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Dismissal Procedures

There have been many changes to employment law and regulations in the last few years. A key area is the freedom or lack of freedom to dismiss an employee.

An employee's employment can be terminated at any time but unless the dismissal is fair the employer may be found guilty of unfair dismissal by an Employment Tribunal.

In November 2011, the qualifying period for unfair dismissal increased from one to two years continuous service. However, there is no length of service requirement in relation to 'automatically unfair grounds'.

We set out below the main principles involved concerning the dismissal of employees including some common mistakes that employers make. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

The right to dismiss employees

Reasons for a fair dismissal would include the following matters:

- the person does not have the capability or qualification for the job (this requires the employer to go through consultation and/or disciplinary processes)
- the employee behaves in an inappropriate manner (the company/firm's policies should refer to what would be unreasonable behaviour and the business must go through disciplinary procedures)
- redundancy, providing there is a genuine business case for making (a) position(s) redundant with no suitable alternative work, there has been adequate consultation and there is no discrimination in who is selected
- the dismissal is the effect of a legal process such as a driver who loses his right to drive (however, the employer is expected to explore other possibilities such as looking for alternative work before dismissing the employee)
- some other substantial reason.

Claims for unfair dismissal

Upon completion of the required qualifying period, employees can make a claim to an Employment Tribunal for unfair dismissal within three months of the date of the dismissal and if an employee can prove that he/she has been pressured to resign by the employer he/she has the same right to claim unfair dismissal or constructive dismissal.

In addition to the increase in qualifying period, the government has also introduced plans for details of claims to be submitted to ACAS where the parties will be offered pre-tribunal conciliation before proceeding to a Tribunal. However, there is no obligation of either party to take it up.

There are two levels of claim, depending on the complexity of the case. There is the straightforward claim where there is one claim per claimant or the more complex multiple claims (including unfair dismissal and discrimination claims)

If the claim proceeds to Tribunal and the employee wins his/her case the Tribunal can choose one of three remedies which are:

- reinstatement which means getting back the old job on the old terms and conditions
- re-engagement which would mean a different job with the same employer
- compensation where the amount can be anything from a relatively small sum to a maximum cap of 12 months' pay, which will apply where the amount is less than the overall cap. Where the dismissal was due to some form of discrimination the award can be unlimited.

If the dismissal is demonstrated as being due to any of the following it will be deemed to be unfair regardless of the length of service:

- discrimination for age, disability, gender reassignment, race, religion or belief, sex, sexual orientation or marriage and civil partnership
- pregnancy, childbirth or maternity leave
- refusing to opt out of the Working Time Regulations
- disclosing certain kinds of wrong doing in the workplace
- health and safety reasons
- assertion of a statutory right.

Statutory disciplinary procedures

The Employment Act 2008 introduced the ACAS Code of Practice which saw a change to the way employers deal with problems at work. It also saw the removal of 'automatic unfair dismissal' related to failure to follow procedures. Tribunals may make an adjustment of up to 25% of any award, where they feel the employer has unreasonably failed to follow the guidance set out in the ACAS Code.

The ACAS Code of Practice sets out the procedures to be followed before an employer dismisses or imposes a significant sanction on an employee such as demotion, loss of seniority or loss of pay.

The ACAS Code does not apply to redundancy or expiry of a fixed term contract.

Standard procedure

Step 1	Employers must set out in writing the reasons why dismissal or disciplinary actions against the employee are being considered. A copy of this must be sent to the employee who must be invited to attend a meeting to discuss the matter, with the right to be accompanied
Step 2	A meeting must take place giving the employee the opportunity to put forward their case. The employer must make a decision and offer the employee the right to appeal against it.
Step 3	If an employee appeals, you must invite them to a meeting to arrive at a final decision

There may be some very limited cases where despite the fact that an employer has dismissed an employee immediately without a meeting, an Employment Tribunal will very exceptionally find the dismissal to be fair. This is not explained in the regulations but may apply in cases of serious misconduct leading to dismissal without notice. What this means in practice awaits the test of case law.

Modified procedure

Step 1	Employers firstly set out in writing the grounds for action that has led to the dismissal, the reasons for thinking at the time that the employee was guilty of the alleged misconduct and the employee's right of appeal against the dismissal
Step 2	If the employee wishes to appeal against the decision, the employer must invite them to attend a meeting, with the right to be accompanied, following which the employer must inform the employee of their final decision. Where practicable, the appeal meeting should be conducted by a more senior or independent person not involved in the earlier decision to dismiss.

The only occasions where employers are not required to follow the ACAS Code of Practice are as follows:

- they reasonably believe that doing so would result in a significant threat to themselves, any other person, or their or any other person's property
- they have been subjected to harassment and reasonably believe that doing so would result in further harassment
- because it is not practicable within a reasonable period
- where dismissal is by reason of redundancy or the ending of a fixed term contract
- they dismiss a group of employees but offer to re-engage them on or before termination of their employment
- the business closes down suddenly because of an unforeseen event
- the employee is no longer able to work because they are in breach of legal requirements eg to hold a valid work permit.

Common mistakes that employers make

For many the regulations have caused some confusion and practical difficulties. Some of the most common mistakes include:

- not applying the procedures to employees with less than the qualifying period of continuous service for unfair dismissal (ie two years). Whilst such employees

are often unable to claim unfair dismissal (unless the reason for their dismissal is one of the automatically unfair reasons for which there is no qualifying period of employment such as pregnancy), they may be able to bring other claims such as discrimination with compensation increased accordingly

- failure to invite employees to disciplinary hearings in writing or supply adequate evidence before the disciplinary hearing. The standard procedure requires the employer to set out the 'basis of the allegations' prior to the hearing
- excluding dismissals other than disciplinary dismissals (eg ill-health terminations)
- not inviting employees to be accompanied
- not including a right of appeal
- not appreciating the statutory requirement to proceed with each stage of the procedure without undue delay
- failure to appreciate that an employee may have right to appeal even if it is requested verbally rather than in writing and is after a timescale set down by the employer
- not appreciating that paying an employee a lower bonus for performance related reasons could potentially amount to 'action short of dismissal' by the employer
- failure to treat as a grievance any written statement/ letter (for example a letter of resignation) which raises issues which could form the basis of a tribunal claim to which statutory procedures apply. This means that the employer must be alert to issues being raised in writing even if there is no mention of the word grievance.

How we can help

We will be more than happy to provide you with assistance or any additional information required so please do contact us.

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