

Employers beware: Financial penalties for breaches of employment rights with "aggravating features"

March 27 2014 Charles Wynn-Evans and Georgina Rowley

At present, when an employment tribunal finds in favour of a claimant, it does not have any power to penalise the employer for breaching the statutory employment obligations it owes to the individual other than by way of an award of compensation or, in discrimination cases, awards in respect of injury to feelings, exemplary damages and aggravated damages. This will change from April 6, 2014, when employment tribunals will have the ability to impose a financial penalty on employers against whom a successful employment tribunal claim is brought where there is a breach of the individual's statutory rights which has one or more "aggravating features".

The aim of this penalty is to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their staff and to reduce deliberate and repeated breaches of employment laws.

How much may the penalty be?

The penalty which the tribunal can impose will range from a minimum of £100 to a maximum of £5,000. Where an award of compensation is made to the individual, the penalty must be 50 percent of that award (subject to the cap of £5,000). The penalty will be reduced by 50 percent if paid within 21 days. The penalty is payable to the secretary of state rather than the individual directly. In cases where an individual has brought several successful claims against an employer in respect of one act, the employment tribunal can only impose one penalty on the employer.

When will the penalty be imposed?

It will be at the employment tribunal's discretion whether to impose a penalty. There is no statutory definition of what constitutes an "aggravating feature" and the employment tribunal will take into account any factors it considers relevant. The size of the employer, the duration of the breach of the relevant statutory employment right and the behaviour of the employer and of the employee are all likely to be considered relevant factors. The employment tribunal must also take into account the employer's ability to pay when deciding whether to impose a penalty and how much any penalty should be. According to the explanatory notes to the legislation an employer is more likely to face a financial penalty where:

- the action was deliberate or committed with malice;
- the employer was an organisation with a dedicated human resources team; or
- the employer repeatedly breached the employment right concerned.

Also, an employer is less likely to face a financial penalty where:

- the employer had only been in operation for a short period of time;
- the employer is a "micro-business";
- the employer only has a limited human resources function; or
- the breach was a genuine mistake.

What does this mean for employers?

The potential financial exposure for employers from employment claims will be increased. Not only is there the risk of paying compensation to a successful claimant, and since July 2013 the risk of being ordered to reimburse the individual for the fees which the individual has to pay to the tribunal to commence a claim and to proceed to a hearing. Now there is also the prospect of a further financial penalty of up to £5,000. The fact that such an award is made where there are aggravating features to an employer's breach may also have additional reputational consequences. Only time will tell how this penalty regime will be applied in practice.

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