

Schedules of Loss: Unfair Dismissal & Discrimination

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Outline – 1 hour overview of issues

- Statutory Basis for awards
 - Employment Rights (NI) Order 1996
 - various discrimination Orders & Regulations
- Unfair Dismissal
 - Basic Award
 - Compensatory Award
- Discrimination Awards
 - Injury to Feelings

Unfair Dismissal

- Compensation Order: article 152 to 161The award of compensation consists of:
 - A basic award, and
 - A compensatory award

Calculating the Basic Award

- Articles 153-156, 160 and 161
- There are 4 key elements in calculating the award
 - The effective date of termination (“EDT”)
 - Length of service at the EDT – art 153(1)(a)
 - Employee’s age at the EDT – art 153 (1)
 - One week’s pay capped at the EDT – art 129 & 23(3)

Basic Award: Formula - art 153(1)

- ERO For up to 20 years of employment (153(3))
 - 1½ weeks for years not below 41
 - 1 week for years not below 22
 - ½ a week for other years
- Years that straddle the boundaries are counted at the higher rate
- There is no age limit

Effective date of termination (“EDT”) primary definition - art 129

- Dismissal with statutory notice or longer given by employer
 - Date notice expires
- Summary Dismissal or Less than statutory notice
 - Date termination takes place
- Constructive Dismissal
 - Date termination takes place

Primary EDT – Time Limits for complaints

- Although this is not part of the present topic to avoid confusion it is important to remember that the primary definition of EDT applies to time limits for presenting complaints to an industrial tribunal:
 - Unfair dismissal - article 145 “three months beginning with the effective date of termination” subject to the statutory extension of a further reasonable period where it was not reasonably practicable to have presented the complaint within the 3 months.
 - An application for interim relief - article 163(2)
 - Dismissals in connection with industrial action – article 144(7)

EDT – extended definition art 129(2) & (4)

- The EDT is extended for the following purposes
 - Qualifying period of continuous employment for unfair dismissal (which does not concern us here) –Articles 9 and Article 140
 - The date from which service is calculated when determining the basic award - Article 153
 - The date at which the statutory cap applied - Article 23
 - The calculation date for a week's pay for a basic award - article 22(3)(b)

EDT - extended definition

- Dismissal with statutory notice or longer given by employer
 - Date notice expires (no change)
- Summary Dismissal or Less than statutory notice
 - The date statutory notice would have expired had it been properly given when the short (or immediate) notice was given
- Constructive Dismissal
 - The date when statutory notice would have expired had it been given by the employer when the actual notice was given by the employee.
- Note: the extended definition appears in article 129(4) and is separately defined in articles 22(6), 124(6)

Basic Award: a week's pay on the calculation date

- ERO Chapter IV arts 16-25
- There are 2 statutory formulae
 - For employees with normal working hours; and
 - For those without normal working hours

Normal Working Hours

- (1) Those with normal hours fixed in the contract
 - Time workers /Piece workers/ Shift workers
- (2) Those without
 - (a) fixed limit for the start of overtime: the fixed limit unless
 - (b) the normal hours fixed in the contract are higher than fixed limit for the start of overtime

Week's wages from Normal Working Hours

- Does the pay vary with the amount of work done in the normal working hours?
 - No – art 17(2)
 - The amount due under the contract of employment for working a normal working week
 - If the hours per week vary on a regular shift/rota then an average of hours is taken over the last 12 complete weeks
 - Yes – art 17(3)
 - The amount will be the average hourly rate for the last 12 complete weeks' of work multiplied by the normal working hours
 - The averaging of hours is applied for shift workers

No normal working hours – art 20

- The 12 week rule
 - The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of the last 12 complete weeks
 - Note: no account is taken of a week in “which **no** remuneration was payable by the employer”. If that is the case ignore that week & go back to the next previous week.

Overtime

- The general rule is that overtime is not included
 - Voluntary on both sides: no
 - Compulsory overtime at the employer's discretion: no
 - Guaranteed overtime (e.g. conditioned overtime for a civil servant): yes
(Tarmac Roadstone Holdings v Peacock [1973] IRLR 157)
- Note: some circumstances will allow for the argument that the contractual hours have been varied to include overtime
 - (Armstrong Whitworth Rolls Ltd v Mustard [1971] 1 All ER 598)

Remuneration

- “any sum that is paid as a wage or salary without qualifications is part of any employee’s remuneration”
 - Contractual payments are included
- Discretionary Payments
 - Tronc but not tips
 - Profit sharing scheme

Only included if there is a contractual right although regular payment may suffice

Remuneration

- Remuneration only covers money payment and not fringe benefits such as:
 - Value of a company car
 - Private use of mobile phone
 - Health Insurance
 - Accommodation
- The amount is gross

Calculation Date for the Basic Award in UD

- The “calculation date” for determining remuneration for a Basic Award is defined in article 22(3) is the “extended EDT”:
 - 22(3)(b) “if by virtue of paragraph (2) or (4) of Article 129 a date later than the effective date of termination as defined in paragraph (1) of that Article is to be treated for certain purposes as the effective date of termination, the effective date of termination as so defined, and
 - (c) otherwise, the date specified in paragraph (6)”
 - 22(6) “the date on which notice would have been given had the contract been terminable by notice and been terminated by the employer giving such notice as is required by Article 118 to terminate the contract the notice expired on the effective date of termination”

Basic Award: statutory cap

- “week’s pay” for the purposes of a Basic Award is capped: ERO art 23(1)(a)
 - The ER (Increase of Limits) Order (NI) 2012 £430
 - 4th March 2012
 - The ER (Increase of Limits) Order (NI) 2013 £450
 - 10th February 2013
 - The ER (Increase of Limits) Order (NI) 2014 £470
 - 16th February 2014

Basic Award: minimum awards for representatives and candidates – art 154

- In certain circumstances the Basic award (subject to a reduction under article 156) may not be less than:
 - 2014 limits order: £5,700
 - 2013 limits order: £5,500
 - 2012 limits order: £5,300
- Reasons:
 - Health & Safety representative /designated employee: 132 (1)(a) and 132(1)(b)
 - Working Time Regulations Sch 1 candidate or representative: 132A(d)
 - Trustee of an occupational pension scheme: 133(1)
 - TUPE or SPC representative or candidate: 134
 - Trade union membership: 136(1)
 - Selection for redundancy on any of the above grounds

Minimum – Statutory Dismissal Procedure

- Art 154 (1A) general rule of a minimum of 4 weeks
- Art 154 (1B) The tribunal is not required to increase the amount of the award if it considers that the increase would result in an injustice to the employer.

The maximum basic award

- 20 years service for an employee over 61 at the extended EDT
 - $20 \times 1.5 = 30$
 - Statutory maximum = £470
- £14,100

Basic Award: reducing the award - art 156

- There are four ways in which the Basic Award may be reduced
 - Unreasonable refusal of offer of reinstatement – art 156(1)
 - Conduct – art 156(2)
 - Redundancy payment – art 156(4)
 - Designated dismissal procedures agreement art 156 (3A)
 - Ex gratia payments under certain circumstances
- NOT: failure to mitigate

Compensatory Award

- **157.** (1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer

- In practice this is Divided into 3 categories
 - Immediate Loss
 - From the date of dismissal to the date of hearing
 - Future Loss
 - From the date of hearing to point at which loss ends
 - Loss of Statutory Rights
 - Nominal amount as compensation for the removal of protection which requires service

Notice Pay

- Should an employee be entitled to loss of notice rights if there is no loss?
 - It seems so if he is dismissed by the employer
 - It seems not if he resigns
- Is an employee under a duty to mitigate during the notice period?
 - It seems so if he has resigned
 - It seems not if he was dismissed in the absence of gross misconduct
- Should notice pay be paid at a reduced rate if the employee was on paid or unpaid sick leave?
- Should notice pay be compensated under the heading loss of statutory rights?

Calculating the Immediate Loss

This is the loss of wages from the date of termination until the date of hearing.

Scenarios:

- I No new job
- II New job which has been lost
- III New job which pays less than the old job
- IV New job which pays better than the old job

Net Weekly Loss

- This includes
 - Net salary (including overtime)
 - Increase in salary, bonuses, commission
 - Fringe Benefits
 - Loss of private use of company car (check P11D)
 - Mobile phone
 - Benefits in kind
 - Health insurance/Free accommodation/Subsidised meals

Specific issue - Health Insurance/Life cover

The cover is afforded to an employee to cover a risk. Whether it is recoverable, and if so in what manner will depend on the circumstances:

- **Immediate Loss:**

- Did the claimant take out replacement cover
- Did the claimant suffer a loss in that respect

- **Future Loss:**

- The cost of taking out such cover

Mitigation of Loss

- 157 (4) In ascertaining the loss referred to in paragraph (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.
 - Burden of proving failure is on the employer
 - Standard required of the employee should not be set too high

Tribunal's duty

The tribunal must determine for how long the employee would have been employed but for the dismissal:

- If fair procedures had been complied with has the employer satisfied the tribunal on the balance of probabilities that the dismissal would have occurred in any event
 - Yes: the dismissal is fair
 - There was a chance of dismissal but less than 50%
- Employment would have continued but only for a limited time
 - Specify the date
- Employment would have continued indefinitely

Pension

- If the claimant was a member of company pension and either fails to gain new employment, or gains new employment with a scheme which is less beneficial there will almost certainly be a pension loss
- Loss of pension may be (and often is) the largest part of the compensatory award
- Assessing compensation is difficult.

Pension Loss

- Essential guidance on the approach:
 - Government Actuary's Department: Compensation for Loss of Pension Rights' 3rd Edition TSO
 - Note the actuarial tables are now out-dated – use Ogden
- Key Elements will be
 - Nature of the scheme (defined benefit-money purchase)
 - Right to lump sum (commutation or not)
 - Nature of new pension if any
 - Withdrawal factor

Future Loss – the questions for the tribunal

Would the claimant have been dismissed in any event?

- If so, when would that dismissal have taken place?
- How likely was the dismissal?

Another approach is –

- Assess a safe date by which the tribunal is certain that the dismissal would take place and then to make an award of full compensation to that period:

O'Donoghue v Redcar & Cleveland BC [2001] EWCA Civ 701

Loss of Statutory Rights

- This is a nominal amount awarded by the tribunal to compensate for the lack of protection of statutory rights such as unfair dismissal
- The difficulties of mitigation during notice would be by-passed if the statutory rights included loss of accrued notice rights
- This figure is generally £400 to £500 (which roughly tracks the statutory cap on a week's pay) although some chairmen award between £250 and £700
- Again – would loss of notice rights not be better compensated under this heading

Claimant vs Employer : timing

- Tribunal's are more likely to accept immediate loss rather than speculative future loss
 - Claimants may benefit from a later to hearing as the difficulty of finding equivalent employment can be proved
 - Respondent may benefit from an earlier hearing if the tribunals do not accurately assess the labour market
- Research into the employment of claimants after tribunal hearings would be beneficial
- Split hearings are likely to favour the claimant

Failure to follow dismissal procedure - uplift

- Employment Order Article 17 provides that where the statutory dismissal procedure has not been complied with mainly or wholly by reason of the failure of the employer then the tribunal shall make an increase of the compensatory element of the award:
 - Initially 10%
 - Increase on just and equitable grounds up to a maximum of 50%
 - Decrease if there are exceptional grounds
 - The tribunal should also set out the basis for any conclusion
 - *McGlinchey v McGurk & Moore* [2014] NICA 3 @ 23-25
 - See *Wardle v Credit Agricole* [2011] EWCA: 10% where the employer has merely ignored procedures

Uplift - failure to comply with grievance

- The Employment Act (NI) 2011 amended and partially repealed the provision of the Employment (NI) Order 2003. Schedule 4 of the 2011 Act inserted article 90AA into the Industrial Relations (NI) Order 1992
- This allows for the uplift of a compensatory award by up to 50% if it considers it just and equitable if the employer has unreasonably failed to comply with the code
- The adjustment applies vice versa for employee failure
- Only one regime can apply (SDP or LRA Grievance)
 - The precise mechanism of dismissal is crucial – for example *Brinks v Hines* [2013] NICA 32 @ 7 considers complications in a TUPE transfer

Reduction of Compensatory Award

- The tribunal can reduce a compensatory award on two distinct grounds:
 - 1 just and equitable –
 - 157(1) ... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances
 - 2 conduct which contributed to the dismissal
 - 157 (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

“Polkey” reduction

- The assessment of what would have occurred but for the dismissal
- Should be undertaken unless the evidence is so scant that it can be effectively ignored
 - Procedure was unfair but the claimant would have been dismissed had a fair procedure been carried out.
 - a redundancy subsequent to the dismissal
 - How long would a reasonable consultation period have been
Elkouil v Coney Island Ltd [2002] IRLR 174 – 10 weeks

Just and Equitable - misconduct

- Broad discretion
- Misconduct unrelated to the dismissal while employed only discovered after the dismissal
 - W Devis v Atkins [1977] ICR 662
-

Contributory Fault - misconduct

- The conduct must be blameworthy
 - Nelson v BBC (No 2) [1980] ICR 110
- Misconduct which was grave but did not justify dismissal
 - Almost always invoked against an unfair sanction dismissal
- Faults in misconduct proceedings were unfair but the employee was to some extent the author of his own misfortune

Contributory fault - capability

- Two threads of argument:
 - Lack of ability is not blameworthy
 - *Kraft Foods v Fox*
 - Laziness, idleness and negligence are blameworthy
 - *Moncur v International Paint [1978] IRLR 223*

Contributory Fault: ill-health

Unusual to find arguments in this line but:

- Failure to attend medical examinations
- Acting in a way detrimental to recovery

- Slaughter v C Brewer & Sons Ltd [1990] ICR 730

Contributory Fault – reductions guidelines

- The EAT recognised 4 broad zones:
 - Claimant wholly to blame: 100% reduction
 - Claimant largely to blame: 75%
 - Parties equally to blame: 50%
 - Claimant slightly to blame: 25%

Hollier v Plysu Ltd [1983] IRLR 260 EWCA

Ex gratia

- If an ex gratia payment is specifically referable to the employee's statutory right to unfair dismissal compensation the payment may be relied upon as a defence to the statutory liabilities
- All post dismissal payments are taken into account in determining loss

Benefits not subject to recoupment

- Incapacity Benefit

- Deductible _ Morgans v Alpha Plus [2005] IRLR 234

- Invalidity Benefit

- Full amount deducted – Puglia v James [1996] IRLR 70
- Half deducted - Rubenstein and Roskin v McGloughlin [1996] IRLR 557
- Not precluded from claiming – Sheffield Forgemasters v Fox [2009] ICR 333

The order of reductions

- 1 Establish Loss(dates, chances, earnings received, mitigation)
- 2 Apply Polkey reduction
- 3 Apply statutory procedure-code uplift/reduction
- 4 Apply reduction for contributory fault
- 5 Deduct termination payments
- 6 Apply statutory cap
- 7 Gross up

Tax and Grossing Up – awards over £30,000

- Tribunal should consider income tax on an award:
 - British Transport Commission v Gourley [1956] AC 185
 - Shove v Downs Surgical plc [1984] IRLR 17
- Problem is:
 - Assessment of compensatory award is based on net loss
 - Any part of the award directly referable to earnings (notice/loss of earnings) are emoluments & subject to income tax
 - Income Tax (earnings and Pensions) Act 2003 sections 401 to 404
 - 403(1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.
 - Amounts above £30,000 are subject to tax.
- Note: it seems that an award for Injury to Feelings for discrimination prior to dismissal is not taxable, but an award related to dismissal may be

The Gourley & reverse Gourley principles

- The Gourley principle provides that a claimant should only be compensated to the extent of what they would have received. Hence compensatory awards are calculated on a net basis.
 - This stops a claimant from receiving a gross figure within the £30,000 exemption (and gaining a windfall)
- The reverse-Gourley principle applies above the £30,000 threshold.
 - Since the claimant will be liable for tax on the amount above £30,000 received the award should be grossed up so as to meet the tax liability
- The tribunal should consider the claimant's tax position in the year of the award: income/allowances/marginal tax rates and tax bands
 - Yorkshire Housing Ltd v Cuerden [2010] UKEAT 0397/09/1607

Interest

- Unfair Dismissal
 - Industrial Tribunals (Interest) Order (Northern Ireland) 1990
- Discrimination
 - Interest payable on loss from the mid-point half way between the date of calculation and the date of discrimination
 - Interest on injury to feelings runs through the entire period from the date of the discrimination

Recoupment of Benefits – unfair dismissal

- Employment Protection (Recoupment of Job Seekers Allowance and Income Support) Regulations (Northern Ireland) 1996
- Social Security (Miscellaneous Amendments No 6) (Northern Ireland) 2010
 - Regulation 5 amends the Recoupment of Jobseeker's Allowance and Income Support Regulations to provide for the recoupment of income-related employment and support allowance payments where an industrial tribunal makes an award in favour of a claimant

Recoupment Notice

Particulars of the recoupment notice:

- (a) monetary award
- (b) prescribed element
- (c) period to which (b) relates
- Excess of (a) over (b)

Injury to Feelings

- Three bands have been identified in *Chief Constable of West Yorkshire Police v Vento (No 2)* [2003] IRLR 102 CA
 - Low Band: less serious, isolated or one-off
 - Middle Band: serious but not of the highest level
 - Upper band: the most serious cases, sustained discrimination over a period
- The value of the bands were increased in *Da'bell v NSPCC (2010)* IRLR 19 EAT and now stand at
 - £500 to £6,000
 - £6,000 to £18,000
 - £18,000 to £30,000
- This was on the basis of RPI increase. Another one is due. Also see

Personal Injury

- Discrimination cases allow for a separate award for personal injury whether psychiatric and/or physical
- Guidelines in *Sheriff v Klyne Tugs* [199] ICR 1170
- Wary of double recovery
 - *HM Prison Service v Salmon* [2001] IRLR 425

Aggravated Damages (an aspect of ITF)

- Compensatory for additional stress caused by the manner of discrimination NOT punitive
- Clear summary in Commr for the Met v Shaw [2011] UKEAT 0125/11/2911
 - History of development @ 15-18
 - Principles @ 19-24
- Exceptional or contumelious conduct or motive
 - Failure to properly investigate a complaint of discrimination
- Wary of double recovery
 - MOD v Fletcher [2010] look at the overall result
 - McConnell v PANI [1997] IRLR 625 @20
- Wrapped up in the award for injury to feelings (difference NI v GB)
 - McConnell – yes
 - Scott v IRC [2004] EWCA Civ 400 – no

Exemplary Damages

- Exemplary damages are punitive
- Basic principles
 - Rookes v Barnard [1964] AC 1129
- Grounds
 - (1) express statutory power (not applicable)
 - (2) oppressive, arbitrary or unconstitutional action by servants of the Government exercising power within the public domain, or
 - (3) the discriminator's conduct was calculated to make a profit in excess of the damages awarded to the claimant.

Developments:

- Previously accepted position – not available (?)
 - Bradford City Metropolitan Council v Arora [1991] IRLR 165 restrictively interpreted the exercise of power - selection for employment outside public domain
 - Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29
 - Open for conscious and contumelious conduct
 - Rookes v Barnard profit open
- Not Equal Pay as this is based on contract rather than tort/statutory tort