

# Wrongful dismissal

When claiming for wrongful dismissal, should you head for the employment tribunal... or the High Court? Clara Johnson reports

## THE POTENTIAL DANGER FOR CLAIMANTS IN

bringing claims for both unfair dismissal and wrongful dismissal in the employment tribunal has been highlighted in a number of recent cases. This danger arises out of the fact that recovery of damages for wrongful dismissal in the employment tribunal is capped at £25,000. What can, and often does, happen is that a claimant will issue proceedings for unfair and wrongful dismissal in the employment tribunal and either concurrently or subsequently, issue further proceedings in the High Court to claim the balance should the tribunal assess damages for wrongful dismissal above £25,000. However, if the employment tribunal makes a determination on the claim for wrongful dismissal, a claimant will not be permitted to bring the second set of proceedings: *Fraser v HLMAD* [2006] IRLR 687; [2006] EWCA Civ 738; *Enfield v Sivanandan* [2005] EWCA Civ 10; *The Times*, 25 January 2005; *Sajid v Sussex Muslim Society* [2002] IRLR 113; [2001] EWCA Civ 1684, *Soteriou v Ultrachem* [2004] IRLR 870; [2004] EWHC 983.

### Fraser

In *Fraser*, the claimant issued proceedings for unfair and wrongful dismissal in the employment tribunal subject to the express reservation, set out in his ET1 claim form, of the right to issue proceedings in the High Court should damages for wrongful dismissal exceed £25,000. Mr Fraser took the precaution of issuing proceedings for wrongful dismissal in the High Court shortly after proceedings were issued in the employment tribunal, but did not take the extra precaution of withdrawing his wrongful dismissal claim from the employment tribunal.

The tribunal found that Fraser had been unfairly and wrongfully dismissed and assessed his damages for wrongful dismissal at £80,000. HLMAD applied to strike out Fraser's subsequent claim for the shortfall. The application was successful and the decision was upheld by the Court of Appeal. The Court of Appeal found that, in failing to

withdraw the claim for wrongful dismissal from the employment tribunal, which had subsequently been determined by the tribunal, meant that it had been 'merged', ie, it had been replaced by the rights created by the judgment. The cause of action for wrongful dismissal had thus been extinguished and a further claim in the High Court could not be brought. This finding was not affected by the fact that Fraser had reserved his right to do so.

### Sajid

In the earlier case of *Sajid*, the claimant had taken the precaution of formally withdrawing his wrongful dismissal for the specific reason that the tribunal did not have jurisdiction to make an award for the level of damages he was seeking. The Court of Appeal found that in such circumstances, the withdrawal could not be taken to have been, or intended by either of the parties or tribunal to constitute, a final and binding determination dismissing the claimant's claim. Rather the effect was to move the claim to a different forum and was not an attempt to re-litigate the same cause of action.

As the Court of Appeal in *Fraser* made clear, these cases reveal a nasty potential trap for the litigant who decides to add a wrongful dismissal claim to his unfair dismissal claim in the employment tribunal and pursue both claims to judgment in the tribunal. The clear message is that proceedings in respect of wrongful dismissal must be formally and unequivocally withdrawn from the employment tribunal if a claimant wishes to pursue the same claim in the High Court: see also *Enfield v Sivanandan* [2005] EWCA Civ 10; *The Times*, 25 January 2005.

In *Fraser*, the Court of Appeal issued guidance that helpfully clarifies the approach to be adopted by claimants and by the courts for such claims:

(1) claimants should confine claims in the employment tribunal to unfair dismissal unless they are willing to limit the total damages to £25,000 or less;

(2) If the claimant wishes to recover more than £25,000, the wrongful dismissal claim should only be made in High Court proceedings;

(3) The findings of the employment tribunal in its judgment on the unfair dismissal claim will provide assistance to the claimant as they will give rise to an issue estoppel in any subsequent proceedings for wrongful dismissal, but the claimant will not be prevented by success in the employment tribunal claim for unfair dismissal from pursuing an action for wrongful dismissal;

(4) An application for summary judgment in the High Court for the wrongful dismissal claim will be appropriate in straightforward cases.

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