REMEDIES FOR UNFAIR DISMISSAL

Where a finding of unfair dismissal has been made by a tribunal, 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.

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.

**COMPENSATION**

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. The additional award is 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.

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 £380 (for dismissals where the effective date of termination is on or after 1 October 2009) and the maximum number of years to be taken into account is 20.

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 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.

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 £65,300. This figure is reviewed annually.

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

- The loss of wages from the date of termination until the date of hearing.
- Future loss of earnings - this will be based on the claimant's net loss of earnings for such a period as the tribunal considers reasonable bearing in mind such matters as the length of time it believes that the claimant will remain unemployed. The award should take into account any increase in salary or other benefit the claimant would have received but for dismissal.
- 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.

Payments made either under a contractual liability by the employer or ex gratia will generally be taken into account to reduce the compensatory award. Accordingly, credit must be given by a claimant for pay in lieu of notice.

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