

# Employment Rights Update

September 2010



**The** Employment Tribunal statistics for April 2009 to March 2010 have recently been released. They show an overall increase by 56% in the number of claims accepted by the Tribunal. Multiple claims have risen by 90%.

Clearly as a direct result of the economic climate unfair dismissal/ redundancy/ breach of contract claims have risen by 62% since 2007/8 and 17% 2008/09. The average amount of compensation in an unfair dismissal case is £9120 with the median being £4903.

The number of cases going to the appeal courts shows no signs of decreasing either. Indeed the Equality Act 2010 is likely to cause an increase in the number of appeals. On that note, be aware that the main provisions of the Equality Act 2010 come into force on **1<sup>st</sup> October 2010**.

In the meantime a few interesting cases this month. I have selected a case on TUPE and a case that makes an interesting point on the Respondent's ability to pay.

## ***Tao Herbs & Acupuncture Ltd v Mrs Y Jin***

The Claimant had been employed from 21 April to 23 December 2008. An issue arose as to the Claimant's capability and also as to her qualifications, for she said she was a qualified traditional Chinese medicine doctor. Her employment was terminated.

The Claimant claimed that she had been unfairly dismissed and had suffered unlawful deductions, because she had

been paid less than the National Minimum Wage.

The Employment Tribunal concluded that the Claimant was genuine and that her witnesses were supportive and correct. It found the Respondent was not reliable.

They concluded she was dismissed because she had asserted her statutory right to be paid the National Minimum Wage. This resulted in the dismissal being automatically unfair and entitled the Claimant to maintain a claim for unfair dismissal despite lacking 12 months' service and the ET awarded her £11,000. The lion's share of that was an award of compensation for the loss of pay from the date of dismissal to the date the hearing concluded, some 38 weeks.

The Respondents appealed on 3 points. However, I only draw your attention to the third point, which was that under section 123 of the Employment Rights Act 1996 the award to the Claimant was not just and equitable because it was substantial. . Essentially, the Respondent argued that if this award had to be paid, the business would go into liquidation. The EAT said that is not the correct approach to the assessment of an award for unfair dismissal, which does not pay attention to the ability of the employer to pay. For the purposes of calculating compensation the Respondent's ability to pay is irrelevant - the prime consideration is the loss suffered by the Claimant.

I think most people would accept that this has to be the correct position. The resources of the employer have to be taken into account in assessing fairness;

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why should the employer get a second bite of the cherry on compensation? The Claimant's loss doesn't depend on the employer's solvency – although, of course, whether the money can be extracted from the employer certainly does.

## ***Todd v Strain and ors***

Mr. Todd was the owner of a care home, which was transferred to Care Concern Limited in January 2008. In November 2007, T had called a meeting without notice to inform staff that an offer had been made for the home that could not be refused but that everyone's job was safe. No detailed information was given at the meeting, which only about a third of staff attended.

Apart from some minor communications with one employee, S, there was no further consultation with staff prior to the transfer.

The tribunal held that Mr. Todd had failed to inform and consult appropriate staff representatives about the measures envisaged in connection with the transfer.

He had also failed to arrange for the election of appropriate employee representatives.

The tribunal identified three measures that T had envisaged taking, which were not communicated to staff or any staff representative. These measures related to the way in which T would make payments to staff for work done in the days up to the date of transfer, including a change to their normal payment date.

The tribunal took the view that the failure to inform and consult about these measures was a serious one and

accordingly awarded each employee 13 weeks' pay. It also decided that, as Care Concern was not at fault, only Mr. Todd was liable to pay the award.

The EAT upheld the tribunal's finding that T had failed to inform and consult, holding that the payment arrangements at issue constituted 'measures' under TUPE. Although the arrangements were administrative and of a kind usually necessary in the context of a transfer, they were not an inevitable consequence of the transfer and represented a departure from what would otherwise have occurred.

The EAT considered that the purpose of the duty to consult must be to enable such transitional arrangements to be explained to employees and to reassure them, if necessary, that they will not be prejudiced in any way. Although the sums involved were small, many of the claimants were not well paid. It could not be said that the effect of the measures was so trivial that they were not caught by TUPE, given the tribunal's finding that the changes caused the employees to worry.

Furthermore, TUPE does not prescribe that a measure's effect must be disadvantageous to the affected employees in order to trigger the requirement to consult.

The EAT did, however, overturn the tribunal's decision to award the claimants 13 weeks' pay and substituted an order for seven weeks' pay. Although there was a complete failure to observe Reg. 13 and 14, this was not a case where no information had been given to the workforce.

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Furthermore, the measures in question were not of any great significance. Finally, the EAT held that, in accordance with Reg. 15(9), which provides for joint and several liability, Care Concern was also liable to pay the compensation awarded, despite the fact that it had not been at fault.

This is a useful case to raise with a transferor or transferee who is reluctant to comply with the consultation requirements.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to [jayne.phillips@morrishsolicitors.com](mailto:jayne.phillips@morrishsolicitors.com)

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