

HOW TO MAXIMISE AND DEFEND HIGH VALUE CLAIMS IN THE ET

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FINANCIAL LOSS

- SCHEDULES AND COUNTER SCHEDULES OF LOSS
 - Prepare at an early stage
 - Detailed but digestible
 - Include header with basic figures

Loss of earnings

■ PAST LOSS

- What would have happened but for discrimination?
- Does the loss actually flow from the discrimination?

Future loss of earnings

■ **Atos Origin IT Services UK Ltd v Haddock 2005 ICR 277**

- Chance that future loss will not occur must be allowed for
- Ordinary contingencies of life must be allowed for
- Credit given for acceleration of receipt
- Reasonable steps to mitigate loss
- Not entitled to compensation for loss that will be avoided
- If uncertain, chance must be estimated and credit given

Future loss of earnings - evidence

■ For Respondents

- The job market
- Focussed searches
- Client knowledge of sector and recruitment
- Offer of employment consultant services
- Uncertainty/ instability in Respondent's business

Future loss of earnings – evidence (2)

■ For Claimants

- Medical evidence
- Job searches
- Job market from their perspective
- Employment consultant

Future loss of earnings - stigma

■ Chagger v Abbey National [2010] IRLR 47

- Stigma damages
- Small v Shrewsbury and Telford Hospitals NHS Trust EAT 0300/14
- Impact of online judgments -
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835790
- Future losses must be discounted to reflect possibility C would have been dismissed anyway

Pension loss

- **Aegon UK Corporate Services Ltd v Roberts 2010 ICR 596, CA**
 - ET wrong to class a final salary pension as an ‘unquantifiable benefit’
- **Dumfries and Galloway Council v Carroll EATS 0001/19**
 - Compensation for loss of earnings and pension can differ

Pension loss (2)

- 2017 guidance revised in March 2021
 - Contributions method for 'simple' cases
 - All cases where loss relates to money purchase scheme and 'non-complex' defined benefit cases

Pension loss (3)

■ Seven steps model for 'complex' cases

- 1 – Identify pension if dismissal not occurred
- 2 – Identify pension in light of dismissal
- 3 - Deduct 2 from 1 to produce multiplicand
- 4 - Identify period of loss using Ogden tables to identify multiplier
- 5 - Multiply multiplicand by multiplier
- 6 – Check lump sum position
- 7 – Gross up

Pension loss (4)

- Adjustment factors
- **Kingston Upon Hull City Council v Dunnachie (No.3) 2004 ICR 227**
 - Old job facts and new job facts

NON-FINANCIAL LOSS

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Non-Financial Loss broadly covers:

- Injury to feelings
- Injury to health
- Aggravated damages
- Punitive or Exemplary damages

Injury to Feelings

- A discretionary award that can be made as part of the compensation package - section 119(4) read together with sections 124(2)(b) & (6) of Equality Act 2010
- To compensate the Claimant not to punish the Respondent
- The burden is on the Claimant to show that their feelings have been injured and to what extent.

A tribunal may take the following factors into account includes:

- Vulnerability of the individual
- Any medical condition from which the claimant is suffering
- The impact that the treatment has had on the victim
- The severity of the acts of discrimination,
- Whether the discrimination was a one-off incident or a course of conduct,

Is there a minimum award?

- Vento Guidelines
- bottom band is £900 to £9,100 (less serious cases, typically one-off occurrence);
- the middle band is £9,100 to £27,400 (cases that do not warrant an award in the upper band); and
- the higher band is from £27,400 to £45,600 (most serious offences such as campaign of discrimination).

Schedule Vs Counter-Schedule of Loss

- Not an exact science but more an analysis of the claimant's feelings as a result of the discrimination translated by the tribunal into a cash equivalent.
- A Schedule of Loss with supporting evidence of injury to feelings claimed is a good start to cashing out. While a Counter-Schedule is the ideal mechanism for R to keep hold of its cash. But does it....

Other ways:

- An Apology
 - In **Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162**. The EAT observed that the greatest mitigation would have been an apology, which was never offered.
- offer of practical help/support can assist in mitigating the picture the big bad employer – counselling; meeting cost of recruiter, etc

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- Evidence of practical steps to act upon findings of fact made by the tribunal, may also serve as mitigation in the tribunal's view.
 - Conversely, evidence of lack of action against any perpetrator or worse, evidence that the perpetrator has been promoted in the interim, is likely to support a higher injury to feelings award.

Injury to Health

- The first point to make is that to recover compensation for injury to health, it has to form part of your pleaded case.
- Secondly, C's advisers should obtain expert evidence at an early stage in proceedings to support a contention that such injury has been caused by the alleged treatment.
- Pick wisely - Ensure that your chosen Expert is suitably qualified.

Multiple complaints of discrimination

- R must remain vigilant - any loss claimed must be attributable to the specific acts which have been held by the Tribunal to constitute unlawful discrimination and not to other discriminatory acts which were not pleaded or were relied upon only as background, or indeed to alleged acts were not found to be proven as unlawful.

Aggravated damages

- recoverable where R has behaved in a high handed, malicious, insulting or oppressive manner in committing the act of discrimination. Examples include:
 - Attempting to cover up or trivialise the wrongdoing.
 - The manner of conducting internal procedures, including failure to investigate complaints or take them seriously.

Mitigate the prospects of Aggravated Damages Award by:

- Ensuring that there is a “learning points” session.
- Counselling to involved about their future conduct;
- Avoid the temptation of adopting the sort of aggressive litigation that would be expected in the High Court in a commercial dispute between to commercial entities or Russian oligarchs!

Exemplary damages

- recoverable in discrimination cases, but only if compensation is insufficient to punish the wrongdoer and if the conduct is either:
 - Oppressive, arbitrary or unconstitutional action by the agents of government, or
 - Where the Respondent's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the Claimant.

Contributory fault/negligence

- In practice we know that discrimination and unfair dismissal claims are often argued in tandem. So, can a reduction in damages be made in both claims (in respect of injury to feeling for a discriminatory dismissal where some blameworthy conduct has been found by the tribunal)?
- in principle it can be done but “rarely if ever” **First Great Western Ltd v Waiyego [2018] 12 WLUK 711**

Individual Respondents

- Often times individual employees are named as Respondents because the Claimant believes that it is necessary for them to do so to establish liability against their employer. In other instances, it is done for tactical reasons, such as bringing the employer to the negotiation table

- For practical reasons, in those cases where there is no conflict between the employer and the individual Respondent and they are being represented by the same advisors, a decision should be made early on that the employer will pay any award that may be made jointly and severally or against an individual

Settlement

- We know that the obvious high value claims settle.
- I repeat what I said earlier on the value of Schedule of Loss and a Counter-Schedule of Loss
- Every now and again a case comes along that doesn't make sense on many levels. In the context of this webinar, for me that case is: **RBS v AB [2020] UKEAT/0266/18/DA**

Mediation

- Mediation can be a very useful tool in settling complex discrimination complaints where you already have a liability judgment. If successful it does away with the need for a difficult remedy hearing which will be traumatic for the Claimant and risky for a Respondent.