

Are you Protected from Discrimination Claims?



The latest statistics relating to discrimination claims in the Employment Tribunal are now available. These reveal that the highest award of compensation for discrimination in 2013 was £169,000, with several other significant six figure awards being made.

Where a discrimination claim succeeds, employees can be awarded compensation for “injury to feelings”, and last year saw awards of up to £28,000 being made under this heading. Added to this would be the financial losses suffered by the employee (including pension loss, which can often be significant), and there is also the potential for a separate award being made for personal injury. Compensation can be increased by up to 25% if the employer has not followed the appropriate dismissal or grievance procedure in terms of the ACAS Code. Employers who are found to have breached employment law with certain aggravating factors can also now be subjected to a fine, which is payable to the Government rather than to the employee.

The figures show that the average award in respect of all discrimination cases decided by the Employment Tribunal last year was £12,000. These calculations do not include cases which may have been resolved by settlement, and there is certainly anecdotal evidence of some very significant sums being awarded in “out of court settlements”.

All of this demonstrates the importance of ensuring that you, as employers, do what you can to reduce the risk of discrimination claims being brought by your workers. An award of £12,000 (the average) may be problematic, but a six figure award could well be fatal for the business.

A proper up-to-date equal opportunities policy is a necessity in most businesses, setting out, for staff and management, what their respective obligations are. Discrimination law now covers a wide range of “protected characteristics” and it is vital

that you are fully aware of all the issues. There are numerous pitfalls employers can fall into. For example, in the £168,000 case referred to above, the employer discriminated against a male employee, on grounds of sex, when labelling a female colleague’s complaint about the male employee as being an allegation of sexual harassment when it was not.

A key point is that where one employee subjects another employee to harassment related to one of the “protected characteristics”, then a claim can be brought against the employer even if the employer was unaware that such behaviour was taking place. The employer’s only defence in that situation is to show that the employer had taken all reasonable steps to prevent discrimination taking place. That will generally mean as a minimum, having an equal opportunities policy in place, publicising it, providing training, and setting a good example.

You should ensure that your policy is comprehensive and up to date. Also, have a clear plan in terms of what other steps you will take in order to improve your chances of being able to rely on the “reasonable steps” defence, in the event of a claim.

Our team of employment law experts can assist you with all these issues.

In this edition

Are you Protected from Discrimination Claims?

Recent statistics on discrimination claims highlight how important it is for employers to take discrimination law seriously.

Drafting of Restrictive Covenants

Restrictive covenants can and do fail if not carefully and tightly drafted with regard to employers’ own particular circumstances.

Holiday Pay: The Current Situation

Sales commission, bonuses and other allowances in employees’ pay? Don’t get stung by a backdated claim for underpayment of holiday pay.

Drafting of Restrictive Covenants

Many employment contracts contain restrictive covenants, i.e. clauses which seek to prevent the employee, after their employment ends, working for a competitor, poaching clients, etc. Over the last year or so, the courts have become more inclined to uphold such restrictions and issue appropriate orders requiring an ex-employee to comply with the restrictions. The courts increasingly recognise that often these restrictions do represent a valid and proper attempt on the employer's part to protect legitimate business interests from abuse at the hands of the ex-employee.

In one recent case, however, the Court of Appeal demonstrated that there is a limit and refused to give effect to the intention behind what was ultimately a badly drafted contractual term. In that case, the restriction prevented the employee from competing with the employer by being involved in any business which sought to sell to the public the "same products" as the employee had been selling for the employer. In fact, the former employer was the only company selling these products (as it was also the manufacturer) and the employee's new employer was selling similar, but not the same products. Although this meant that the restriction was meaningless, the court refused to rewrite it to give effect to what had presumably been intended in the first place ("similar products"), and the former employer was left with no protection against this competition.

This case emphasises the need to ensure that restrictive covenants are carefully and tightly drafted with regard to your own particular circumstances. It is not a case of "one size fits all". Employers should not underestimate the harm which can be done by a departing employee. They should take steps to ensure that contracts are up to date in relation to restrictive covenants, confidentiality, intellectual property, the return of property and information upon termination of employment. It is important to take expert advice on the terms of your contracts to ensure maximum protection.

Holiday Pay: The Current Position

A significant issue in the sphere of employment law currently is the question of the calculation of holiday pay payable to employees when they take their 5.6 weeks' statutory leave. The calculation of "a week's pay" for these purposes is, in terms of the legislation, complex, and different considerations apply depending on the way the work is done, whether there are normal working hours etc. In most cases, however, where there are normal working hours and pay for those normal hours does not change from week to week, then a week's holiday pay will simply be that normal weekly wage.

Recently, the European Court has reaffirmed that all payments which are "intrinsically linked" to the work being done should be included in holiday pay. This could include sales commission, bonuses and other allowances.

At the same time, some Employment Tribunal (ET) cases in the UK have had to consider the issue of overtime and whether variable overtime which is worked in addition to normal working hours has to be included in holiday pay. On this point, recently a 3 day hearing took place before the Employment Appeal Tribunal (EAT) at which the issues were explored extensively. A decision is awaited, but the key issues include whether European law requires that holiday pay includes overtime, whether an ET has the power to "rewrite" the legislation in order to implement that and, therefore, whether private/public sector employers now need to make changes to the way holiday pay is assessed.

The calculation of holiday pay is hugely complex and employers are well advised to audit their working practices and procedures and take advice as to the options available at this stage. If there is a valid claim for underpayment of holiday pay in the past, this could go back at least 5 years, resulting in a potentially significant liability. Matters may be partly clarified when the EAT issues its decision. Watch this space!

Update

Minimum Wage Increases from October 2014:

- The rate for those 21 and over will increase from £6.31 to £6.50.
- The rate for 18 to 20-year-olds will increase from £5.03 to £5.13.
- The rate for 16 and 17 year olds will increase from £3.72 to £3.79.
- Apprentice rate will increase from £2.68 to £2.73.

From 1 October 2014:

- Fathers and partners of pregnant women will be entitled to unpaid time off for up to 2 ante-natal appointments.

Employment Seminars:

23/10/14: Employment Law Update 2014 **Part 1:** The Main Changes in the Law.

27/11/14: Employment Law Update 2014 **Part 2:** Top 20 Cases.

Each session is free of charge and starts at 12:30, followed by a buffet lunch.

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