Ending the Employment Relationship

Winckworth Sherwood

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This guide is the third instalment of our whistle-stop tour of UK employment law outlining some of the key issues to consider when ending the employment relationship. We hope that growing businesses and multinational organisations setting up in the UK, in particular, will find our guides useful.

While we refer to the UK throughout this guide for ease, there are in fact different legal systems in the UK. This guide concerns English employment law. Please note that this guide is not a comprehensive summary of all legal requirements and guidance; rather it highlights some of the key legal areas UK employers should be aware of. Specific legal advice should be taken on particular circumstances. The information is correct as of September 2020.

If you would like to discuss anything raised in this guide, our experienced employment team is here to help. Their contact details can be found at the end of this guide.

For more information, please visit: **wslaw.co.uk/employment.**

Dismissing an Employee

UNFAIR DISMISSAL

Employees with at least two years' service have the right not to be unfairly dismissed (there are limited circumstances where this service threshold is not required). When contemplating dismissing an employee, an employer needs to have a fair reason for dismissal, follow a fair process and act fairly and reasonably.

A LAWFUL DISMISSAL

If an employer wishes to dismiss an employee lawfully, it must ensure that it:

1. Has a fair reason for dismissal.
2. Follows a fair procedure and acts fairly and reasonably.
3. Complies with the terms of the employment contract, particularly as regards the employee's notice period.
4. Does not discriminate unlawfully.
5. Provides written reasons for dismissal (subject to exceptions).

Fair Reasons for Dismissal

There are five potentially fair reasons for dismissal:

1. Conduct: This could be a single act of misconduct (for example theft) or a series of less serious acts (for example, persistent lateness).

2. Capability: The employee is incapable because of poor performance or ill health.

3. Redundancy: There is a workplace closure, business closure or reduced need for employees.

4. Illegality: Where continuing to employ the employee would contravene a statutory restriction (for example, because of their immigration status).

5. "Some other substantial reason" (SOSR): This is a catch-all category of potentially fair reasons that do not fall under the other categories. For example, this may include dismissals for refusal to agree to changes to terms and conditions, pressure from third parties such as clients to remove the employee, and business reorganisations falling short of a genuine redundancy situation.

An employer should compile documentary evidence to support the fair reason before taking the decision to dismiss.

Specific guidance regarding different types of dismissal is set out below:

MISCONDUCT

To dismiss an employee fairly on grounds of misconduct, an employer must operate a fair disciplinary procedure. This should be set out in a disciplinary policy which is accessible to the employee.

It may be appropriate to suspend the employee from work while an investigation into the allegations against them is carried out. Any such suspension will normally be on full pay.

It will be unfair to dismiss an employee for a first offence, unless the incident is serious enough to constitute gross misconduct. In all other cases employees should normally be given warnings before dismissal. There is no specific legal requirement that a certain number of warnings must be given prior to dismissal, but it is common for employers to apply the following stages to a disciplinary procedure:

- Oral warning
- First written warning
- Final written warning
- Dismissal

Remember to follow the ACAS Code on Disciplinary and Grievance Procedures (ACAS Code) – see the Fair Procedure section for further details.

POOR PERFORMANCE

The ACAS Code recommends that an employee should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been given.

Unless the employee has been guilty of gross negligence (in which case it may be fair to dismiss without any prior warnings) the employer will be expected to follow a procedure whereby the employee is given a series of warnings explaining the respects in which their performance is unsatisfactory, the improvement required and the time within which the improvement must be made. The consequences of failing to achieve the required standards within that timeframe should also be made clear. Consequently, a fair process could take a number of months.

If appropriate, the employee should be given reasonable assistance (such as additional training and regular monitoring) to help them achieve the required improvements.
Consideration should also be given to whether the employee should be transferred to an alternative position.

ILL HEALTH

Before dismissing an employee for long-term sickness absence, the employer should investigate the current medical position by either sending the employee to a company nominated doctor or by obtaining a report from the employee's own doctor. If this reveals that the employee will be unable to return to work within a reasonable period of time it may be fair for the employer to dismiss. What is "reasonable" in this context will depend on the nature of the business and the employee's position. For example, a small business will generally not be expected to tolerate as much sickness absence as a larger organisation.

Before carrying out the dismissal, the employer should consult with the employee regarding the likelihood of the employee returning to work, the employer's intention to dismiss and any alternatives to dismissal (for example, it may be possible for the employee to return on a part-time basis or carry out different duties). Particular care should be taken if the employee's condition is sufficiently serious to bring them within the definition of a person with a "disability" under the Equality Act 2010. In these circumstances, the employer will be under an obligation to make a "reasonable adjustment" to accommodate the employee's disability.

We would strongly encourage you to seek legal advice before dismissing someone who is on long term sick leave as there is the added risk of a discrimination claim, for which the employee does not need any length of service.

REDUNDANCY

A redundancy situation occurs under UK law where there is:

- A business closure.
- A workplace closure.
- A reduction in the workforce - there is a reduced requirement for employees to carry out the particular work for which they have been employed.

A dismissal on the grounds of redundancy may be found to be unfair either as a result of the manner in which employees were selected for redundancy or as a result of the procedure by which the redundancies were put into effect.

An employer would not normally be able to show that it acted reasonably unless it:

- Compiled evidence to support the decision for instance, a financial business case.
- Identified the pool of employees 'at risk' of redundancy (which should include all employees who undertake similar or interchangeable work).
- Applied objective, non-discriminatory, selection criteria to the selection pool to determine who may be made redundant, for example, performance review scores.
- Warned and consulted with the affected employees about the proposed redundancy.
- Searched for suitable alternative roles within the business.
- Offered a right of appeal to the decision to dismiss.

Where an employer is planning large-scale redundancies, it must also undertake collective consultation with trade union or elected employee representatives.

An employee who is dismissed because of redundancy is entitled to receive a statutory redundancy payment (as well as their notice) if they have more than two complete years' service at the date of dismissal. A statutory redundancy payment is calculated using a formula based on the employee's age, length of service and weekly pay (subject to a cap of £538). The maximum statutory redundancy payment is currently £16,140.

NO DISCRIMINATION

Employers must not base a dismissal on a reason that is directly or indirectly discriminatory, including dismissing an employee on the basis of a "protected characteristic", i.e. his or her sex, disability, race, religion or belief, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity, or for an unjustified age-related reason.
Employers must also not dismiss an employee because they have done a "protected act", for example, raised a grievance about being paid less than a male colleague.

Fair Procedure and Acting "Reasonably"

The employer needs to follow a fair procedure to dismiss the employee and also act reasonably in treating the potentially fair reason as a sufficient reason for dismissal. This will involve taking into consideration different factors, depending on the reason for dismissal. For example, where an employee is being dismissed because they are not capable of doing their job, an employer will usually have to give the employee a chance to improve. All the circumstances, including the size and resources of the employer, will be relevant when determining whether it acted reasonably.

In cases of misconduct and poor performance, the employer should comply with the ACAS Code. The Code applies even where an employee is only given a written warning.
Failure to follow the ACAS Code may lead to a finding of unfair dismissal and the Tribunal may increase compensation by up to 25% if the failure to comply was unreasonable.

The basic steps in the ACAS Code include:

1. Undertaking an investigation to establish the facts.
2. Notifying the employee in writing of the basis of the problem.
3. Holding a disciplinary hearing to discuss and consider both sides of the matter.
4. Writing to the employee with the decision and providing a right of appeal.
5. Holding an appeal hearing to consider the grounds of appeal.
6. Providing the employer's final decision to the employee in writing.

An employee has a right to request to be accompanied at any disciplinary and appeal hearings by a work colleague or a trade union representative.

Notifying the Employee of Dismissal

Employees with two years' service are entitled, on request, to a written statement setting out the reasons for dismissal and this has to be provided within 14 days. Employees who are dismissed while pregnant or during maternity or adoption leave must be provided with written reasons without having to request it, regardless of length of service. It is good practice, in any event, to provide written reasons for dismissal.

The employee should be dismissed in accordance with their contract.

Employees generally have a right to be given a period of notice (or, depending on their contract, a payment in lieu of notice) if their employment is terminated.

An employee who is guilty of gross misconduct or other repudiatory breach of contract will have no right to notice or payment in lieu of notice. In such cases the employer can dismiss them without notice (summary dismissal).

An employer's failure to give adequate notice is likely to result in a wrongful dismissal claim, for which the employee can claim loss of earnings and benefits to which they would have been entitled during the notice period.

The contract should be checked regarding the employee's entitlement to accrued but untaken holiday pay, bonus, commission and other benefits on dismissal. An employee who is made redundant may be entitled to a statutory redundancy payment.

It is important to take legal advice before taking any steps to dismiss an employee in order that any risks are considered and an appropriate strategy is put in place.

Costly Consequences

UNFAIR DISMISSAL CLAIMS

If an employee is unfairly dismissed, they can claim:

- A basic award, which is calculated using a formula based on the employee's age, length of service and weekly pay (subject to a current cap of £538 gross pay).
- Lost earnings subject in most cases to a maximum limit. This is the lower of a year's actual gross pay or the maximum award which is currently £88,519.

Reinstatement or re-engagement can also be sought but these remedies are rarely awarded.

DISCRIMINATION AND WHISTLEBLOWING CLAIMS

If an employee is dismissed for a discriminatory reason or for blowing the whistle they can claim:

- A basic award, which is calculated using a formula based on the employee's age, length of service and weekly pay (subject to a current cap of £538 gross pay).
- Lost earnings - there is no cap on compensation but the employee is under a duty to mitigate their loss.
- Injury to feelings (up to £45,000) in discrimination and whistleblowing detriment cases.

Employees can bring claims against individual perpetrators of discrimination and whistleblowing retaliation (such as other employees and Board members).

Negotiating a Settlement

Sometimes, from both a practical and commercial point of view, it is better to try and reach a financial agreement with an employee to leave. However, there are risks in proposing such a solution, so always take legal advice before entering into any negotiations. If an agreement can be reached, the employer should usually ask the employee to sign a settlement agreement.

A settlement agreement is the only way in the UK to have an effective waiver of an employee's statutory employment claims, such as unfair dismissal or disability discrimination.

A settlement agreement will require an employee to obtain independent legal advice regarding the terms and effect of the settlement agreement in order for it to be legally binding.

Our Team

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Louise is a trusted advisor to UK businesses advising on all aspects of employment law from drafting contracts of employment to defending Tribunal claims. She gets to know her client, listens to them and uses her experience and commercial nous to create solutions to meet her client's needs. Louise values all of her client relationships, providing prompt, collaborative and pragmatic advice.

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Blair acts for numerous corporate clients, from multinational companies to owner-managed businesses. He advises them on restructuring and redundancy exercises, performance and conduct issues, discrimination, internal investigations, international secondments, senior level recruitment and terminations, restrictive covenant enforcement and litigation in the Employment Tribunal and the High Court.

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Danielle advises both employees and employers on all aspects of contentious and non-contentious employment matters. Danielle is experienced in dealing with a wide range of employment issues ranging from everyday HR queries to multifaceted and complex disputes and litigation. Danielle ensures that her advice to each client is carefully tailored by considering industry specific and commercial factors as well as the relevant legal issues. Danielle also adopts a collaborative approach with clients in order to devise appropriate and effective strategies.

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Kezia has been advising businesses and individuals on all aspects of UK immigration and nationality law for over 14 years having qualified as a solicitor in 2005. Kezia has an established reputation for delivering high level client service combined with clear strategic advice relating to all areas of immigration. Whether you are an investor or an entrepreneur starting a business within the UK, an international corporation transferring staff to the UK or a family relocating to the UK, Kezia can advise and assist on the full range of immigration matters, from straight forward queries matter to highly complex issues. Kezia acts for a variety of corporate clients assisting them with end-to-end sponsorship licence applications and visa advice, including providing comprehensive support with UK immigration compliance issues.

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Will provides straightforward, strategic and commercial advice to his clients, enabling employers to manage disciplinary and other HR issues in a way that minimises the risk of litigation, and helping employees to achieve excellent financial settlements. Will also has a wealth of experience in advising clients who are involved in employment tribunal litigation.

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Aleksandra qualified into the Employment team in 2019 having spent five years working in the team as a Paralegal. She has a breadth of experience having worked on a wide range of contentious and non-contentious employment matters, representing both employer and employee/senior executive clients. Her recent experience includes acting for employees in grievances and appeals and negotiating favourable and high-value departure terms as well as helping employers with a range of HR queries.

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James has specialised in employment law since 1995 and has regularly been a recommended lawyer in the Legal 500 directory. His particular professional specialisms are: helping employers resolve crisis situations; managing large scale redundancy exercises; advising on complexity of TUPE consultation and indemnities, conducting and defending complex tribunal litigation.

“Expertise in their respective areas, second to none. Very much work as a team.”

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