is defined as "an order that the employer shall treat the complainant in all respects as if he had not been dismissed". Before making such an order the tribunal requires to consider:

- Whether or not the complainant wishes to be reinstated;
- Whether or not it is practicable for the employer to comply with an order for reinstatement; and
- In cases of contributory conduct, whether or not it would be just and equitable to order reinstatement.

Practicable in this context means more than merely possible.

If a reinstatement order is made the complainant will be entitled to the arrears of pay and benefits that he or she would have received but for the dismissal, together with any rights and privileges, including seniority and pension right. He or she must be restored to his or her original job and receive back pay and benefits from the date of dismissal.

Re-Engagement

If a tribunal decides not to order reinstatement it must go on to consider re-engagement. This involves the employer, or an associated employer, re-engaging the complainant in employment comparable to that from which he or she was dismissed. In deciding whether or not to re-engage the tribunal will take into consideration the same factors as for reinstatement above.

If it decides to order re-engagement, the tribunal must specify the terms on which re-engagement will take place and in particular specify:

- The identity of the employer;
- The nature of the employment;

- The remuneration for the employment;
- Benefits payable and arrears of pay;
- Any rights and privileges including seniority and pension rights to be restored; and
- The date by which the order must be complied with.

In calculating the amount of arrears of pay and benefits payable the tribunal will take into account, so as to reduce an employer's liability, wages paid in lieu of notice, ex gratia payments paid by the employer or remuneration paid in respect of employment with another employer.

In practice employees rarely ask for reinstatement or re-engagement, and even if they do, tribunals rarely make such orders. In cases where serious allegations of discrimination etc have been made, it is even less likely that the employee will re-join the company of the practicalities of them working again in what would be a difficult environment for all concerned.

Unfair Dismissal Award

An award for compensation must consist of a basic award and a compensatory award. In the vast majority of cases these are the only categories of award that are considered. An additional award can be made only in certain circumstances - such as where there has been non-compliance with an order for reinstatement or re-engagement and in similar circumstances for union related dismissals, health and safety related dismissals and employee representative dismissals or public interest disclosures.

Basic Award

The amount of the basic award will be in most cases the same as that of a statutory redundancy payment. The maximum amount of a week's pay for the purposes of calculation currently stands at £525.00 (for dismissals where the effective date of termination is on or after 6 April 2019) and the maximum number of years to be taken into account is 20. For those employees who earn over £27,300 per annum, they would be subject to the £525 cap stated above.

A week's pay is based on gross pay and the award is calculated by reference to the period ending with the effective date of termination during which the employee was continuously employed and allowing:

- One and a half weeks' pay for each year of employment in which the employee was not below the age of 41;

- One week's pay for each year of employment not falling within the above in which the employee was not below the age of 22; and
- Half a week's pay for each year of employment not falling within either of the above.

The basic award may be reduced in certain circumstances, in particular:

- Where the employee has unreasonably refused an offer of reinstatement;
- Where the employee's conduct before dismissal makes a reduction just and equitable; and
- Where the employee has been dismissed for redundancy and received a redundancy payment.

Compensation Award

The amount of compensation is such amount as a tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The current statutory maximum for the compensatory award is the lower of;

- £86,444 (reviewed annually and normally increased), and
- 52 multiplied by a week's pay of the employee

The most common awards of compensation are those set out below:

- The loss of wages from the date of termination for 52 weeks (minus any earnings received from a new job)
- Benefits in kind (for example medical insurance, company car and other fringe benefits).
- Pension rights - if the claimant was a member of a company pension scheme he or she will almost certainly suffer financial loss because any deferred pension payable will be based on salary at the date of dismissal instead of at normal retirement age.
- Loss of statutory rights - a nominal figure in recognition of the fact that the complainant has lost protection from unfair dismissal for a year.

Even after a finding of unfair dismissal, there are a number of circumstances where the level of compensation that would otherwise have been awarded is reduced or even eliminated by the tribunal. These circumstances are where:

- The tribunal finds that the conduct of the employee contributed to the dismissal;
- The employee failed to mitigate his or her loss; or
- The tribunal considers it just and equitable to limit the award for some other reason.

Where a claimant is considered to have caused or contributed to his or her own dismissal the tribunal is likely to reduce both the compensatory and basic award by such proportion as it considers just and equitable. For example, if the procedures used to dismiss were unfair but the claimant's conduct to a certain extent contributed to his or her misfortune, such a reduction would usually be made.

While procedural failings will normally render a dismissal unfair, compensation can be reduced in proportion to the likelihood that the dismissal would have occurred had a fair procedure been followed.

The employee is under a duty to mitigate his or her loss. The employee must make attempts to seek alternative employment and be realistic in his or her job expectations. If the employee has not made reasonable efforts to find other work, compensation will be reduced to reflect the tribunal's view of what would have happened if he or she had done so. The burden of proving a failure to mitigate is on the employer. It is therefore in the employer's interest to hunt out vacancies for the claimant to apply for, and try and gain alternative employment.

ACAS Code of Practice

Should the employer fail to comply with the ACAS Code of Practice, then any award could be increased by up to 25%. Likewise, should the employee fail to comply or participate in the ACAS Code then any award could be reduced by up to 25%. It is therefore important to follow correct procedure throughout the grievance and disciplinary procedures.

Loss of Statutory rights

Employees will normally be awarded a nominal figure for the inability to bring a claim of unfair dismissal against a future employer, until they have been employed for two years. The value of this loss is normally between £250 - £500.

Additional sums

The employer could also be required to reimburse the employee for reasonable costs incurred for searching for alternative employment, such as the cost of attending interviews, making applications etc.

Finally, any ex gratia payments will generally be taken into account to reduce the compensatory award.

This information is provided for general reference purposes only. If you have a specific enquiry relating to this topic please contact Wirehouse on:

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