Advanced People Management

Dismissal From Work : An Explanation

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'Just being honest that's all'

Dismissal: An Explanation

A dismissal occurs when the Contract of Employment comes to an end. A dismissal can be instigated by either the employer or the employee. When the employee brings the contract to an end this is generally known as a 'resignation' and if the employer brings the contract to an end it is generally known as 'involuntary termination'.

When dismissing an employee the employer has to show that the dismissal was for a fair reason (see below) and that they acted fairly and reasonably in the dismissal (followed a procedure).

Fair reasons for a dismissal

The Employment Rights Act 1996 section 98(1)(2) Sets out five potentially fair reasons for a dismissal:

Section 98(1)

***in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*:**

(a) The reason (or, if more than one, the principal reason) for the dismissal, and

(b) That it is either a reason falling within subsection (2) or 'some other substantial reason' of a kind such as to justify the dismissal of an employee holding the position which the employee held

Section 98(2)

***a reason falls within this subsection if it*:**

(a) Relates to the 'capability or qualifications' of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the 'conduct' of the employee

(c) Is that the employee was 'redundant', or

(d) Is that the employee could not continue to work in the position which he held without 'contravention' (either on his part or on that of his employer) of a 'duty or restriction imposed by or under an enactment'

Each of these provisions will be expanded upon below starting with section 98 (1)(b)

Some Other Substantial Reason (SOSR)

While subsections of the ERA 1996 98(2)(a)(b)(c)(d) all give specific reasons for a dismissal, SOSR can be a dismissal for any number of other reasons. For example and generally speaking, under SOSR an employer could dismiss an employee if all of a sudden the employer experiences a downturn in business and is subject to financial difficulties as a result of the downturn. Rather than make people redundant the employer could consult their employees seeking agreement around wage decreases. If most of the employees accept the change and, for example, two do not, then the employer could possibly dismiss the two and cite SOSR as the reason for the dismissal (as always care should be taken and legal advice sought before adopting this route).

In other words if an employer has a really good business reason to vary the Contract of Employment, has sought consultation with their employees, and there is an unreasonable refusal on the part of any employee to accept the changes, while the majority accept, then potentially, depending on other factors, the employer could dismiss under SOSR. However, if an employee has a very valid reason to not accept any proposed changes, then the employer would have to adopt an alternative stance and not dismiss the employee(s).

SOSR could also be used as a reason to dismiss where it is recognised that there has been a 'serious breakdown' in the employment relationship which has resulted in major disruption to the business. The employer would be expected to have followed a fair procedure and have given the employee ample warning and the opportunity to change their behaviour. If at the end the employee does not change then the employer could dismiss and cite SOSR as the reason for the dismissal, but again always seek legal advice before taking this course of action.

Other reasons that fall within the remit of SOSR could be:

- Restructure or reorganisation of the business because of business survival
- Excess costs associated with employment that the employer cannot reasonably afford
- An employee unreasonably refusing to sign a 'Restricted Covenant' which was very important for the employer, where the majority of other employees had signed it
- Generally, if all other employees have agreed to changes in Terms and Conditions and one or two do not, then they could be dismissed for SOSR

As in all dismissals, an employer will have to have followed a recognisable and transparent procedure and acted fairly by, for example, giving the employee(s) the opportunity to accept any proposed changes or changing their behaviour before dismissing for SOSR.

Capability and Qualification

Capability means *capability assessed by skill, aptitude, health or any other physical or mental quality*. Qualification means any *degree, diploma or any other technical or professional qualification relevant to the position which the employee held* (ERA 1996, s 98(3))

Capability

This applies where the employee is not capable of performing the job that they are required to do either through lack of skill, general incompetence, laziness or due to ill-health. The two main categories that this applies to, however, are poor performance and ill-health. For both of these, it is very important that the employer follows a specific procedure which involves a series of meetings. For poor performance, the ACAS Code of Practice for Disciplinary and Grievance Procedures outlines the procedure to be followed. For Ill-health dismissals, a very detailed procedure that places a huge amount of emphasis on medical advice and recommendation, as well as employee feedback will need to be followed and documented.

For capability dismissals, the employer does not have to prove that the employee is not capable of performing the job, the employer will only need to establish an honest belief on reasonable grounds that the employee is incapable.

For performance dismissals, the employer has to inform the employee of what is required, inform the employee of the areas in which the employee is failing to perform their job, warn the employee of the possibility of warnings or dismissal if there is no improvement and provide the employee with the opportunity to improve. The latter is best achieved by providing additional training and by setting date deadlines within which improvements have to be made.

For ill-health dismissals, a very detailed assessment will be required and for the dismissal to be deemed as fair detailed medical evidence will need to be sought, from the employee's doctor and consultant. In some cases, this will need to be backed up by an independent occupational health report. A series of meetings will need to be held after each stage of the procedure to discuss, with the employee, their diagnosis and prognosis. Job role changes and reasonable adjustments have to be considered and all of the procedure has to be transparent and documented.

Qualification

Qualification dismissals are very rare because it is usually established before any job offer is made that the potential employee does hold the relevant Degree, Diploma or Professional Accreditation relevant for the job. That said if it is found after employment that the

employee was not honest then a dismissal on the grounds of qualification will probably be appropriate. Another good example of a qualification dismissal that is often cited is where an employee is employed as a driver and then they lose their Driving Licence, in that situation any dismissal would fall within the remit of a qualification dismissal. With all qualification dismissals, alternative job roles should always be considered and an appropriately transparent and documented procedure should be followed.

Conduct

Misconduct is usually the correct terminology within the employment context for this type of dismissal. As with performance and ill-health dismissals, the employer does not have to prove the misconduct, the employer has to establish a reasonable belief that the misconduct took place and that belief has to be established after a reasonable investigation has taken place.

The ACAS Code of Practice on Disciplinary and Grievance Procedures has to be followed for all misconduct dismissals alongside the company's own contractual disciplinary policies and procedures. Usually, the employer's Contract of Employment and or Company/Employee Handbook will set out acts that are considered to represent misconduct and acts that are considered gross misconduct by the employer.

The basic procedure that an employer is expected to follow by law is:

(1) An investigation, and if required
(2) A disciplinary hearing
(3) If the allegation is proven, the sanction; this could be an oral warning (misconduct), written warning (serious misconduct) or a dismissal (gross misconduct)
(4) The employee should be allowed to appeal the decision

The procedure has to be transparent and documented: The employee should be given prior warning, by letter, of an investigation and be invited to an investigation meeting. If after the investigation meeting the employer feels that disciplinary proceedings are appropriate, the employee should be sent a letter inviting them to the disciplinary hearing, be given details of the allegations, details of the evidence that will be used during the hearing so that the employee has plenty of time to prepare their defence and be given details of the potential sanction that may be applied if the allegation(s) is upheld.

It is always good practice to allow the employee to be accompanied to all meetings and hearings by either a trade union official or a work colleague.

Finally, the employee should always be given the right to appeal

Redundancy

Section 139 of the Employment Rights Act 1996 sets out 3 circumstances which cover a redundancy situation:

> (1) For the purposes of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to
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> (a) the fact that his employer has ceased or intends to cease
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> (i) to carry on the business for the purposes of which the employee was employed by him, or
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> (ii) to carry on that business in the place where the employee was so employed, or
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> (b) the fact that the requirements of that business
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

In brief what this translates into is that a redundancy situation arises when either the employer ceases business completely, the employer ceases business at a particular place or there is less work available.

All employers have to follow a Redundancy Procedure and if the company intends to make more than 20 employees redundant then additional consultation will have to take place. For small businesses that are making less than 20 people redundant the following basic principles have to be applied:

- employers should give as much warning as possible of impending redundancies which will give unions, or employee representatives and employees an opportunity to consider possible alternatives to redundancy
- the employer should consult the appropriate union or employee representatives as to the best means by which the redundancies can be achieved fairly and with as little hardship to the employees as possible
- the employer will try to agree on the criteria for selecting employees
- whether or not the criteria are agreed on the employer will try to establish objective rather than subjective criteria
- the employer must ensure that the selection is made fairly in accordance with these criteria

- the employer will consider whether the employee could be offered alternative employment.

As with the other types of dismissals the procedure has to be fair, transparent and documented, and all of the people affected by the redundancy should be given the right to appeal the dismissal.

Enactment

This type of dismissal is very rare indeed. This dismissal occurs where the law (an Enactment) does not allow you to employee someone anymore. A really good example would be the employee who was employed as a driver but has now lost their licence to drive. The law states that anyone who drives has to have a Driving Licence and so now as an employer you have no choice but to dismiss this person.

As with all dismissals always consider alternative jobs and always follow an appropriate procedure.