

Settlement agreements and unfair dismissal
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**Enterprise and Regulatory Reform Act 2 25th
June 2013**

- Section 13 provides that the qualifying period to claim unfair dismissal does not apply to dismissal because of the employee's "political opinions or affiliation"
- Section is the minimum required by the ECHR to comply with their decision in Redfearn v UK Govt [2012] ECHR 1878.
- Case was about a driver in Bradford sacked in 2004 because he was elected as a BNP councillor
- This came into force on the 25th June 2013

**Enterprise and Regulatory Reform Act 7 29th
July 2013**

Cap on Compensatory Award for unfair dismissal

- Unfair dismissal compensation is made up of two elements:-
 - (a) Basic award – calculated like a statutory redundancy payment (save for in some cases of automatic unfair dismissal)
 - (b) Compensatory award
- Limited further the maximum potential compensatory award for unfair dismissal claims to one year's gross pay

**Enterprise and Regulatory Reform Act 7 29th
July 2013**

Cap on Compensatory Award

- The cap is reduced to 52 weeks gross pay OR the current statutory cap **whichever is lower**.
- This came into force on the 29th July 2013 in respect of dismissals on or after that date.
- The statutory cap is £76,574 for dismissals on or after 6 April 2014 (£74,200 for those after 1 February 2013)

**Enterprise and Regulatory Reform Act 8 29th
July 2013**

Settlement Agreements

- The terms "compromise agreement" and "compromise contract" to be replaced with "settlement agreement".
- There is an ACAS Code of Practice and also an ACAS Booklet: "Settlement Agreements: A Guide". Failure to follow the code will not make a party liable or lead to an adjustment in awards but can be taken into account by ET's in deciding cases.

Settlement Agreements

- Offers to end the employment relationship on agreed terms can now be made on a confidential basis even where there is no existing dispute for it to be "without prejudice" to
- Employers can initiate discussions about the employee leaving under a settlement agreement without fearing that the employee will refer to this in a later unfair dismissal claim
- ERRA inserts s111A into the Employment Rights Act 1996

Settlement Agreements

- ACAS Code of Practice
- Parties should be given a “reasonable period of time” to consider the agreement- what is reasonable depends on the circumstances - recommends at least 10 calendar days to consider the formal written agreement terms and to get independent advice
- Good practice to have a face-to-face meeting which a TU rep is permitted to attend and to explain reasons for proposal

Settlement Agreements

- “s111A(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under s111 (unfair dismissal)”
- Such discussions can’t be referred to in Tribunal evidence in unfair dismissal claims unless
 - There is “improper behaviour”
 - There is an automatically unfair reason for dismissal claimed e.g. whistle-blowing, TU membership etc
 - On a question of costs

“Improper behaviour”

Examples

- Harassment, bullying, threats
- Physical assault
- Discrimination
- Putting undue pressure
 - Not giving a reasonable time for response
 - e.g. saying before a disciplinary process has begun that if they don’t accept the agreement they “will” be dismissed)
 - on the employer e.g. employee threatening to make a damaging public disclosure

“Without prejudice save as to costs”

- Under s111(5) of Employment Rights Act 1996 it can still be possible to refer to pre-termination negotiations “on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved”
- If the offer is marked “Without Prejudice Save as to Costs” it can be referred to on a costs application

“Without prejudice save as to costs”

- Generally each side bears its own costs unless a party has behaved particularly unreasonably
- Respondent would tend to only want to refer to an earlier offer if they can argue that the Claimant has behaved especially unreasonably
- The Claimant may want to retain evidence of any unreasonableness by the employer e.g. anything showing they were not given the recommended response time

Impact

- This plus ET fees plus early conciliation
- More claims being settled than litigated?
- More settlement agreements at an early stage
- Some employers offer them even where they are not paying the employee anything over and above their contractual entitlements

Financial penalties

For claims lodged on or after 6 April 2014 the ET has a *discretion* to impose financial penalties on employers who lose ET claims if the employer's breach has "one or more aggravating features" s16 of ERA inserts s12A into the Employment Tribunals Act 1996 ("ETA")

Financial penalties

- If the Claimant is awarded compensation and the ET decides to exercise its discretion the financial penalty (payable to the Secretary of State, not the Claimant) shall be
 - Half of the compensation awarded to the Claimant
 - BUT no less than £100 and no more than £5,000
 - The ET must take into account the employer's ability to pay

"Aggravating features"

- When is an ET likely to exercise its discretion?
- Where the action was deliberate or committed with malice
- The employer has a dedicated human resources team
- Or where the employer has repeatedly breached the right concerned

Financial penalties

- When is an ET less likely to exercise its discretion?
- Possibly where the employer:-
- Has been in operation for only a short period of time
- Is a micro-business (fewer than 10 employees)
- Has only a limited human resources function
- The breach was a genuine mistake
- The ET must also have regard to the employer's ability to pay (s12A(2) ETA)

Impact

- Employers are more likely to make early low offers which employees may feel pressurised to accept
- When trying to negotiate consider
 - Is there any improper behaviour you can allege you would refer to in a later ET claim?
 - The likely compensation

Compensation

- What might be included in any compensation awarded if a claim was eventually brought?
- Unfair dismissal – basic and compensatory award (consider loss of earnings, pension loss, loss of statutory rights, loss of any benefits, notice pay, expenses incurred in looking for work, any uplift for breach of ACAS Code up to 25%)

Compensation

- Discrimination – can include injury to feelings (and constitutes “improper behaviour”)
- TUPE failure to inform and consult – up to 13 weeks gross pay per affected employee

Conclusion

- Tactics
 - Threaten that the employer’s “improper behaviour” will be referred to in Tribunal
 - Say we would be requesting the employer to exercise its discretion to make a financial penalty
 - Show awareness of the ACAS Code guidelines
 - Seek independent advice on any agreement from a specialist employment solicitor

Conclusion



Awareness of rights early is even more important as employers may seek to pressurise employees to compromise any rights

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