

Whitepaper – Termination of the Contract of Employment

The contract of employment can be terminated in a variety of ways.

Fair Reason to Dismiss

To dismiss an employee an employer should be able to show that the dismissal is for one of the following reasons:

- An employee's conduct
- A reason related to an employee's capability or qualifications for the job
- Redundancy
- Because a statutory duty or restriction prohibited the employment being continued
- Some other substantial reason of a kind which justifies the dismissal. (SOSR)

Contractual Dismissal

If an employee is dismissed in accordance with the notice given in his or her contract of employment he or she has been contractually dismissed. Dismissing an employee contractually will not necessarily prevent a claim for unfair dismissal being made by the employee but will prevent any claim of wrongful dismissal being made. An example of a contractual dismissal is a dismissal following a build-up of disciplinary warnings.

Summary Dismissal

If an employee is dismissed without notice he or she is summarily dismissed. An employer is entitled to dismiss without notice if an employee is in serious breach of contract. This will usually mean that he or she has committed an act of gross misconduct.

A contract of employment or disciplinary procedure made under that contract may define an act of 'gross misconduct' for which an employee may expect to be dismissed without notice. The ACAS Code of Practice on Disciplinary and Grievance Procedures recommends that a disciplinary procedure should define which acts of misconduct will be classified as gross misconduct for these purposes.

Examples of serious breaches that have justified summary dismissal are:

- Refusal to obey a lawful order;
- Dishonesty;

- Prolonged unauthorised absence;
- Disclosing confidential information;
- Gross negligence; and
- Drunkenness at work.

If an employee has been summarily dismissed it will be possible for the employee to bring an action for wrongful and unfair dismissal.

Expiry of a Fixed-Term Contract

A contract that has been entered into by the parties for a fixed period will terminate automatically at the end of that term. At common law, expiry of a fixed-term contract does not constitute dismissal. However, the Employment Rights Act 1996 provides that expiry of a fixed-term contract will constitute a dismissal for the purposes of a claim for redundancy, or for unfair dismissal.

Frustration

A contract is "frustrated" on the happening of an event that makes performance of the contract impossible or significantly different from that which had been intended by the parties. Frustration most commonly occurs in situations where the employee is imprisoned. If a contract is frustrated there will generally be no dismissal and therefore no claim for unfair dismissal can be made. Such cases are rare and consideration should be given to the length of time the employee will not be capable of performing the contract.

Resignation

An employee may resign at any time by giving proper notice in terms of the contract of employment.

After a lawful resignation has been given it cannot be withdrawn unless done so with the employer's express permission or where the resignation came in the heat of the moment and was retracted quickly. There may be circumstances where an employer may not wish to allow a retraction, however they may be best placed to allow it to avoid a potential claim.

There can be difficulties in knowing whether the words or actions of the employee constitute a resignation. The normal approach of courts and tribunals will be to judge how a reasonable employer, in the particular circumstances, would interpret the actions or words of the employee.

An invitation by an employer to the employee to "resign or be dismissed", is likely to amount to a dismissal. However, this should be distinguished from advance warning that

a dismissal may occur at some time in the future. The dismissal will not take place until the future event has occurred e.g. if an employer tells its employees that their place of business will be closing in six months' time. Accordingly, if an employee resigns following advance notification of dismissal and claims that he or she has been dismissed and in turn claims a redundancy payment, his or her claim will be likely to fail. Advance notification is not enough to constitute a dismissal.

Constructive Dismissal/ Repudiation of Contract

An employee is dismissed by his or her employer if the employee terminates the contract in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct. Accordingly, if an employee resigns in response to a serious breach or repudiation of the contract by the employer, the employee may argue that he or she has been dismissed for the purposes of bringing a claim both for breach of contract and for unfair dismissal.

The following are examples of conduct by the employer that have been considered sufficiently serious to constitute a repudiation entitling the employee to resign and claim unfair dismissal and or/breach of contract:

- Failure to pay wages;
- Unilateral alteration of the employee's job content or status;
- Unilateral variation in contract terms;
- Harassment;
- Humiliating employees in front of others;
- Unwarranted demotion or disciplinary sanctions; and
- Falsely accusing an employee of misconduct/incapability.

To succeed in bringing a claim for constructive unfair dismissal arising out of a repudiatory breach by the employer, an employee must satisfy certain criteria.

As a general rule, an employee must have been employed for at least two years before they can claim unfair constructive dismissal and must show (a) that the employer has committed a fundamental breach of contract or shows an intention no longer to be bound by it; (b) that this was the reason he or she left; (c) that he or she did not act too hastily; and (d) that he or she did not delay too long.

An employee can also claim constructive dismissal in response to an action taken by the employer that is the "final straw" in a series of acts, even if the final act is not unreasonable when viewed in isolation.

Notice Periods

When a contract of employment is terminated by dismissal or resignation the employer or employee must usually serve notice on the other party.

Normally, the correct period of notice will be that stated in the contract of employment. If there is no written contract or the contract makes no mention of notice, there is an implied term that the contract may be terminated with reasonable notice.

Reasonable notice will vary according to the seniority of the individual employee and the nature of his or her employment. Senior managers or executive directors will normally be able to argue they are impliedly entitled to notice of anything between three and twelve months.

Any contractual notice provision, whether expressly stated in the contract of employment or implied as reasonable notice, cannot, however, be less than the statutory entitlement to minimum notice. By statute, an employee is entitled to a minimum of one week's notice once he or she has been employed for one month. Thereafter the entitlement is as follows:

- 1 month's service but less than 2 years' service – 1 week.
- 2 years' service or more – 1 week for each completed year of service to a maximum of 12 weeks after 12 years' service.

If the employee is serving notice on the employer, once he or she has been employed for one month, he or she must not give the employer less than one week's notice of termination.

Notice may be given orally or in writing but employers should ensure that notice is given in writing; this should avoid any disputes regarding whether notice has been given and if so on what date the notice has been given.

Pay in Lieu of Notice

An express term should be in the contract permitting payment in lieu of notice. Employers will often decide to pay in lieu of notice i.e. to dismiss an employee and pay him or her for the period of notice but require that the employee should cease work immediately and not work out the notice period.

Garden Leave

Garden leave is where an employee who has resigned or been dismissed is required to serve out their notice period at home, rather than reporting for work. There should be a specific clause in the employees contract to allow an employer to place the employee on garden leave. For the duration of the garden leave, the employee must remain available to work for the employer during normal working hours, they should not start alternative employment. They continue to receive their usual salary and benefits.

Date of Termination

The date of termination of the contract of employment is important in relation contractual and statutory purposes.

In relation to contractual rights, the date of termination is the date on which the contract comes to an end. If termination is with notice, the termination date falls on the expiry of the notice period. If no notice is served the termination date will be the date on which the employee ceases to work (in the case of resignation) or the date on which the employee is summarily dismissed (in the case of a summary dismissal).

The effective date of termination for the purposes of bringing a statutory unfair dismissal claim is more complicated. Usually the effective date of termination will be the date on which the employee ceases work. Where the contract is terminated without the employee working out his or her notice, the effective date of termination is the date on which the termination takes effect. If, therefore, an employer makes a payment of wages in lieu of notice, the effective date of termination is not postponed. However, if the employee is placed on garden leave, the effective date of termination will be the date on which the notice expires rather than the date on which the employee ceases working.

If an employer gives less than the statutory minimum notice required, the effective date of termination is treated as postponed for the purpose of deciding whether or not an employee has sufficient continuity of service to bring an unfair dismissal claim. The date is postponed to the date on which the statutory minimum period of notice would have expired.

The effective date of termination is not postponed where an employee is summarily dismissed in circumstances where the employer is entitled to dismiss that employee for gross misconduct.

Where an employee resigns and claims constructive dismissal the effective date of termination is postponed to the date when the employment would have ended if the employer had given the statutory minimum notice.

An appeal by an employee will not work to postpone the effective termination date unless there is a provision in the contract of employment that states otherwise.

This information is provided for general reference purposes only. If you have a specific enquiry relating to this topic please contact Wirehouse on:

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