

RadcliffesLeBrasseur



Employment Briefing

October 2009

Case of the Month

In any claim for breach of contract the claimant must ensure the loss suffered is as small as possible. This duty to mitigate loss applies to a claim for breach of an employment contract in a wrongful dismissal claim. So typically an employee who is dismissed without notice or pay in notice has to account for any income earned in what would have been the notice period.

In statutory unfair dismissal claims there is a different rule. Since 1972 it has been held that an employee who is dismissed unfairly can be awarded compensation for the lack of notice or pay in lieu of notice without giving credit for any earnings during what would have been the notice period. In the case that established this principle, **Norton Tool Company Limited v Tewson** [1972] ICR 290 the reason given was that in the context of a statutory right intended to encourage good industrial practice an employee should receive what he would have received had good industrial practice been followed. As one judge explained, if good practice had been followed a payment in lieu would be made and the fact that these wages are paid in advance “may soften a little the blow of losing employment”.

In **Stuart Peters Ltd v Bell** [2009] EWCA Civ 938 the Court of Appeal considered whether this principle applied to a claim of constructive dismissal. A constructive dismissal occurs when the employee brings the employment to an end by accepting a repudiatory breach of contract by the employer and resigns for that reason. The employment tribunal and the EAT considered that it did because they thought it was wrong to draw a distinction between the different ways that employment ends.

The Court of Appeal disagreed. It held that the rule in *Norton Tool* was one based on upholding good industrial practice. Whilst there was a good practice where the employer overtly dismissed none existed in a constructive dismissal. In these cases the employer may well be striving to keep the contract alive or denying any breach. In such circumstances there was a willingness to pay wages and no good practice existed that a payment in lieu should be made. Accordingly in constructive dismissal claims the duty to mitigate applies and any earnings in the period of notice have to be taken into account.

As one of the judges observed “this area of law is not always conspicuously consistent”!

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Further Information

If you would like further information or to comment in general regarding this case, please contact



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