

## **CLIENT GUIDE 2 : DISMISSING AN EMPLOYEE**

A quick guide to the main points to consider when dismissing employees including practical steps to help employers avoid unfair dismissal claims.

### **Why is it important to dismiss an employee correctly?**

#### **Unfair dismissal claims are expensive and time-consuming**

If you dismiss an employee for a reason other than one allowed by law or without the correct procedure being followed, a claim for unfair dismissal is likely to follow. The damages for a successful claim can be substantial. Even if a claim for unfair dismissal does not succeed, the costs of defending a claim, in particular in terms of management time, may be significant.

### **How can employees be dismissed lawfully?**

#### **There must be a fair reason for the dismissal and the employer must act reasonably and comply with statutory procedures**

#### **The dismissal will only be for a fair reason if:**

- It relates to the employee's conduct; or
- It relates to the employee's capability or qualifications for the job; or
- The employee's job is redundant; or
- The employee has reached the contractual retirement age or the default national retirement age of 65 (but note that an employer is obliged to consider an employee's request to work beyond retirement age); or
- Continuing to employ the employee would be illegal, for example as a result of their immigration status; or
- It is for some other substantial reason of a kind which justifies the dismissal.

### **Employer must act reasonably**

Even if there is a potentially fair reason for the dismissal, the employer must be able to show that it acted reasonably in dismissing the employee for that reason. Reasonableness is undefined. Among the commonest reasons for dismissal are misconduct, inability to do the job and redundancy. What is reasonable will depend to a great extent on all the circumstances surrounding the dismissal. An employer contemplating dismissal should ask whether:

- (1) there is sufficient reason for dismissal;
- (2) reasonable alternatives to dismissal were considered;
- (3) the dismissal is consistent with previous action by the employer and any disciplinary procedure;
- (4) the dismissal is fair taking all relevant factors known at the time into consideration and
- (5) it has, as a minimum, followed the statutory disciplinary and dismissal procedures.

The size and resources of the employer will be relevant when determining whether it acted reasonably.

### **Compliance with procedures**

It is still important to follow the appropriate procedure before dismissing an employee even if there is a potentially fair reason for the dismissal. Failure to do so could lead to a claim for unfair dismissal. The minimum steps that an employer should take before dismissing an employee (for a reason other than retirement) are set out in the Employment Act 2002 (Dispute Resolution) Regulations 2004. The process requires:

- (1) the employer to set out the problem in writing to the employee giving full details;
- (2) both parties meeting to discuss the problem and
- (3) an appeal to be arranged if requested.

For dismissals on the grounds of retirement, employers are required to implement a statutory retirement procedure as the employee approaches retirement age.

As a general rule, employees must have been employed for one year before they can bring a claim for unfair dismissal. Certain dismissals are, however, deemed automatically unfair and employees are protected against being dismissed on those grounds as soon as they start work. These include reasons connected to pregnancy, parental leave, requests for flexible working and whistleblowing.

### **Some don'ts**

Do not take any action that could breach an employee's contract because the employer could lose the benefit of any contractual rights such as post-employment restrictions preventing the employee working for a competitor. It may result in the employee having a claim for breach of contract, for example if the employer failed to give the contractual notice period or to pay a contractual bonus.

Do not claim that a dismissal is for any reason other than the real one. For example avoid using redundancy as the reason for dismissing an employee for poor performance. This will not reflect well on the employer in any subsequent tribunal hearing.

Do not sideline, bully or shun an employee to get him to leave. This could lead to a claim for constructive dismissal.

Do not assume that someone can be dismissed simply because his fixed term contract has come to an end. This could lead to a claim for unfair dismissal. You must still follow the standard statutory dismissal procedure.

### **Practical steps to take to reduce risk**

In order to help avoid potential claims relating to a dismissal, make sure to follow good management practice:

- Deal with any issues with employees as soon as they arise.
- Problems can often best be resolved in an informal meeting with the employee but it is important to make it clear that a formal process will be used if necessary.
- Conduct regular appraisals with employees. This is not only to give them an accurate assessment of their work but also to allow them to raise any concerns.
- Use probationary periods effectively. Quickly identify performance problems so action can be taken. If you decide to dismiss, you should do so within the first year of employment.
- Always keep records of any performance related correspondence (formal or informal) with employees to include records of all conversations.
- Use caution when corresponding with employees. Aggressive e-mails should be avoided.
- Take extra care where stress could be a factor in an employee's poor performance.
- Always fully investigate the circumstances where there are any claims made by or against an employee.
- Be aware that if an employee has raised a grievance in the past, there may be a risk of a victimisation claim. To avoid this, always act in a fair and consistent manner.
- It is sometimes simplest to reach a financial agreement with an employee to leave. If such an agreement can be reached, the employer should usually ask the

# **JUDITH M LONG**

*solicitors*

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employee to sign a compromise agreement in order to protect it against future claims but must ensure that the employee has had independent legal advice on the agreement.

- When giving oral or written employee references, always ensure that they are accurate.

## **Current developments**

When the Employment Bill comes into force (forecast for April 2009), it will repeal the statutory dispute resolution procedures. Employers will then be advised to follow less stringent guidance published by Acas.

***You are advised to take legal advice before dismissing any employee***

If you require more information, please contact **Judith Long**.

## **JUDITH M LONG**

*solicitors*

76 Empire Square East

Long Lane

London

SE1 4NB

Tel: 020 7403 3337

Fax: 020 7407 1982

E-mail: [judithmlong@msn.com](mailto:judithmlong@msn.com)

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