

Welcome to the updates section

Changes to the basic award

It should be noted that the statutory formula for calculating the basic award set out in Chapter 4.02 has not changed as a result of the introduction of the Employment Equality (Age) Regulations (EEAR) 2006 except that:-

- the lower and upper statutory age limit has now been removed (EEAR Sch 8 Part 2 Para 25) and
- the scaling down provisions in the 64th year of employment have been repealed (EEAR Sch 8 Part 2 Para 27)

The references in chapter 4.08 and 4.09 should be amended accordingly.

Compensatory award: is there a statutory minimum?

It is well established that the purpose of the compensatory award is to compensate the claimant for the loss flowing from the dismissal and not to punish the employer. Prior to the Court of Appeal's ruling in *Langley and another v Burlo* [2007] IRLR 145, there was a line of recent authority (including the EAT's ruling in *Langley* [2006] IRLR 460) which suggested that earlier authority to the effect that a claimant was always entitled to a minimum compensatory award for loss of notice entitlement was incorrect and that the award should be based strictly on the loss suffered by the Claimant (see Chapter 6.06-6.08). It was also established that credit should be given for payments received during the notice period other than those which are recouped (see Chapter 7.47).

However, this case law must now be considered in the light of the Court of Appeal's ruling in *Langley and another v Burlo*. In that case, the Claimant B worked for the Respondent as a nanny. Following her dismissal, she claimed compensation for loss of notice pay. During her notice period, she was involved in an car accident. Her contract of employment provided that in the event of sickness, she would only received statutory sick pay. The Employment Tribunal upheld B's complaint of unfair dismissal and awarded her full loss of pay for her notice period (as damages for wrongful dismissal). The EAT allowed the appeal and substituted an award based on the sickness benefit which the Claimant would have received during her notice period but for her unfair dismissal.

The Court of Appeal, dismissing the appeal, upheld the result but did not agree with the EAT's reasoning: the Court did not accept that the principle set out by the NIRC in *Norton Tool Co*

Ltd v Tewson [1972] IRLR 86 entitled a Claimant to be compensated for the full loss of notice pay during the notice period. According to the Court of Appeal, the Norton Tool case only established that it was unnecessary to give credit for sums earned from other employers during the notice period. (The Court also rejected the EAT's reasoning that the Norton Tool principle had been overruled by the House of Lords in *Dunnachie v Kingston upon Hull City Council* [2004] IRLR 287). As regards the wider principle, the Court noted that in *Babcock FATA Ltd v Addison* [1987] IRLR 173 the Court of Appeal had rejected the suggestion that there was a wider principle which entitled a claimant to be compensated for a minimum notice period based on good employment practice. In the present case therefore the Claimant was only entitled to be compensated for the loss she suffered as a result of her dismissal namely the loss of sick pay which she would have received during her notice period.

The Court of Appeal's ruling leaves the law somewhat confused: there would appear to be no entitlement to a minimum award of compensation based on a claimant's notice entitlement (although it is unclear what would have happened had B not been involved in a car accident). It would appear that the loss is calculated on the actual loss suffered by the Claimant during the notice period. However, payments received from the new employer during the notice period should be ignored in assessing any loss suffered during the notice period. The principles as stated in Chapter 7.47 should be amended accordingly.

Assessing future loss

The assessment of future loss is inevitably speculative (Chapter 7.62) but the Employment Tribunal is entitled to consider future contingencies including the possibility that the Claimant would not have retained his or her previous job even if he or she had not been dismissed- what Burton J called "old job facts" in the *Dunnachie (No3)* (Chapter 7.78).

In *Scope v Thornet* [2007] IRLR 155, the Court of Appeal confirms that the Employment Tribunal's duty to assess what is just and equitable may involve making predictions based on the evidence they have heard and that tribunals cannot "opt out" of this duty simply because their task is a difficult one and may involve speculation. The Court recognises that there may be cases in which the evidence is so sparse that a tribunal might conclude that the loss would have continued indefinitely but where there is evidence to the contrary this should be taken into account. It was therefore open to the Tribunal in the Thornet case to conclude that the Claimant's employment would not have lasted for more than six months because of work-relationship problems and the imminent termination of the employer's lease (although the case was remitted to the Tribunal to reconsider the appropriate period as its reasons for limited the award were unclear).

Loss of death in service benefits

Compensation may be awarded for loss of fringe benefits (Chapter 8) but compensation may only be recovered if the Claimant can show that he or she has actually suffered a quantifiable loss. In *Knapton and ors v ECC Card Clothing Ltd* [2006] IRLR 756 the EAT ruled that the Employment Tribunal was wrong to award compensation for loss of life insurance where the Claimant survived during the period in question and did not take out his own life insurance policy since the Claimant had not suffered any financial loss as a result.

Compensation: general principles and polkey reductions

In *Software 2001 Ltd v Andrews and ors* (UKEAT/0533/06/DM) the EAT has helpfully summarised the case law relating to the circumstances in which it may be just and equitable to limit the compensatory award.

The EAT stated that the following principles emerge from the cases referred to in its decision namely:-

1. In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissing, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
2. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
3. However there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
4. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
5. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not

directed itself properly and has taken too narrow a view of its role.

6. The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.
7. Having considered the evidence, the Tribunal may determine
 - a. That if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer- that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
 - b. That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
 - c. That the employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case (Cf see Chapter 12.47).
 - d. Employment would have continued indefinitely. However this conclusion should only be reached where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

Some of the other recent case law on Polkey reductions is considered below.

Stock options and Polkey reductions

The issue of calculating compensation for loss of stock options and its relationship with a "Polkey" deduction was considered by the EAT in *Selective Beauty UK Ltd v Hayes* (EAT/0582/04). The essential facts were that the employment tribunal valued the total loss for loss of stock options at £546,428.57. It then applied a Polkey reduction of 80% to reflect the chance that the Claimant would have remained in employment had a fair procedure been followed, ie it reduced the total loss by 80%. Finally, it reduced the balance of the award by 20% to take account of contributory fault leaving a total award of £87,428.56.

The employer's appeal against the approach adopted by the Tribunal was too simplistic on the facts before it: in particular that the Tribunal had failed to take account of a number of key imponderables in the way it assessed the award for loss of stock options. These included the likely value of shares in the future in the event of floatation or takeover? The question whether the Respondent would float at all and if so when? The question whether the Claimant would have in fact purchased the shares on floatation and whether the Claimant would have in fact

remained in employment at the time the shares were floated?

Allowing the appeal, the EAT (Cox J) ruled that the tribunal had erred by simply applying the Polkey percentage reduction of 80% without making any allowance for the other uncertainties as to whether and at what price the Claimant would have been able to exercise the stock options (if at all). The EAT also agreed that the tribunal should have separately considered whether the Claimant would have remained in employment long enough to purchase the shares stating that:

"it seems to us that the conventional **Polkey** approach is not applicable in relation to a claim such as this where the future opportunity said to have been lost depends on the chances of the Applicant keeping his job for at least some 18 months after the date of dismissal, that is until at least January 2005. A finding that there was a 20 percent chance of the applicant keeping his job until June 2003 does not in our judgment adequately embrace the time which would then elapse before the loss claimed might have materialised . . . A tribunal might reasonably conclude in such a case that, in a claim for such losses over a period of, for example, 12 months, there was a 40 per cent chance of the Applicant remaining in employment for the first six of those months, but only a 20% chance in relation to the following six months, A reasonable approach in such a case might well be for a tribunal to apply an average **Polkey** deduction of 30% to all the loss".

The case was remitted to the employment tribunal for reassessment of the award.

Applying Polkey reductions in hypothetical situations

The Court of Appeal [2006] EWCA Civ 285 has confirmed that EAT's ruling in *Gover and ors v Property Care Ltd* (EAT/0458/05/ZT) that an employment tribunal did not err when it limited the award of compensation to three months representing the period which it would have taken for the employers to consult properly over a proposed variation to contractual rates of commission. The Appellants, relying on *Eaton v King (No2)* [1998] IRLR 686 (Chapter 12.13) sought to argue that it was not open to the employment tribunal to speculate on what the outcome of such consultation would have been in the light of the tribunal's finding that the original terms proposed by the employer's were unreasonable and that the claimant's were reasonable to reject those terms. However, both the EAT and Court of Appeal ruled that it was open to the tribunal, applying its industrial knowledge, to conclude that even if the employers had come back with a more reasonable set of proposals, these would have been rejected by the Claimants and limits its award accordingly.

Are Polkey reductions affected by s.98A(2) of the ERA 1996?

In *Mason v Governing Body of Ward End Primary School* [2006] IRLR 432 HH Judge McMullen QC suggests (obiter) that the general principles governing Polkey reduction set out in Chapter 12 from Chapter 12.06-12.27 may have been affected by statutory reversal of the

substantive ruling in *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 brought about by 98A(2) of the ERA 1996. This now provides that:

"Subject to subsection 1 [*which deals with the statutory disputes procedure*] failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of s.98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure".

HH Judge McMullen QC correctly states that it is for the employer to prove that this would have been the case on a balance of probabilities but then goes on to state that this means that the employer at the very least the employer would need to show that the claimant would have been dismissed on a scale of anything from 51% to 100% and therefore it is not now appropriate to reduce an award on a Polkey basis by more than 50%. There is also some further obiter support for this view in *Alexander and another v Brigden Enterprises Ltd* [2006] IRLR 422.

With respect, this view is questionable for a number of reasons: first, it fails to distinguish between questions of liability and compensation: the legislative purpose of the new statutory provision is to "reverse" **Polkey** on the issue of liability to the extent that it is now open to the employer to argue that, on a balance of probabilities, it would have been fair to dismiss the Claimant if a proper procedure had been followed. This is an "an all or nothing" matter relating to the issue of liability not compensation. Secondly, there is nothing to suggest that the introduction of this new statutory provision was intended by parliament to fetter the discretion of tribunals under s.123(1) of the ERA 1996. The approach of assessing this on a percentage chance basis which in appropriate cases is well established (see the Court of Appeal's ruling in *Allied Maples Group v Simmons and Simmons* [1995] 1WLR 1602 at page 1610C). Thirdly, as Elias P recognises in *Alexander*, Polkey reductions may arise in a wide variety of circumstances, for example, it may be open to the tribunal to conclude that dismissal was inevitable but limit the award for the period of time it would have taken to complete a fair process. In such circumstances, the statutory defence under s.98A(2) would not be made out, liability would be established but compensation would be limited to the period of time it would take to complete the process.

New Compensation Rates

The annual increase in compensation limits for tribunal claims has been announced.

The Employment Rights (Increase of Limits) Order 2006 (SI 2006/3045), which applies to dismissals on or after 1 February 2007, provides that the new limits will be as follows:-

- A week's pay is increased to £310. This also applies to debts under insolvency

provisions.

- The maximum compensatory award for unfair dismissal is increased to £60,600.
- The minimum basic award for defined dismissals relating to trade union reasons, health & safety and whistleblowing is increased to £4200.
- The minimum award for unlawful inducement relating to trade union membership, activities or collective bargaining is increased to £2700.
- The minimum award for exclusion or expulsion from a trade union is increased to £6600.
- The rate of guarantee payments is increased to £19.60.

Page reference amendments

In the light of these increases amendments should be made to the following paragraphs:

- 3.41 Maximum additional award will be increased to £16120.
- 4.12 Minimum award in trade union cases will be increased to £4200.
- 4.20 Maximum basic award will be £9300.
- 5.105 A week's pay will be £310.
- 6.41 Maximum compensatory award will be increased to £60,600.
- 18.16 A week's pay will be £310.
- 18.17 A week's pay will be £310.
- 18.64 Guarantee pay will be £19.60.
- 18.199 A week's pay will be £310.
- 18.241 A week's pay will be £310. The maximum compensatory award will be increased to £60,600 and the minimum award will be £6,600.
- 18.245 A week's pay will be £310. The maximum compensatory award will be increased to £60,600 and the minimum award will be £6,600.
- 19.24 A week's pay will be £310.
- 19.25 The statutory maximum redundancy payments will be increased to £9300.

New rates of maternity pay and statutory sick pay

The Government has announced that from April 2006, the standard rate of maternity, paternity and adoption pay will rise from £106 per week to £108.85 per week. The standard rate of statutory sick pay will rise from £68.20 per week to £70.05 and the earnings threshold for these payments will rise from £82 per week to £84 per week.

Polkey reductions

In *Gover and ors v Property Care Ltd* EAT/0458/05/ZT, the EAT upheld an employment tribunal's judgment to limit the compensatory award to a period of three months as representing the length of time it would have taken for the employers to consult properly before implementing new terms and conditions of employment which involved substantial cuts to the Appellant's commission. The EAT rejected the argument based on *Eaton v King (No2)* [1998] IRLR 686 (page references 12.13, 12.17, and 12.30) that "where a Respondent had set its face against fairness . . . it was impossible to reconstruct what would have happened had things gone fairly". The EAT held that the tribunal was entitled to conclude, on the evidence, that even if the employers had introduced the new terms in a fair manner, the new terms would still have been unacceptable to the Claimants, and to limit its award accordingly.

Tribunal award may include allowance for depreciation

In *Melia v Magna Kansei Ltd* [2006] IRLR 117 the Court of Appeal has confirmed (page reference 7.38) that it is open to an Employment Tribunal to increase its award for past loss to reflect the depreciation in the value of the award, and that it is just and equitable to treat this "loss" in the same way as the benefit received by way of an accelerated payment, ie to apply a premium of 2.5%. In an appropriate case, this may make up for the absence of a power to award interest on the award.

Missing reference

The cross reference at paragraph 3.33 should be to 3.27. The Authors apologise for the omission.