

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Employment

Financial penalties

Summary and Background

92. Where an employment tribunal finds in favour of a claimant, it has the power to award various remedies. However, it currently has no power to penalise an employer for the actual breach of employment law. In order to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment laws, employment tribunals will be given the discretion to impose a financial penalty on any respondent found to have breached the claimant's rights.

Section 16: Power of employment tribunal to impose financial penalty on employers etc

93. This section adds a new section 12A to the ETA 1996. Section 12A gives employment tribunals the discretion to impose a financial penalty on a respondent employer where there has been a breach of a worker's employment right(s) and the employment tribunal considers that, in the circumstances, the employer's behaviour in committing the breach had one or more aggravating features. Section 12A provides that a financial penalty can be imposed on the employer irrespective of the nature of the remedy awarded to the claimant.
94. Subsection (2) of section 12A requires the tribunal to have regard to the employer's ability to pay when deciding whether to order an employer to pay a penalty under this section and, subject to subsections (3) to (7), in deciding the amount of the penalty. An employment tribunal may, for example, conclude that where the employer is a business in formal insolvency proceedings the imposition of a penalty is inappropriate. The tribunal may decide that, in the circumstances and considering that the imposition of a penalty would have the effect of reducing the monies available to satisfy the creditors or would adversely affect the sale of the business as a going concern, a penalty should not be imposed.
95. If the employment tribunal makes a non-financial award (e.g. an order for reinstatement) then any financial penalty imposed must be at least £100 and cannot exceed £5,000 (subsection (3)). If the remedy awarded by the employment tribunal to the claimant is a financial award (e.g. compensation) then any financial penalty imposed must be set at 50% of the amount of the claimant's financial award subject to a minimum of £100 and a maximum of £5,000 (subsections (4) and (5)).

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

96. Subsection (7) of section 12A will apply where the employment tribunal is dealing with claims brought by different workers against the same employer together, i.e. in what are widely known by employment tribunal users as ‘multiple claims’. Where a financial award is made in such cases, the employment tribunal will have a discretion as to the amount of the financial penalty which it can impose in each claim, subject to a total minimum payment of £100 and to a maximum of £5,000 and 50% of the amount of the award for each individual claim.
97. Where a single act by an employer leads to multiple claims by a worker (for example, where a dismissal leads to claims for unfair dismissal and holiday pay), subsection (8) of section 12A provides that only one financial penalty can be imposed by the employment tribunal.
98. The effect of subsection (9) of section 12A is that when *subsections (5) and (7)* refer to “50% of the amount of the award” this does not include any additional compensation awarded for a failure to comply with an order or recommendation of the tribunal.
99. The Secretary of State has the power to change, by regulations, the figures set out in subsections (3), (5), (7) and (10) (subsection (12)). If the employer complies with the order to pay a financial penalty no later than 21 days after the date that written notice of the decision is sent by the employment tribunal to the employer, the amount of the financial penalty is reduced by 50% (subsection (10)). The financial penalty shall be paid into the Consolidated Fund (subsection (13)).
100. Section 12A does not prescribe the features which employment tribunals should take into consideration when determining whether a breach had aggravating features; this is for the employment tribunal to decide, taking into account any factors which it considers relevant, including the circumstances of the case and the employer’s particular circumstances. The employment tribunal should only take into account information of which it has become aware during its consideration of the claim. A non-exhaustive list of factors which an employment tribunal may consider in deciding whether to impose a financial penalty under this section could include the size of the employer; the duration of the breach of the employment right; or the behaviour of the employer and of the employee. The concept of aggravating features in section 12A is not the same as the existing regime of aggravated damages in discrimination claims in England and Wales.
101. An employment tribunal may be more likely to find that the employer’s behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer’s behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake.