GUIDE TO DISMISSING EMPLOYEES WITH LESS THAN 2 YEARS SERVICE

General Information

Usually, employees who have been employed less than 2 years (1 year in Northern Ireland) do not have the right to claim unfair dismissal. However, this does not mean there are no employment law issues to consider when dismissing someone who is a short-serving employee.

Below are some of the things you need to consider before making the decision to dismiss someone who does not have the general right to claim unfair dismissal

Probationary periods

Just because an employee is in a probationary period does not give you the right to terminate their employment without any chance of legal recourse. However, since the vast majority of probationary periods are of less than 12 months in duration (three or six months being the 'norm'), it is unlikely that the employee will have a claim for unfair dismissal when dismissed during or at the end of the probationary period, unless one of the 'automatically unfair' reasons as set out below applies. That said, the employee may well have a number of other possible claims. These are discussed in further detail below.

Automatically unfair reasons for dismissal

A dismissal will be automatically deemed unfair (regardless of length of service) if the reason or principal reason for dismissal is/was:

- a union-related reason, for example because the employee was, or proposed to become, a member of an independent trade union or because the employee refused to become or to remain a member of an independent trade union or where the employee was dismissed for having taken, or having proposed to take, part in the activities of an independent trade union, either outside working hours or within working hours if permitted by the employer.
- for participating in official industrial action in certain circumstances.
- as a result of pressure from a trade union, by way of the threat of industrial action.
- for a reason related to the employer contravening the rules prohibiting the compilation, use, sale or supply of blacklists of trade union members or activists.
- the assertion of a statutory right, for example, the employee asserted their right to receive a written statement of particulars of employment or not to have unlawful deductions made from their wages.

- a pregnancy or maternity-related reason.
- a health and safety-related reason, for example, where the employee carried out health and safety activities on behalf of their employer, or where they brought to the attention of their employer a concern over a risk to health and safety, or where they proposed to leave, or left, the workplace and refused to return while danger persisted, in the event that they reasonably believed their well-being was in serious and imminent danger and this could not reasonably be averted, or where, in these circumstances, they took appropriate steps to protect themselves or others from danger.
- for a reason connected with the assertion of rights relating to the National Minimum Wage legislation.
- for a reason connected with the assertion of rights, or the refusal to forgo a right, under the Working Time Regulations 1998, for example, the right to paid annual leave or the right to refuse to work on average more than 48 hours per week.
- a reason connected with the performance by an employee who is a pension scheme trustee of his functions as such a trustee.
- a reason connected with the performance by an employee representative, or a candidate in an election for representatives, or of his function as such an employee representative or candidate, on a transfer of an undertaking (TUPE) or where the employer proposed to make collective redundancies.
- a reason connected with the refusal of Sunday work by a shop worker or betting worker.
- a reason connected with the making of a whistleblowing protected disclosure under the Public Interest Disclosure Act 1998.
- a reason connected with trade union recognition or bargaining arrangements.
- that the employee exercised, or sought to exercise, the statutory right to be accompanied to a disciplinary or grievance hearing or to another meeting where the statutory right to be accompanied applies or that the employee accompanied, or sought to accompany, another worker to such a hearing or meeting.
- that the employee took, or sought to take, parental leave, paternity leave, adoption leave, time off to deal with family emergencies involving a dependant or shared parental leave (shared parental leave is added from 1 December 2014).
- that the employee made, or proposed to make, an application to work flexibly under the statutory right to request flexible working arrangements.
- that the employee took, or proposed to take, action with a view to enforcing or securing the benefit of working tax credit.
- that the employee exercised, or sought to exercise, their rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- that the employee exercised, or sought to exercise, their rights under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
- that the employee had been summoned or was absent from work to attend jury service, in certain circumstances.
- that the employee exercised, or sought to exercise, their statutory right to paid time off for study or training, where it applies.

- that the employee made, or proposed to make, an application for time off work for the purposes of study or training under the statutory right to request time to train, or they exercised a right under the time to train procedure, where it applies.
- that the employee took action to enforce the requirements imposed on employers under the Pensions Acts 2008 and 2011 relating to the automatic enrolment of eligible workers into a qualifying workplace pension scheme.
- because the employee refused to accept an offer by their employer for them to become an employee shareholder.
- that the employee exercised, or sought to exercise, their statutory right to time off to accompany a pregnant woman to an ante-natal appointment (from 1 October 2014).
- that the employee exercised, or sought to exercise, their statutory right to time off to attend an adoption appointment (from 5 April 2015).
- because the employee breached an unenforceable exclusivity clause in their zero hours contract (from 11 January 2016).
- a selection for redundancy for a reason which would have been automatically unfair if it had been the reason for dismissal.

In addition, where the reason or the principal reason for the employee's dismissal is, or relates to, their political opinions or affiliation, or is connected with the employee's membership of the reserve forces, the employee does not need to have a qualifying period of employment in order to bring a claim for unfair dismissal. Note, however, that, unlike the automatically unfair reasons for dismissal listed above, a dismissal on the basis of political opinions or affiliation, or membership of the reserve forces, is not automatically unfair – rather, it simply permits such an unfair dismissal claim to be heard on normal principles without the need for a qualifying period of employment.

Before dismissing a short-serving employee, you need to check that one of the above reasons is not the reason, or principal reason, for their proposed dismissal. Even where it is not but there is a possibility that an employee could argue that it was, you will need evidence to demonstrate to an Employment Tribunal that the reason for dismissal was something else, such as the employee's conduct, capability or redundancy. This will necessarily involve building up a 'paper trail' of supporting documentation, including minutes of meetings with the employee, and may mean that the dismissal has to be delayed for a short period of time whilst you gather your documentary evidence together to support the genuine reason for dismissal.

Unlawful discrimination

Employees do not need to have a qualifying period of service in order to bring a claim of unlawful discrimination. Indeed, they do not need to be, or have been, employees at all because job applicants may also bring discrimination claims. UK employment law recognises nine types of unlawful discrimination: discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including colour, nationality and ethnic or national origins), religion or belief, sex or sexual orientation.

As a general rule, the Equality Act 2010 recognises four types of discrimination:

1. Direct discrimination.
2. Indirect discrimination.
3. Victimisation.
4. Harassment.

There are two additional ways in which you might unlawfully discriminate against a disabled employee:

1. Discrimination arising from a disability – by treating the employee unfavourably because of something arising in consequence of their disability and the treatment is not a proportionate means of meeting a legitimate aim.

2. By failing to comply with the duty to make reasonable adjustments. This comprises three requirements. Firstly, where a provision, criterion or practice (PCP) puts a disabled employee at a substantial disadvantage in comparison with non-disabled persons, you must take such steps as it is reasonable to have to take to avoid the disadvantage. Secondly, where a physical feature of your business premises puts a disabled employee at a substantial disadvantage in comparison with non-disabled persons, you must take such steps as it is reasonable to have to take to avoid the disadvantage. Finally, where a disabled employee would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with non-disabled persons, you must take such steps as it is reasonable to have to take to provide the auxiliary aid.

So before dismissing a short-serving employee, you need to check that there is no discrimination angle to the decision. Even if there is no discriminatory reason for the dismissal decision, but there is a possibility that an employee could argue that the dismissal was discriminatory, you will need evidence to demonstrate to a tribunal that the decision to dismiss was not based on unlawful discrimination, or was not an act of victimisation as a result of the employee having made allegations of unlawful discrimination or harassment or as a result of the employee having brought Employment Tribunal proceedings of this nature.

The statutory dismissal and disciplinary procedure

The statutory dismissal and disciplinary procedure (DDP) was abolished on 6 April 2009 so no longer needs to be followed in relation to dismissing short-serving employees. However, it still remains in force in Northern Ireland.

Contractual claims

Disciplinary and dismissal procedures

Where it is a term of the contract of employment that the employer must follow a disciplinary or other procedure prior to dismissal of an employee, in such cases if the employee can show that the conduct of the procedure would take time and therefore extend the period of employment, they may be able to claim as damages lost wages for the time which the disciplinary or other procedure would have taken. The limit of compensation is normally the time which it would have taken to pursue the procedure and, in most cases, the compensation awarded has tended to be a sum of three to four weeks' pay.

Thus, if you dismiss a short-serving employee for conduct reasons without following a contractually binding disciplinary procedure, you are at risk of a breach of contract claim for failing to follow your own procedure.

Notice pay

Other than for offences of gross misconduct, an employee is always entitled to receive a notice period on being dismissed, whether that dismissal is on grounds of capability, long-term incapacity, conduct, redundancy or for any other reason. Employees are entitled to a notice period regardless of their age.

The employee's written statement of particulars of employment must provide details of notice required by either party to terminate the contract. However, the notice period must never be less than the statutory minimum notice requirements. Where an employee has between one month's and two years' continuous service, the statutory minimum notice period is one week.

Where the employee has less than one month's service, you must give them a reasonable period of notice. This may be less than one week, but it does not necessarily mean no notice at all.

However, both parties to the contract of employment may agree to a different period of notice than the statutory amount, provided always that the agreed notice is not less than that amount. Therefore, on dismissing a short-serving employee, you are required to give the employee the agreed notice under the contract or the statutory minimum period of notice, whichever is the greater. It follows that any dismissal which fails to comply with either the contractual or statutory notice is a breach of contract and a wrongful dismissal.

Where a contract of employment contains no provision for notice, a tribunal is entitled to impose what it determines is a reasonable period of notice. This may not be the statutory period of notice. Factors taken into account in determining reasonable notice include the seniority and remuneration of the employee, their length of service and what is usual in the particular trade or profession.

Holiday pay

On being dismissed (even in cases of gross misconduct), the employee must be apportioned annual leave days on a pro rata basis and must be paid in lieu of any annual leave days which have accrued, but which have not been taken as at the date of termination of employment.

You can include a written claw-back clause in the employee's contract of employment for holiday taken before it has been earned. Such a clause would enable you to deduct the amount equal to excess holiday taken from any final salary payment on termination of the employee's employment. Without such a clause, an amount equal to excess holiday taken cannot be deducted from the employee's final salary.

Outstanding wages

It goes without saying that, on dismissing a short-serving employee, you must pay them their accrued and outstanding wages or salary. Failure to do so is likely to result in a claim for unpaid wages.

Dismissals close to the two year point

An employee can generally make a claim for unfair dismissal if they have been employed for two years or more (the qualifying period of employment is one year in Northern Ireland).

Sometimes, employers dismiss employees without notice (or with pay in lieu of notice) or without following a contractually binding disciplinary procedure in order to prevent the employee from accruing the two-year period of employment usually required to bring an unfair dismissal claim. Where the dismissal is in breach of the contractual right to a notice period and there is no pay in lieu of notice clause in the contract, or it is in breach of a contractual disciplinary procedure, the law used to state that the employee was entitled to claim, as part of their wrongful dismissal damages, compensation to reflect the loss of the chance to claim unfair dismissal i.e. on the basis that had due notice been given or had the contractual disciplinary procedure been followed, the employee would have been entitled to claim unfair dismissal. However, as the law currently stands, this is no longer the case and an employee cannot claim 'loss of chance' contractual damages in circumstances where dismissal was without notice or with pay in lieu of notice or in breach of a contractual disciplinary procedure.

However, where an employee is dismissed without receiving due notice, the legislation operates to treat the employee's employment as continuing until the expiry of the statutory minimum period of notice. In the case of an employee who has been employed for less than two years, as stated above, the statutory minimum notice period is one week. What this means in practice is that if an employee is dismissed at the one year and 51-week point without notice, the effective date of termination of employment will be taken to be one week later and the employee will then be entitled to claim compensation for unfair dismissal.

However, the extra week will not be added in cases of summary dismissal in circumstances where the employee had committed an act of gross misconduct. The tribunal will first investigate whether it was a genuine case of gross misconduct.