NEW DISCIPILINARY AND GRIEVANCE PROCEDURES 2009

Compensation Provisions

Generally the Courts and Tribunals have been unable and/or reluctant to award compensation over and above the appropriate statutory formula for e.g. the basic award for unfair dismissal or the Claimant's actual loss in the case of e.g. the compensatory award for unfair dismissal.

Attempts to claim aggravated damages or exemplary damages in employment cases have almost always proved to be unsuccessful. Compensation in Employment Tribunal cases has been seen as a means of providing redress to the Claimant without any additional element of punishment for procedural failure or misconduct by the Respondents, even where e.g. dismissal or discrimination occurred in the most unfair and unacceptable manner.

The power to increase awards of compensation was introduced in 2004 by the Employment Act 2002 (Dispute Resolution) Regulations 2004.

1. THE OLD REGIME

Section 31 Employment Act 2002:

"Non completion of statutory procedure: adjustment of awards

(1) This section applies to proceedings before an Employment Tribunal relating to a claim under any of the jurisdictions listed in Schedule 3 by an employee.

(2) If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –

(a) The claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies

(b) The statutory procedure is not completed before the proceedings were begun, and

(c) The non completion of statutory procedures is wholly or mainly attributable to the failure by the employee -

(i) To comply with the requirements of the procedure or

(ii) To exercise a right of appeal under it.

It must, subject to sub-section (4) reduce any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so to reduce it by a further amount, but not so much as to make a total reduction of more than 50%

(3) If in the case of proceedings to which this section applies it appears to the Employment Tribunal that –

(a) The claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,
(b) The statutory procedure was not completed before the proceedings were begun and
(c) The non completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with the requirement of the procedure,

It must, subject to sub-section (4) increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances do so, increase it by a further amount, but not so as to make a total increase of more than 50%

(4) The duty under sub section (2) or (3) to make a reduction or increase of 10% does not apply where there are exceptional circumstances which could make a reduction or increase or that percentage unjust or inequitable, in which case the Tribunal may make no reduction of increase or a reduction or increase of such less a percentage as it considers just and equitable in all the circumstances

(5) Where an award falls to be adjusted under this Section and under Section 38, the adjustment under this section shall be made before the adjustment under that section.

2. CASE LAW

Despite the wealth of cases for statutory and disciplinary and grievance procedures under the old regime, very few of these cases deal with the question of compensation. Those that touch on the subject, do not convey a series of hard and fast rules which can be relied upon in running a claim or negotiating. Some examples are:

Metrobus Ltd –v- Cook (EAT 2007)

The EAT decided that an uplift of 40% is appropriate where a large employer "blatantly failed to comply" with the obligation to send a step 1 letter. The test, on appeal, is one of perversity which is a difficult hurdle to overcome.

Cex Ltd –v- Lewis (EAT 2007)

In this case the EAT refused to lay down general guidelines for application of the uplift. They commented that it was appropriate for a Tribunal to take into account the employer's ignorance of the statutory dismissal proceedings when deciding to impose the minimum uplift of 10%.

Aptuite Ltd –v- Kennedy (EAT 2007)

The EAT overturned an uplift of 40% awarded by the Employment Tribunal because:

- The employer was large
- There had been a general lack of consultation
- The Claimant had been treated in a "shoddy" manner.

The EAT stated that these factors were all irrelevant. In calculating the uplift Tribunals should only have regard to the failure to follow the statutory procedure.

McKindless Group –v- McLaughlin (EAT Scotland April 2008)

The Employment Tribunal awarded a 50% uplift after the employer had admitted breach of the statutory dismissal procedures. However the EAT overturned the award and substituted a 10% uplift on the following grounds.

- A Tribunal cannot award more than a 10% uplift in the absence of evidence on the reason or reasons for breach of the statutory dismissal procedure, and

- A Tribunal is not entitled to take into account the way in which the employer subsequently conducted the litigation.

3. THE NEW REGIME

Section 3 Employment Act 2008

"Non compliance of statutory codes and practice"

(1) The Trade Union & Labour Relations (Consolidation) Act 1992 is amended as specified in sub-sections(2) and (3).

(2) After Section 207 there is inserted –

207A Effective Failure to Comply with Code: Adjustment of Awards

(i) This section applies to proceeding before an Employment Tribunal relating to a claim by an employee under any jurisdictions listed in Schedule A2.

(ii) If, in the case of proceedings, to which this section applies, it appears to the Employment Tribunal that –

(a) The claim to which the proceedings relate concerns a matter to which the relevant Code of Practice applies.

(b) The employer has failed to comply with that code in relation to that matter, and

(c) That failure was unreasonable,

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%

(6) If in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –

(a) The claim to which the proceedings relate concerns a matters to which a relevant Code of Practice applies,

(b) The employee has failed to comply with that code in relation to that matter, and

(c) That failure was unreasonable, the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%

(7) Sub-Section(2) and (3), "Relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

NB: Sub-section (5) of Section 207(A) provides that where an award is adjusted under Section 207A that adjustment must be applied before any adjustment under Section 38 of the Employment Act 2002 for failure to provide employment particulars.

The 2002 legislation effectively stated that the Tribunal must make an increase or deduction of at between 10% to 50% if a party does not complete the relevant statutory procedure. The only exception occurs in "exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable". In such a case the Tribunal is given the power to make no reduction or increase or alternatively a reduction or increase below 10%.

The 2002 legislation appeared to impose a duty on Tribunals to reduce awards except in exceptional circumstances. The 2008 legislation confers a power on Tribunals to increase or reduce an award if it is considered just and equitable to do so in all the circumstances.

Prior to 2008 there was some uncertainty as to the guidelines to be adopted by Employment Tribunals when increasing or reducing awards between 10% and 50%. No definitive interpretation can be obtained from existing case law.

The new regime, set out in Section 3 of the Employment Act 2008 will create even more uncertainty. The 2008 legislation gives Employment Tribunals considerably more discretion as to when to make an increase or reduction while at the same time limiting the amount in question to a figure of between 1% and 25%.

The explanatory notes of the Employment Act 2008 describe the section as providing "an incentive to follow recommended practice". Quite apart from the amounts involved, the wording of the legislation effectively weakens the legislation on this point. The requirement to increase or reduce is not mandatory and is in any event subject to a "just and equitable" test in all the circumstances".

Section 7 of the Employment Act 2008

Compensation For Financial Loss

(1) *In the Employment Rights Act 1996 in Section 24 (Determination of Complaints Relating to the Deduction of Wages or Payments to Employer)*

(a) *The existing provision becomes sub-section (1) and*

(b) *After that provision there is inserted – "(2) Where a Tribunal makes a declaration under sub-section (1) it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that sub-section) such amount as the Tribunal considers appropriate in the circumstances to compensate the worker for any financial loss sustained by him that is attributable to the matter complained of"*

(2) *In that Act, in Section 163 (Determination of Questions in* Relation to Redundancy Payments) at the end there is inserted –

(5) Where a Tribunal determines under sub-section (1) that an employee has the right to a redundancy payment, it may order the employer to pay to the worker such amounts the Tribunal considers appropriate in all the circumstances to compensate the worker for a financial loss sustained by him which is attributable to the non payment of the redundancy payment.

This is a new provision, designed to compensate workers for financial loss sustained as a result of:

- Unlawful deduction from wages
- Payments made to the employer in contravention of sections 15 and 21(1) of the Employment Rights Act 1996.
- Non payment of redundancy awards

The relevant part of the explanatory notes to this section state:

"The remedies available in Sections 23 and 24 of ERA 1996 do not however extend to compensation for losses arising out the non payment or unauthorised deduction or payment for example of additional bank charges or interest charges. It is possible for a separate claim for such losses to be made by workers who are no longer employed by the defaulting employer, but only in the County Court as part of an action for

breach of contract by means of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 or its equivalent in Scotland.

Section 7 inserts a new provision in to ERA 1996 (New Section 24(2)) so as to empower an Employment Tribunal to order an employer to make, in addition to the payments (or repayments) of the amount of the unauthorised deduction payment, a compensatory payment to reflect any financial loss suffered by the worker as a result of the employer's default. The Tribunal will calculate any such amount so as to be appropriate in all the circumstances. It is intended to enable workers to be fully compensated for their losses, and to simplify the process of recovery for those whose employment relationship has ended by removing the need to make a separate County Court claim"

These new provisions are welcome as they relate entirely to the claims of employees and workers before an Employment Tribunal. The explanatory notes refer to "additional bank charges or interest charges" incurred by the employee or worker as a result of the unauthorised deductions or failure to pay redundancy pay. These examples are not exhaustive.

The extent of the claims that can be made by an employee or worker in circumstances remain to be determined. No doubt employers will raise all sorts of arguments to determine the link between the loss claimed by the employee or worker and the unauthorised deduction or failure to make payment.

In addition to bank charges or interest charges, it will be interesting to see what types of claim can be brought by employees or workers in these circumstances.