

UNFAIR DISMISSAL

Important updates:

Is an employee entitled to legal representation in disciplinary proceedings?

Generally an employee is only allowed to be accompanied to a disciplinary hearing by a colleague or a trade union representative, not a legal representative. However, a recent judgment held that where the allegation and potential consequences for the employee's future were particularly serious (the employee was a schoolteacher accused of an abuse of trust through having an inappropriate relationship with a child), the employee is entitled to legal representation. (*R v Governors of X School, ex p G*)

Resigning in the heat of the moment

You must be wary of resignations made in the heat of the moment or by immature employees. The law requires you to allow the employee a reasonable period of reflection before you accept such a resignation. However, the EAT has recently decided that the period of reflection need not be long (30 minutes in that case!). What is essential is that you allow a period of time in which to enable the employee to change his mind, if it seems he did it in the heat of the moment. If he does not change his mind, then you may accept his resignation. (*Ali v Birmingham CC*)

Statutory dispute resolution procedures

On 6 April 2009 the statutory dispute resolution procedures were repealed and as a consequence it will no longer be an automatically unfair dismissal if you do not follow the statutory procedures.

Instead, there is now an ACAS Code that governs the handling of grievances and dismissals. Any departure from the Code, if not reasonable in the eyes of a Tribunal, may result in "punishment" by either uplifting any compensatory award by up to 25% - if you have departed unreasonably from the Code – or reducing an award by up to the same degree where the employee has departed from the Code unreasonably.

NB: The New Regime does not apply to redundancies, fixed-term contracts or grievances lodged by an employee representative on behalf of two or more employees.

Transition

Where either the dismissal or disciplinary action occurred before 6 April 2009, the Old Rules apply – statutory dispute resolution procedures must be followed and the old uplifts (10-50%) apply.

Hints and tips:

1. If you have identified a reason for dismissal, stick to it. Including other reasons creates doubt as to why the employee was dismissed, which is likely to benefit a former employee at a Tribunal hearing;
2. When a problem with an employee arises, deal with it early and "positively"; i.e. send polite emails and/or letters and try to resolve less serious issues through informal hearings first. If you can show a

trail of reasonable and prompt communication on your part, it makes it far harder for an employee to succeed in a claim against you;

3. In order to avoid the problem area of capability dismissals, conduct regular appraisals that are honest and enable the employee to raise concerns. If you are too nice in the first place, it makes it difficult to dismiss an employee for poor performance later because the change in standard will be less credible. If there is a problem from the outset, say so, making sure that you keep detailed notes of all meetings and conversations;
4. If you give an employee a warning make sure that you back it up in writing. If you end up in an employment tribunal this paper trail will be vital;
5. If necessary make use of a clause to extend an employee's probationary period. This should be discussed with the employee and any extension should be recorded;
6. If employees raise grievances, make sure you deal with them fully, no matter how minor. If you don't do this, and you then go on to begin a disciplinary procedure against them, it gives them ammunition to allege victimisation;
7. Be aware of employees who might be suffering from stress. You are expected to offer support to such employees and a failure to do so could make any disciplinary procedure or dismissal problematic. You must consult employees regularly as to their concerns, as well as being vigilant. The same also applies to harassment and bullying;
8. The expiry of a fixed-term contract does not mean that you can simply dismiss someone; the usual unfair dismissal laws apply;
9. Do not assume that if you dismiss an employee prior to them having a year's service they cannot bring a claim and it is therefore a 'safe dismissal'. Although (with certain exceptions) they cannot bring a claim for unfair dismissal, there is no minimum period of service required to bring a claim for discrimination;

Remember that an employee's minimum statutory notice period will be taken into account when looking at their period of continuous employment for unfair dismissal purposes. Therefore, if an employee has been continuously employed for 51 weeks and is subsequently dismissed without notice they will be taken as having one week's statutory minimum notice and will therefore have the requisite 52 weeks service. The exception to this is where an employee is summarily dismissed for gross misconduct.

This note does not constitute legal advice and is intended as general guidance only. If you would like further information or would like to arrange a meeting please

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