

Shock Statistics for Employers

The publishing of the Tribunal Annual Statistics for 2009/2010 has highlighted the increasing number of employers falling foul of employment law claims:

- 56% increase from 2008/2009 in number of claims accepted by Employment Tribunals, which are now at their highest ever level. This is mainly attributable to multiple claims (i.e. claims by groups of employees, such as for equal pay, TUPE, collective redundancies etc).
- 14% increase in number of single claims by Employment Tribunals. (This is a more relevant figure for the actual increase in employment law claims).
- 17% increase in number of tribunal claims associated with unfair dismissal, breach of contract and redundancy - likely to be caused by the economic recession.

The results clearly show a rise in the number of claims being lodged with the Employment Tribunal.

This rise can undoubtedly be attributed to the economic downturn and employers' realisation that they need to tackle such matters as underperforming members of staff in order to preserve their economic well being.

Disciplinary Action & Police Investigations

The Employment Appeal Tribunal held in the unfair dismissal case of **Secretary of State for Justice v Mansfield 2010** that where an employee is facing disciplinary proceedings and is at the same time the subject of a police investigation, the employer has a wide discretion as to whether or not to postpone the disciplinary hearing.

Main points to consider for employers exercising this discretion:

- Will continuing the disciplinary process prejudice the employee's criminal proceedings?

However, this is exacerbated by the fact that employees are more aware of their legal rights and are not reluctant to raise proceedings to enforce these rights. Even if employers are able to successfully defend the claims brought against them, the claim may mean significant waste of management time and expense (and in most cases legal costs cannot be recovered from the other side). Employees may represent themselves, or arrange "no win no fee" representation, so they have nothing to lose.

There is much to be said, particularly in these difficult economic times, for going the extra mile to ensure that employees are treated fairly and reasonably to minimise the risk of disgruntled employees and, therefore, minimise the risk of claims. Certainly, employers should ensure that they have comprehensive and up to date policies and procedures in place within their organisation. They should also ensure those members of their organisation who will implement the policies are properly trained to use them - to avoid becoming a statistic in the future...

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- To what extent does the prejudice justify a delay?
- What is a reasonable delay in the circumstances?

Historically, case law has shown that when the Tribunal considers a delay to be unreasonable, the dismissal will be rendered unfair.

Many employers may wish to dismiss as soon as possible rather than wait for what could be a lengthy police investigation. In some cases, the employer will be able to go ahead with an internal disciplinary process and potentially dismiss whilst

In this edition

Shock Statistics for Employers

An increasing number of employers are being subjected to employment law claims. Why is this happening? and, How can you avoid it?

Disciplinary Action & Police Investigations

A look at the points to be considered by employers when deciding whether or not to postpone a disciplinary hearing.

Damages for Failure to Follow Disciplinary Procedures

A case analysis highlighting the importance for employers of following their contractual disciplinary procedures in order to avoid significant potential damages claims.

Update

Equality Act 2010

New National Minimum Wage Rates

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police investigations are ongoing and without awaiting the outcome of the police investigation. The problem arises where the employee in question refuses to participate in the internal disciplinary proceedings on advice that it may prejudice the criminal proceedings, and therefore, access to particular evidence, which the employer would have used to make their decision, may be denied. The employer will have to make an assessment on the evidence available, weighing up relevant factors against the

risk of the employee raising a claim against them:

- Does the evidence available require an explanation in order for the employer to be able to reasonably justify their decision?
- What could be the potential costs involved in delaying the internal disciplinary process?

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Damages for Failure to Follow Disciplinary Procedures

Case Analysis: *Edwards v Chesterfield Royal Hospital* 2010 EWCA CIV 571

The landmark ruling in this case considered what an employee can recover in a claim for breach of contract in respect of a failure by an employer to follow their contractual disciplinary procedures.

It had been held by previous case law that employees do have a right to claim damages where an employer does not follow a contractual disciplinary procedure. However, the measure of those damages was restricted to salary for the period of time it would have taken to go through the contractual procedure (fairly minimal). Specifically, an employee could not seek to argue that had the procedure been followed, they would not have been dismissed, and therefore claim damages for prolonged loss of earnings. Such a claim was governed exclusively by the unfair dismissal regime, and employees could not get round that by pursuing a court claim for breach of contract. The Court of Appeal in *Edwards* disagrees.

Mr Edwards sought over £4 million damages following his dismissal. He claimed that the employer's disciplinary panel had not been constituted in line with the contractual policy, and there had been a breach of contract. Were it not for that breach, he would not have been dismissed. He sought damages for loss of earnings for the rest of his working life.

The Court held that in principle (although there were still many issues of fact for Mr Edwards to prove) the claim could succeed and he could recover damages on that basis. He would still need to show, however, that he had taken proper steps to mitigate his loss by finding other work. The Court held that the statutory unfair dismissal

scheme does not impinge on any cause of action the employee might otherwise have for breach of contract and so he was perfectly entitled to seek to recover damages for all the consequences of that breach. This controversial decision is, we understand, being appealed, but is of potentially great significance. It should be noted that the Court did not award Mr Edwards £4 million – it merely found that in principle it was a valid claim.

Employers now need to review the merits of having a contractual (as opposed to discretionary) disciplinary policy as part of their suite of employment policies or part of the employment contract. One option might be to disapply the policy during the first year of employment to enable new starts to be dismissed more readily if things are not working out, or build in sufficient flexibility so that the employer has some discretion as to how to deal with matters.

If the policy is stated to be contractual, great care must be taken to ensure that it is followed to the letter. Otherwise, the door is opened for a dismissed employee to claim substantial compensation. By analogy, similar concerns must arise in relation to other contractual policies governing dismissals for redundancy or poor performance, and employers should review these also. Of course, if the policy is contractual, care must be taken in changing that policy, or the nature of it, and advice should be sought before reviewing or altering your contract or practice. The employment team at **bto** would be happy to assist to ensure your organisation is protected.

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Update

Reminder: Equality Act 2010!

The core provisions of the Equality Act 2010 will become law in October this year. Obligations for employers will remain largely the same. The Act harmonises and replaces previous legislation (such as the Race Relations Act 1976 and the Disability Discrimination Act 1995). The aim is to ensure consistency in what employers need to know to make their workplace comply with the law.

New National Minimum Wage Rates

New rates from 1 October 2010:

- £5.93 per hour (standard adult rate) for workers aged 21 and over.
- £4.92 per hour (youth development rate for 18 – 20 year olds).
- £3.64 per hour (young people rate) for 16 – 17 year olds.
- £2.50 per hour (apprentice rate) for apprentices under 19 and apprentices aged 19 and over in the first year of their apprenticeship.
- £4.61 per day for the accommodation off set.

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