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Unfair Dismissal: An Explanation

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'Just being honest that's all'

Unfair Dismissal: An Explanation

For any dismissal to be deemed fair the employer has to have a good reason for the dismissal, follow a fair disciplinary procedure, ensure that they comply with the provisions set out in the Contract of Employment, ensure that they give the employee the contractual Notice Pay and that they do not discriminate against the employee.

Fair and Unfair Reasons for a Dismissal

The Employment Rights Act 1996 sets out five potentially fair reasons for a dismissal:

- Conduct: The dismissal is related to the employee's behaviour
- Capability or qualifications: where the dismissal is related to either the employee's performance or the employee does not hold the relevant qualifications to do the job
- Redundancy: the employers business is not performing well particularly in the area that the employee(s) works in and so a dismissal could result
- Illegality: the law does not allow the employer to continue with the employment of an employee
- Some other substantial reason (SOSR): Any other really good reason that is causing major disruption for the employer

For an employee to bring a claim of unfair dismissal against their employer the law currently states that the employee requires two years of continuous service with that employer. If an employee does not have two years' service then the Employment Tribunal Service does not have the legal jurisdiction to hear the case.

However, the two years continuous service provisions are only relevant if the dismissal is connected to any of the five potentially fair reasons for dismissal outlined above. An employee does not require two years of continuous service if they bring a claim of unfair dismissal under a reason that is deemed to be an automatic unfair reason for dismissal.

The legislation, such as, The Employment Rights Act 1996, The Working Time Regulations 1998, The National Minimum Wage Act 1998 and loads of other Acts and Regulations have various sections scattered around each of them that state that if an employee is dismissed, including selected for redundancy, for asserting a statutory right under the legislation then that dismissal will be deemed as automatically unfair enabling the employee to bring a claim of unfair dismissal even if they have less than 2 years of service.

For example, if an employee makes a complaint to the employer about their rest breaks and the employer goes on to dismiss the employee because of that complaint then that will be

deemed an automatic unfair dismissal. There are loads of examples of what the law defines as automatic unfair dismissals below are some of the more common ones:

- Relating to health and safety (Health and Safety at Work Act 1974)
- Asserting a statutory right generally (Employment Rights Act 1996)
- Asserting a right under the Working Time Regulations
- Making a protected disclosure (Employment Rights Act 1996)
- Acting as an employee representative (The Information and Consultation of Employees Regulations 2004)
- Asserting a right under the National Minimum Wage Act
- Dismissal because of a political opinion (The Employment Rights Act 1996 and The Equality Act 2010)
- Relating to pregnancy, maternity or paternity leave (The Employment Rights Act 1996 and a few other Acts/Regulations)
- Discrimination under one of the protected characteristics (The Equality Act 2010)

As mentioned the above list is just a few of the more commonly cited reasons for an automatic unfair dismissal, automatic unfair reasons are extensive and beyond the scope of this brief paper but they include such things as union membership, family related dismissals, pension scheme representatives, Fixed-Term Employees, Agency Workers and on and on it goes, too many to cover in this small information booklet.

The point is that if an employee at work raises concerns or complains about something linked to the law, employment rights, or individual difference, then do not dismiss that person soon after the concern or complaint was made; unless of course the dismissal is genuinely not linked to the concern or complaint.

One other point about unfair dismissal needs to be mentioned that is very important; some employers faced with a difficult situation with someone at work give the person an option: *'either you resign or you will be dismissed'*. If you give this ultimatum to someone and then they go on to start an unfair dismissal claim against you, the courts will more than likely deem your ultimatum approach as an unfair dismissal even if the person had given you their resignation. Why is that you are asking? It is to do with the concept of power relations at work! The law recognises that employers have more power than employees and so the law protects employees from abuses of power. That type of ultimatum is seen as an employer abusing their power; it's as simple as that.

Dismissal Procedure

We have so far established that for a dismissal to be viewed as fair, the dismissal has to be for one of the potentially fair reasons: conduct, capability which includes ill-health, redundancy, enactment and SOSR. For all of these types of dismissal, a particular dismissal

procedure has to be followed by the employer. We can group the procedure according to the type of dismissal, for example, for a redundancy dismissal a redundancy dismissal procedure will need to be followed, for an ill-health dismissal, under capability, a long-term absence management dismissal procedure will need to be followed by the employer. For all of the different fair reasons for a dismissal, a distinct dismissal procedure has to be followed.

A further complication arises which sometimes leads to a degree of confusion. Dismissal procedures for misconduct, SOSR and enactment are usually under the company's disciplinary procedure, whilst dismissal procedures for poor performance, long-term absence management and redundancy follow their own procedures which do not form part of the company's disciplinary procedure, confused… you will be!

For simplicity lets just group them like this:

• Misconduct, SOSR and enactment: follow the company's disciplinary procedure
• Ill-health absence: follow the company's long-term absence management procedure
• Poor performance: follow the company's performance management procedure
• Redundancy: follow the redundancy procedure

<u>Misconduct, SOSR and Enactment disciplinary procedure</u>

Although a disciplinary procedure is usually invoked after an event, for example, **misconduct**; after the employee steals something from the workplace, or **SOSR**; an employee swears and shouts at the boss at work regularly or **enactment**; the employee has lost their Driving Licence. The disciplinary procedure should always be viewed as a process rather than an event.

The process

(1) The investigation
(2) The disciplinary hearing
(3) If the allegation is substantiated then the appropriate penalty, for gross misconduct this is usually dismissal
(4) Always allow an appeal, and during all the meetings and hearings allow the employee to be accompanied

Misconduct and sometimes SOSR dismissals are further complicated in law by something known as the 'Burchell Test'.

In a case; ***British Home Stores v Burchill (1976)*** the court laid down some rules that all employers have to obey when faced with employee misconduct at work and a potential dismissal. The Burchill test is a three-tier test:

(1) The employer believed that the employee was guilty of the misconduct alleged
(2) The employer had reasonable grounds on which to sustain that belief, and
(3) The employer carried out as much investigation into the matter as was reasonable in all the circumstances. The dismissal then has to fall into the *'Band of Reasonable Responses'*; which is, would another reasonable employer dismiss in similar circumstances?

<u>Ill-health</u>

Your Contract of Employment and Company/Employee Handbook should contain the procedure that you will use in the event that an employee is off work due to long-term sickness.

The basic process to be used for ill-health is:

(1) Seek the employees view on the situation
(2) Seek medical evidence (you have to get written consent off the employee for this)
(3) Hold a series of meetings with the employee to discuss the condition and the return to work. Ask how you could help the employee back to work via reasonable adjustments
(4) Make an informed decision about the employees future with you. Take into account the medical evidence and the employees opinion
(5) Make sure you do not discriminate against the employee
(6) Always allow the employee to appeal any decisions that you make and always allow the employee to be accompanied during any meetings

<u>Poor Performance</u>

This is always going to be a very tricky subject and you have to handle this in a particular way. No one likes being told that they are rubbish at their job and that is what makes this subject complicated and very personal for employees.

The starting point is the job description, make sure your employees are only being asked to perform the job they were hired to do. Make sure you have trained them well to perform their tasks. Always have an appraisal system in place and monitor their performance regularly. With these basic safeguards in place if you still have performance issues with someone then the basic process for poor performance is:

(1) Investigate the issues
(2) Invite the employee to a formal meeting to discuss the issues
(3) Give the employee a timeline in which to improve
(4) Invite them in again after the time has been reached and discuss
(5) If required give them additional training and support and set a new timeline for improvement
(6) Hold another meeting
(7) Finally, make your decision based on the evidence
(8) Always allow the employee to appeal and always allow them to be accompanied to all formal meetings and hearings

Redundancy

Redundancy is another very unpleasant aspect of employee relations both for the employee and the person chairing the meetings. Redundancies are legally complicated and emotionally draining for all involved and it is always best to get a legal professional to help you with this. The basic redundancy process is:

(1) Redundancy notification to the employee
(2) Selection-pooling
(3) Selection process
(4) The first set of meetings
(5) The second set of meetings
(6) The final set of meetings
(7) Always allow people to appeal any decisions and always allow them to be accompanied to all meetings

If you end up in an Employment Tribunal and the employee is alleging unfair dismissal it is the employer's responsibility to show that the reason for the dismissal or the principal reason for the dismissal was for one of the potentially fair reasons set out above. Once this has been established the tribunal will then investigate your reason for dismissal

The dismissal will be represented by the set of facts known to the employer at the time of the dismissal and these facts will represent the reason for the dismissal. Sometimes an employee will argue that the dismissal was not the reason the employer is arguing, instead, it was for another reason, for example, the employee asserted a statutory right. If this is the situation the tribunal will first investigate the employer's reason for the dismissal and then move on to investigate the employee's version.

The tribunal will then move on to do an assessment of the fairness of the decision to dismiss, taking into account the size of the employer and the resources available to them. It is important then that the employer follows the Acas Code on Disciplinary and Grievances

Procedures and take into account the employers own disciplinary procedure outlined in the employer's Contract of Employment or Company/Staff Handbook.

Some common procedural failings are:

- Failure to warn an employee when misconduct or poor performance issues first emerge
- To document previous issues of misconduct or poor performance
- Failure to give advance warning of an investigation meeting or disciplinary hearing
- Failure to properly inform the employee of the substance of the accusations against them before a disciplinary hearing
- Failure to give to the employee any evidence that will be used during the disciplinary hearing
- Failure to inform the employee that is the complaint is proven by the employer this may lead to the employee's dismissal
- Not allowing the employee to be accompanied
- Managers acting unreasonably and not allowing the employee or their representative to state their case/defence
- Managers acting on evidence that is problematic/unsafe
- The decision to dismiss being influenced by others (managers'directors) who have played no part in the process
- Appeals being chaired by those who had previously taken part in the process