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Dismissals: HR guide

Description

Introduction

When considering **dismissals** there are many pitfalls. Employers need to be aware of the legal framework to ensure that they are not exposed to employment tribunal claims.

Wrongful dismissal

If an employer dismisses the employee without contractual notice (in circumstances where the employer is not entitled to dismiss immediately) the employee may have a claim for damages for wrongful dismissal. Damages would be assessed by calculating the financial position that the employee would have been in had the contract been performed lawfully. This will normally therefore be the net remuneration for the notice period. It could in some cases be for a longer period if, for instance, a contractual disciplinary process had not been followed.

If an employee establishes that they have been constructively dismissed, the employee may have a claim for damages for wrongful dismissal. There needs to be a fundamental breach of contract by the employer (either being an actual breach or an anticipatory breach) and the employee needs to resign swiftly as a result of the breach. The same method of calculation of losses applies.

Unfair dismissal â?? qualifying period

Generally, currently, employees need to have at least two yearsâ?? continuous service to bring an **unfair dismissal** claim (though there are some exceptions). The new employment legislation will reduce the qualifying period from two years to six months. The six month qualifying period will apply for employees with employment end dates on or after 1 January 2027.

Be aware that an employee could bring claims, such as for discrimination or whistleblowing, which have no length of service requirement. It is therefore advisable to follow a fair process wherever possible (including when the employee is on probation) â?? so you can account for your decisions.

Also be aware that employees can take minimum statutory notice into account in getting up to the two year mark unless the employee is guilty of misconduct entitling the employer to terminate immediately. This notice is one week for continuous service of less than two years but one month or over. So if you **dismiss** an employee a few days before their two yearsâ?? service without serving them notice, an extra week can be added for the purpose of calculating the two year period.

Unfair dismissal â?? fair reason

Dismissals for some reasons are automatically unfair. Reasons include, among others, a reason connected with pregnancy or childbirth, for a health and safety reason, for making a protected disclosure (whistleblowing) and for asserting a statutory right.

Generally, an employer can defend a claim by showing that the reason (or principal reason) for the **dismissal** was one of the potentially fair reasons for **dismissal** such as conduct, capability, redundancy, contravention of a statutory restriction (for example that continued employment would breach immigration rules) or some other substantial reason (for example pressure from a client to dismiss.) Once the employer has established a potential fair reason for **dismissal** the employment

tribunal must then decide if the employer acted reasonably in **dismissing** the employee for that reason.

Unfair dismissal â?? fairness

In misconduct cases to satisfy the reasonableness (fairness) test: at the time of **dismissal** the employer must have had an honest belief that the employee was guilty of the misconduct; at the time of the **dismissal** the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and at the time that the employer formed that belief it had carried out as much investigation as was reasonable in the circumstances. The employment tribunal must also consider whether in **dismissing** the employee the employer acted within the band or range of reasonable responses open to the employer.

In capability cases when determining fairness relevant factors could include: whether the employer explained the employeeâ??s shortcomings; whether the employee had been given a sufficient opportunity to improve; whether training and supervision had been provided; whether warnings were issued; whether the employee had been given an opportunity to put forward their case; and whether alternatives to **dismissal** were considered.

In redundancy cases when determining fairness relevant factors could include: whether individual consultation (and in some cases collective consultation) had been carried out; whether, in appropriate cases, there had been an objective selection process; and whether the employer searched for suitable alternative roles within the organisation and, possibly, other group companies.

In cases of **dismissals** for breach of a statutory restriction relevant factors for determining fairness could include the extent of the restriction, the duration of the restriction and whether alternatives to **dismissal** had been considered.

In cases of **dismissals** for some other substantial reason, relevant factors for determining fairness could be whether there had been an adequate investigation, whether the employee had had an opportunity to put forward their case, whether the employer had consulted with the employee and whether alternatives to **dismissal** had been considered.

Be aware that a **dismissal** could include the non-renewal of a fixed-term contract.

Employers should be aware of the Acas Code of Practice on Disciplinary and Grievance Procedures (Code). The code covers, among other things, investigations, disciplinary hearings, the right to be accompanied and the right of appeal. Employment tribunals must take the Code into account when considering whether an employer has acted reasonably or not. If an employee wins an **unfair dismissal** claim employment tribunals are also able to adjust awards up or down by 25 percent for unreasonable failure to comply with any part of the Code by the employer or the employee.

Unfair dismissal â?? constructive unfair dismissal

If an employee resigns swiftly in response to a fundamental breach of contract by the employee, subject to the employee reaching the qualifying period (unless there is an exception) the employee may have a claim for constructive unfair dismissal. the qualifying period. In the vast majority of cases where the employee has proved that their employer has fundamentally breached their contract it will be very difficult for the employer to show that they have acted fairly.

Unfair dismissal â?? compensation

The maximum compensation award for general unfair dismissal claims is, currently, the lower of 52 weeksâ?? pay or the fixed cap, being Â£123,543. There are a few exceptions where there is no 52 week and financial cap such as whistleblowing. Also there is no limit for discrimination claims.

The new employment legislation will abolish the 52 week and financial cap. The removal of the cap will take effect from 1 January 2027.

Reaching a deal

Even if there is no actual dispute with the employee, the employer may still be able to have an off-the-record conversation with the employee and try and reach a deal for their employment to end. As long as there is no improper behaviour, such as blackmail, this â??protected conversationâ?? would be inadmissible in any general **unfair dismissal** proceedings. When a deal is reached the parties would usually enter into a settlement agreement.

However, employers do need to be careful. There are some exceptions for **unfair dismissal** including where the **dismissal** relates to pregnancy, where you do not get protection. Also other claims such as discrimination are not protected. It is therefore sensible to speak to your lawyer before having those

discussions.

This guide is intended for guidance only and should not be relied upon for specific advice.

If you need advice on **dismissals** or have queries relating to other employment law issues please do not hesitate to contact me on 020 3797 1264.

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