

EMPLOYMENT

Law guide - Discipline and dismissal

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Discipline in the workplace

Overview

These sections will show you how to discipline your employees if their performance or conduct is not up to the expected standard.

Disciplinary procedure

Disciplinary situations include misconduct and/or poor performance.

Employers and employees should always seek to resolve disciplinary issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary issue. In some cases, an external mediator might be appropriate.

Many potential disciplinary issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally. In doing so, basic principles of fairness should be applied.

Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.

Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case, but whenever a disciplinary process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary meeting.
- Employers should allow an employee to appeal against any formal decision made.

For more information see the chapter on 'Disciplinary procedures' below.

Dismissal

One of the most important categories of employment related claims in the Republic of Ireland is for unfair dismissal and is governed by the Unfair Dismissals Acts 1977-2001. The Unfair Dismissals Acts cover people who have been employed for at least a year and have not reached the normal retirement age.

The law gives most employees the right not to be unfairly dismissed. You must be able to show, not only that you had substantial grounds to dismiss your employee, but also that you acted fairly in the way in which you handled the dismissal.

Unfair dismissal is covered in more detail in the chapter 'Dismissal'. Some of the issues covered include:

- dismissal procedures
- constructive dismissal
- fair dismissal
- can the employee bring a claim
- employees remedies for unfair dismissal
- termination of the employment contract

Employment claims

Compromise agreements

A compromise or settlement agreement is a legally binding contract entered into by an employer and employee who are in dispute over one or more issues arising out of their employment relationship. It is used to settle any disputes which would otherwise have to be settled by the employment tribunal.

A compromise agreement will follow the termination of the employee's employment and will usually provide the employee compensation. In return, the employee will agree not to pursue any legal claims that he or she may have against the employer that relate to their employment and its termination (as well as agreeing to any further conditions that the employer may impose). Consequently, if the employee has signed a legally binding compromise agreement, the employee may be prevented from pursuing proceedings before an employment tribunal.

Legal requirements

Before a compromise or settlement agreement can be legally binding, the following conditions must be met:

- a) The agreement must be in writing.
- b) The agreement must relate to a particular complaint or legal proceedings made, raised or instigated by the employee.
- c) The agreement must state that the statutory conditions regulating compromise agreements have been satisfied.
- d) The employee must have received legal advice from a 'relevant independent adviser' as to the terms and effect of the proposed agreement and, in particular, its effect on his or her ability to pursue a claim before an employment tribunal.
- e) The following can be classed as relevant independent advisers:
 - qualified lawyers (solicitors holding a practising certificate or barristers in practice or employed to give legal advice)
 - officers, officials, employees or members of an independent trade union, provided they have been certified in writing by the union as competent and authorised to give advice
 - employees or volunteer workers at advice centres giving free legal advice provided they have been certified in writing by the advice centre as competent and authorised to give advice
 - fellows of the Irish Institute of Legal Executives employed by a solicitors' practice

f) When the relevant independent adviser gives the legal advice, there must be an insurance contract in force, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in relation to the advice.

g) The agreement must identify the relevant independent adviser.

Essential elements

The contents of a compromise agreement will depend on the requirements of the employer and employee who are in dispute. A good compromise agreement will ensure that an employer's business interests are protected whilst also making sure that future claims are prohibited.

However, generally the following items should be considered when negotiating a compromise agreement:

a) settlement of all current and future legal claims, allegations and/or complaints against the employer by the employee and the provision of compensation for doing so

b) payment of any outstanding sums that are owed to the employee by the employer under the terms and conditions of his or her contract. Such sums may include salary, outstanding holiday pay and any bonus to which he or she may be entitled

c) provision for the payment of the employee's legal fees

d) provision for the employee's resignation (if applicable)

e) an assurance that a suitable reference will be provided by the employer in respect of the employee (including a template if one can be agreed)

f) provisions that ensure that the employee will not use or disclose any confidential information

Tax on settlements

An employer can make two different types of payment to an employee under a compromise agreement; the payment of earnings and a termination payment. Payment of earnings will be taxable in the usual way, but special considerations apply to termination payments.

For further information on the tax implications and exemptions that relate to compromise agreements, see: www.revenue.ie.

Disciplinary procedures

Introduction

Even in well-run businesses, it may sometimes be necessary to take disciplinary action against employees.

Therefore it is crucial that you have written dismissal/disciplinary rules and procedures. If problems do arise, you can deal with them using your procedures rather than let them fester into resignations and/or tribunal claims.

Your rules and procedures must:

- be set out in writing
- be fair and reasonable, which means that they should take into account the principles set out in the Code of Practice on Grievance and Disciplinary Procedures SI 146/2000

Failure to meet either of these requirements may result in extra compensation for the employee if they succeed in a tribunal claim.

Setting out disciplinary rules

Draw up rules to set the standards of conduct and performance required. Make sure your rules are fair, clearly written and reflect the needs of your business.

Rules can help:

- you act fairly and consistently
- your workforce to understand what you expect of them
- contain and resolve issues
- avoid potential employment tribunal complaints

A disciplinary procedure is the means by which rules are observed and standards are maintained. The procedure should be used primarily to help and encourage employees to improve rather than just as a way of imposing punishment. It provides a method of dealing with any apparent shortcomings in conduct or performance and can help an employee to become effective again. The procedure should be fair, effective and consistently applied.

The rules should not discriminate on the grounds of gender, marital/civil partnership status, family status, sexual orientation, religion or belief, age, disability, race or membership of the Traveller Community.

You cannot expect to list everything that might lead to disciplinary action, but you could cover:

- absence
- discrimination, bullying and harassment
- health and safety
- personal appearance
- prohibited activities
- smoking, alcohol and drugs
- work standards
- timekeeping
- use of company facilities and equipment

The rules should also set out behaviour which will be treated as gross misconduct - misconduct judged so serious that it is likely to lead to dismissal without notice. It is important to give examples of what will count as gross misconduct, such as:

- bullying
- drunkenness/drug abuse
- fighting at work
- fraud
- gross negligence/insubordination
- serious breaches of health and safety
- theft
- wilful damage to property

Make it clear in your disciplinary procedure that the list is not meant to be exhaustive. What counts as gross misconduct varies depending on the type of business and the role of the employee.

Informal and formal disciplinary action

Informal action

If an employee's performance or conduct does not meet your standards, you should try to help that employee to improve. Have an informal discussion with the employee as soon as problems arise, explain the problem and agree actions with them. This kind of informal chat is not part of any formal disciplinary procedure.

If the employee's poor conduct or performance persists, you may have to take formal disciplinary action.

Formal disciplinary action

When applying formal procedures, employers should always bear in mind principles of fairness. For example, employees should be informed of the allegations against them, together with the supporting evidence, in advance of any disciplinary meeting. Employees should be given the opportunity to challenge the allegations before decisions are reached and should be provided with a right to appeal.

Good disciplinary procedures should:

- be in writing
- be non-discriminatory
- provide for matters to be dealt with speedily
- allow for information to be kept confidential
- tell employees what disciplinary action might be taken
- say what levels of management have the authority to take the various forms of disciplinary action
- require employees to be informed of the complaints against them and supporting evidence, before a disciplinary meeting
- give employees a chance to have their say before management reaches a decision
- provide employees with the right to be accompanied
- provide that no employee is dismissed for a first breach of discipline, except in cases of gross misconduct
- require management to investigate fully before any disciplinary action is taken
- ensure that employees are given an explanation for any sanction and allow employees to appeal against a decision
- apply to all employees, irrespective of their length of service, status or say if there are different rules for different groups
- ensure that any investigatory period of suspension is with pay, and specify how pay is to be calculated during this period, If, exceptionally, suspension is to be without pay, this must be provided for in the contract of employment
- ensure that any suspension is brief, and is never used as a sanction against the employee prior to a disciplinary meeting and decision, Keep the employee informed of progress
- ensure that the employee will be heard in good faith and that there is no prejudgment of the issue
- ensure that where the facts are in dispute, no disciplinary penalty is imposed until the case has been carefully investigated, and there is a reasonably held belief that the employee committed the act in question

Criminal charges or convictions

An employee should not be dismissed or otherwise disciplined solely because he or she has been charged with or convicted of a criminal offence. The question to be asked in such cases is whether the employee's conduct or conviction merits action because of its employment implications.

Where it is thought the conduct warrants disciplinary action, the following guidance should be considered:

- The employer should investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure.
- Where the conduct requires prompt attention, the employer need not await the outcome of the prosecution before taking fair and reasonable action.
- Where the police are called in, they should not be asked to conduct any investigation on behalf of the employer, nor should they be present at any meeting or disciplinary meeting.

In some cases, the nature of the alleged offence may not justify disciplinary action – for example, off-duty conduct which has no bearing on employment – but the employee may not be available for work because he or she is in custody or on remand. In these cases, employers should decide whether, in the light of the needs of the organisation, the employee's job can be held open. Where a criminal conviction leads, for example, to the loss of a licence so that continued employment in a particular job would be illegal, employers should consider whether alternative work is appropriate and available.

Where an employee, charged with or convicted of a criminal offence, refuses or is unable to cooperate with the employer's disciplinary investigations and proceedings, this should not deter an employer from taking action. The employee should be advised in writing that, unless further information is provided, a disciplinary decision will be taken on the basis of the information available and could result in dismissal.

Where it is unlikely that an employee will return to employment, although there might be an argument that the employment contract comes to an end automatically, it is normally better for the employer to take disciplinary action.

An employee who has been charged with, or convicted of, a criminal offence may become unacceptable to colleagues, resulting in workforce pressure to dismiss and threats of industrial action. Employers should bear in mind that they may have to justify the reasonableness of any decision to dismiss and that an employment tribunal will ignore threats of, and actual industrial action when determining the fairness of a decision. They should consider all relevant factors, not just disruption to production, before reaching a reasonable decision.

Which procedures must I follow?

Employers and employees should always seek to resolve disciplinary issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary issue. In some cases, an external mediator might be appropriate.

Many potential disciplinary issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally. In doing so, basic principles of fairness should be applied.

Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.

Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case, but whenever a disciplinary process is being followed it is important to deal with issues fairly. The Labour Relations Commission established a code of practice for fair disciplinary and grievance procedure. It provides a very useful guide as to the best approach to take when dealing with disciplinary situations.

The following is a summary of what a good disciplinary and grievance procedure should be:

- It should be fair.
- It should be clear.
- The penalties that can be imposed should be made clear.
- There should be an internal appeals mechanism.

The penalties should include, in the first instance, an oral warning, then a written warning, then a final written warning, suspension without pay, transfer to another job or part of the company, demotion or dismissal.

Investigations

Establishing the facts

It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.

When investigating a disciplinary matter, take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter, and the more serious it is, then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

In some cases, the investigation will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

If there is an investigatory meeting:

- give the employee advance warning and time to prepare
- it should not by itself result in any disciplinary action
- it should be conducted by a management representative and should be confined to establishing the facts of the case. It is important that disciplinary action is not considered at an investigatory meeting. If it becomes apparent that formal disciplinary action may be needed then this should be dealt with at a formal meeting at which the employee will have the statutory right to be accompanied
- although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure

Suspension

In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

There may be instances where suspension with pay is necessary while investigations are carried out, for example, where relationships have broken down, in gross misconduct cases or where there are risks to an employee's or your business's property or responsibilities to other parties. Exceptionally, you may wish to consider suspension with pay where you have reasonable grounds for concern that evidence has been tampered with, destroyed or witnesses pressurised before the meeting.

Disciplinary meetings

Preparing for the meeting

You should:

- Ensure that all the relevant facts are available, such as disciplinary records and any other relevant documents (for instance, absence or sickness records) and, where appropriate, written statements from witnesses.
- Where possible, arrange for someone who is not involved in the case to take a note of the meeting and to act as a witness to what was said.
- Check if there are any special circumstances to be taken into account. For example, are there personal or other outside issues affecting performance or conduct?
- Be careful when dealing with evidence from a person who wishes to remain anonymous. Take written statements, seek corroborative evidence and check that the person's motives are genuine.
- Consider what explanations may be offered by the employee, and if possible, check them out beforehand.
- Allow the employee time to prepare his or her case. Copies of any relevant papers and witness statements should be made available to the employee in advance.
- If the employee concerned is a trade union representative discuss the case with a trade union full-time official after obtaining the employee's agreement. This is because the action may be seen as an attack on the union.
- Arrange a time for the meeting, which should be held as privately as possible, in a suitable room, and where there will be no interruptions. The employee may offer a reasonable alternative time within five days of the original date if their chosen companion cannot attend. You may also arrange another meeting if an employee fails to attend through circumstances outside their control, such as illness.
- Try and get a written statement from any witness from outside the organisation who is not prepared to or is unable to attend the meeting.
- Allow the employee to call witnesses or submit witness statements.
- Consider the provision of an interpreter or facilitator if there are understanding or language difficulties (perhaps a friend of the employee, or a co-employee). This person may need to attend in addition to the companion though ideally one person should carry out both roles.
- Make provision for any reasonable adjustments to accommodate the needs of a person with disabilities.
- Think about the structure of the meeting and make a list of points you will wish to cover.

What if an employee repeatedly fails to attend a meeting?

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed. Considerations may include:

- any rules your business has for dealing with failure to attend disciplinary meetings
- the seriousness of the disciplinary issue under consideration
- the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service
- medical opinion on whether the employee is fit to attend the meeting
- how similar cases in the past have been dealt with

Where an employee continues to be unavailable to attend a meeting, the employer may conclude that a decision will be made on the evidence available. The employee should be informed where this is to be the case.

How should the disciplinary meeting be conducted?

Remember that the point of the meeting is to establish the facts, not catch people out. The meetings may not proceed in neat, orderly stages but it is good practice to:

- introduce those present to the employee and explain why they are there
- introduce and explain the role of the accompanying person if present
- explain that the purpose of the meeting is to consider whether disciplinary action should be taken in accordance with your business's disciplinary procedure
- explain how the meeting will be conducted

Statement of the complaint

State precisely what the complaint is and outline the case briefly by going through the evidence that has been gathered. Ensure that the employee and his or her representative or accompanying person are allowed to see any statements made by witnesses and to question them.

Employee's reply

Give the employee the opportunity to state their case and answer any allegations that have been made. They should be able to ask questions, present evidence and call witnesses. The accompanying person may also ask questions and should be able to confer privately with the employee. Listen carefully and be prepared to wait in silence for an answer as this can be a constructive way of encouraging the employee to be more forthcoming.

Establish whether the employee is prepared to accept that they may have done something wrong or are not performing to the required standard. Then agree the steps which should be taken to remedy the situation.

If it is not practical for witnesses to attend, you should only consider proceeding if you are satisfied that the employee will not be disadvantaged by not being able to ask the witness questions at the meeting.

Alternatively, consider an adjournment to allow questions to be put to a witness who cannot attend in person but who has submitted a witness statement.

General questioning and discussion

You should:

- use this stage to establish all the facts
- ask the employee if they have any explanation for the alleged misconduct or unsatisfactory performance, or if there are any special circumstances to be taken into account
- if it becomes clear during this stage that the employee has provided an adequate explanation or there is no real evidence to support the allegation, bring the proceedings to a close
- keep the approach formal and polite and encourage the employee to speak freely with a view to establishing the facts. A properly conducted disciplinary meeting should be a two-way process. Use questions to clarify the issues and to check that what has been said is understood. Ask open-ended questions, for example, 'what happened then?' to get the broad picture. Ask precise, closed questions requiring a yes/no answer only when specific information is needed
- do not get involved in arguments and do not make personal or humiliating remarks
- avoid physical contact or gestures which could be misinterpreted or misconstrued as judgmental

If new facts emerge it may be necessary to adjourn the meeting to investigate them and reconvene the meeting when this has been done.

Summing up

Summarise the main points of the discussion after questioning is completed. This allows all parties to be reminded of the nature of the offence, the arguments and evidence put forward and to ensure nothing is missed. Ask the employee if they have anything further to say. This should help to demonstrate to the employee that they have been treated reasonably.

Adjournment before decision

Adjourn before a decision is taken about whether a disciplinary penalty is appropriate. This allows time for reflection and proper consideration. It also allows for any further checking of any matters raised, particularly if there is any dispute over facts.

Stopping or suspending the meeting

When an employee raises a grievance during the meeting, it may sometimes be appropriate to consider stopping the meeting and suspending the disciplinary procedure. For example when:

- the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have
- bias is alleged in the conduct of the disciplinary meeting
- management have been selective in the evidence they have supplied to the manager holding the meeting
- there is possible discrimination

It would not be appropriate to suspend the meeting where the employee makes an invalid point. For example, if they mistakenly claim that they have the right to be legally represented or that a collectively agreed and applicable procedure does not apply to them because they are not a union member.

It is possible that the disciplinary meeting may not proceed smoothly – people may be upset or angry. If the employee becomes upset or distressed allow time for them to regain composure before continuing. If the distress is too great to continue then adjourn and reconvene at a later date – however, the issues should not be avoided. Clearly during the meeting there may be some 'letting off steam', and this can be helpful in finding out what has actually happened. However, abusive language or conduct should not be tolerated.

Following a disciplinary meeting, you should inform the employee as soon as possible in writing of:

- what disciplinary penalty you plan to impose, if any
- the reasoning behind the decision
- what specific improvement is required - if any
- how long any warning is going to remain in force
- the likely consequences of any repetition of the misconduct or continuation of the poor performance

The right of appeal and how and within what period this should be exercised

Penalties

What should be considered before deciding any disciplinary penalty?

When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:

- whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct
- the penalty imposed in similar cases in the past
- whether standards of other employees are acceptable, and that this employee is not being unfairly singled out
- the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service
- any special circumstances which might make it appropriate to adjust the severity of the penalty
- whether the proposed penalty is reasonable in view of all the circumstances
- whether any training, additional support or adjustments to the work are necessary

It should be clear what the normal organisational practice is for dealing with the kind of misconduct or unsatisfactory performance under consideration. This does not mean that similar offences will always call for the same disciplinary action - each case must be looked at on its own merits and any relevant circumstances taken into account. Such relevant circumstances may include health or domestic problems, provocation, justifiable ignorance of the rule or standard involved or inconsistent treatment in the past.

Imposing the disciplinary penalty

First formal action – unsatisfactory performance

In cases of unsatisfactory performance an employee should be given an 'improvement note' setting out:

- the performance problem
- the improvement that is required
- the timescale for achieving this improvement
- a review date
- any support, including any training, that the employer will provide to assist the employee

The employee should be informed that the note represents the first stage of a formal procedure and is equivalent to a first written warning and that failure to improve could lead to a final written warning and, ultimately, dismissal. A copy of the note should be kept and

used as the basis for monitoring and reviewing performance over a specified period (e.g., six months).

If an employee's unsatisfactory performance – or its continuance – is sufficiently serious, for example, because it is having, or is likely to have, a serious harmful effect on the organisation, it may be justifiable to move directly to a final written warning.

First formal action – misconduct

In cases of misconduct, employees should be given a written warning setting out the nature of the misconduct and the change in behaviour required.

The warning should also inform the employee that a final written warning may be considered if there is further misconduct. A record of the warning should be kept, but it should be disregarded for disciplinary purposes after a specified period (e.g., six months).

Final written warning

If the employee has a current warning about conduct or performance then further misconduct or unsatisfactory performance (whichever is relevant) may warrant a final written warning. This may also be the case where 'first offence' misconduct is sufficiently serious, but would not justify dismissal. Such a warning should normally remain current for a specified period, for example, 12 months, and contain a statement that further misconduct or unsatisfactory performance may lead to dismissal.

Dismissal or other sanction

If the employee has received a final written warning, further misconduct or unsatisfactory performance may warrant dismissal.

Alternatively the employment contract may allow for a different disciplinary penalty instead. Such a penalty may include disciplinary transfer, disciplinary suspension without pay, demotion, loss of seniority or loss of increment. These sanctions may only be applied if allowed for in the employee's contract or with the employee's agreement.

Any penalty should be confirmed in writing, and the procedure and time limits for appeal set out clearly.

Dismissal with notice

Employees should only be dismissed if, despite warnings, conduct or performance does not improve to the required level within the specified time period. Dismissal must be reasonable in all the circumstances of the case.

Unless the employee is being dismissed for reasons of gross misconduct, he or she should receive the appropriate period of notice or payment in lieu of notice.

Dismissal without notice

Employers should give all employees a clear indication of the type of misconduct which, in the light of the requirements of the employer's business, will warrant dismissal without the normal period of notice or pay in lieu of notice. So far as possible, the types of offences which fall into this category of 'gross misconduct' should be clearly specified in the rules, although such a list cannot normally be exhaustive.

Gross misconduct is generally seen as misconduct serious enough to overturn the contract between the employer and the employee thus justifying summary dismissal. Acts which constitute gross misconduct must be very serious and are best determined by organisations in the light of their own particular circumstances.

However, examples of gross misconduct might include:

- theft or fraud
- physical violence or bullying
- deliberate and serious damage to property
- serious misuse of an organisation's property or name
- deliberately accessing internet sites containing pornographic, offensive or obscene material
- serious insubordination
- unlawful discrimination or harassment
- bringing the organisation into serious disrepute
- serious incapability at work brought on by alcohol or illegal drugs
- causing loss, damage or injury through serious negligence
- a serious breach of health and safety rules
- a serious breach of confidence

If an employer considers an employee guilty of gross misconduct and thus liable for summary dismissal, it is still important to follow a fair procedure as for any other disciplinary offence. This will include establishing the facts of the case before taking any action, holding a meeting with the employee and allowing the employee the right of appeal. It should be made clear to the employee that dismissal is a possibility. A short period of suspension with full pay to help establish the facts or to allow tempers to cool may be helpful. However, such a period of suspension should only be imposed after careful consideration and should be kept under review. It should be made clear to the employee that the suspension is not a disciplinary action and does not involve any prejudgment.

Appeals

Right of appeal

The opportunity to appeal against a disciplinary decision is essential, and appeals may be raised by employees on any number of grounds, for instance, new evidence, undue severity or inconsistency of the penalty. The appeal may either be a review of the disciplinary sanction or a re-hearing depending on the grounds of the appeal.

An appeal must never be used as an opportunity to punish the employee for appealing the original decision, and it should not result in any increase in penalty.

What should an appeals procedure contain?

It should:

- specify a time-limit within which the appeal should be lodged
- provide for appeals to be dealt with speedily, particularly those involving suspension or dismissal
- wherever possible provide for the appeal to be heard by someone senior in authority to the person who took the disciplinary decision and, if possible, someone who was not involved in the original meeting or decision
- spell out what action may be taken by those hearing the appeal
- set out the right to be accompanied at any appeal meeting
- provide that the employee, or a companion if the employee so wishes, has an opportunity to comment on any new evidence arising during the appeal before any decision is taken

Small organisations

In small organisations, even if there is no more senior manager available, another manager should, if possible, hear the appeal. If this is not possible, consider whether the owner or, in the case of a charity, the board of trustees, should hear the appeal. Whoever hears the appeal should consider it as impartially as possible.

How should an appeal hearing be conducted?

Before the appeal ensure that the individual knows when and where it is to be held, and of their statutory right to be accompanied. Hold the meeting in a place which will be free from interruptions. Make sure the relevant records and notes of the original meeting are available for all concerned.

At the meeting

You should:

- introduce those present to each other, explaining their presence if necessary
- explain the purpose of the meeting, how it will be conducted, and the powers the person/people hearing the appeal have
- ask the employee why he or she is appealing
- pay particular attention to any new evidence that has been introduced, and ensure the employee has the opportunity to comment on it
- once the relevant issues have been thoroughly explored, summarise the facts and call an adjournment to consider the decision
- change a previous decision if it becomes apparent that it was not soundly based, If the decision is overturned, consider whether training for managers needs to be improved, if rules need clarification, or if there other implications to be considered
- inform the employee of the results of the appeal and the reasons for the decision and confirm it in writing, make it clear, if this is the case, that this decision is final

Dismissal

Overview of unfair dismissal

The law gives most employees the right not to be unfairly dismissed. You must be able to show, not only that you had good reason to dismiss your employee, but also that you acted fairly in the way in which you handled the dismissal.

You must therefore show that you were lawfully entitled to dismiss the employee and that the dismissal was fair. If not, the employment appeals tribunal may either make an order for reinstatement or award the employee monetary compensation.

Generally an employee must show that they have been dismissed under the Unfair Dismissals Act 1977 have one years' continuous service to be able to pursue a claim for unfair dismissal; however, there are a number of exceptions for which there is no qualifying period (such as maternity, whistleblowing, parental leave, union organising etc.). Always consult our telephone legal advice helpline before dismissing any employees. If an employee considers that he/she has been unfairly dismissed, he/she is entitled to bring a claim before the Employment Appeals Tribunal and apply for reinstatement, re-engagement or compensation.

Types of dismissal

Actual dismissal

Your employee is treated as being dismissed if you terminate the contract of employment by notice or without notice. This includes the most common of the three dismissal situations, where you simply give notice in accordance with the terms of the contract.

It also covers the situation where you terminate the contract without notice, dismissing your employee summarily. In this case, even though the dismissal has been provoked by your employee's conduct, it is your action in treating the contract as having come to an end which terminates the contract and thus constitutes a dismissal.

For example, if your employee is absent without leave and you refuse to allow that employee to return to work, this will operate as a dismissal.

In certain circumstances, for example, where you speak to your employee in a disrespectful manner, you may well be in breach of an implied term of mutual trust and confidence and this may amount to constructive dismissal.

Where you offer your employee a choice to resign or a dismissal and they choose to resign, as you have forced this upon your employee, it will be treated as a dismissal.

A fixed term expires without being renewed

Where a fixed term contract expires without being renewed, your employee is treated as being dismissed. In contrast to the purely contractual position, if the contract is not renewed it is treated as a dismissal for the purposes of proceeding with a statutory claim.

A fixed term contract may contain a 'break' clause under which either you or your employee would be entitled to terminate the contract by giving notice before the term expires. If the contract expires by reaching the end of the term and the contract is not renewed, this constitutes a dismissal.

The employee is constructively dismissed

Where your conduct amounts to a fundamental breach of the employment contract and your employee leaves your employment by terminating the contract, with or without notice, it is said that he or she has been constructively dismissed. If you breach an express term of the contract, for example you unilaterally reduce wages, and your employee elects to leave, this will be treated as constructive dismissal.

A breach of implied duty of mutual trust and confidence may also result in constructive dismissal. However, any breach of contract, whether express or implied, must be sufficiently serious to amount to a fundamental breach of contract. If the breach is of a minor nature, constructive dismissal will not result.

A threat to change the terms and conditions of employment and to dismiss an employee if they do not accept the changes can amount to a constructive dismissal even if there is a resignation before implementation of the changes. It is possible to look to the cumulative effects of your actions.

The final act may not in itself amount to fundamental breach of contract but could be the 'last straw' entitling your employee to claim constructive dismissal. Should your employee wish to rely on constructive dismissal, they must leave your employ within a reasonable period following the breach to avoid being taken as having confirmed the contract.

The employee must resign in response to your fundamental breach of the contract and will not be constructively dismissed if the resignation is for some other reason.

Can the employee bring a claim?

An employee must have completed at least one year's continuous employment with their employer to qualify to make a claim in an employment tribunal unless their claim relates to one of the following:

- being discriminated on the grounds of sex/gender, age, race, disability, sexual orientation, religion or belief, civil or family status, and/or membership of the traveller community
- being dismissed for or suffering a detriment because they are pregnant and all reasons relating to maternity leave
- being dismissed or suffering a detriment for taking or seeking to take time off for parental leave, paternity leave (births and adoption), adoption leave or time off for dependants
- being dismissed or suffering a detriment for acting as an employee representative at grievance/disciplinary and dismissal hearings and/or appeals
- being dismissed or suffering a detriment for being a member of a trade union or participating in legitimate trade union activities
- being dismissed or suffering a detriment for exercising, or seeking to exercise the right to take time off for jury service (or some other public duty), antenatal care or looking for work or arranging training prior to being made redundant
- being dismissed or suffering a detriment for making a protected disclosure (generally known as 'whistleblowing')
- being dismissed or suffering a detriment for any of six circumstances relating to health and safety specified in the EC Health & Safety Directive 89/391 (such as whistleblowing on health and safety breaches)
- being dismissed or suffering a detriment for exercising, or seeking to exercise, rights under the Working Time Regulations – including rest periods, breaks and annual leave
- being dismissed or suffering a detriment for exercising, or seeking to exercise, rights under National Minimum Wage regulations
- being dismissed or suffering a detriment for claiming a statutory right
- being dismissed or suffering a detriment for exercising, or seeking to exercise, rights under part-time or fixed-term employee regulation
- being dismissed or suffering a detriment for being a trustee of an occupational scheme
- being dismissed or suffering a detriment for failing to disclose a spent conviction
- being dismissed or suffering a detriment for claiming repayment following an unlawful deduction from wages

- being dismissed or suffering a detriment for requesting an itemised pay statement or written terms and conditions of employment or written statement of reasons for dismissal
- claiming damages for breach of the terms of an employment contract

Excluded groups

The right to claim unfair dismissal does not apply to certain excluded groups. An employee is barred from bringing a claim if he or she:

- has not been continuously employed for one year at the effective date of termination - see 'Effective date of termination' below
- is a share fisherman or merchant seaman
- is a member of the police or armed forces
- Is genuinely self-employed (Please note, though, that tribunals have found some apparently 'self-employed' persons to be employees/workers'. Whether a person is self-employed or not is a question of fact in all the circumstances. Tribunals are reluctant to allow the parties to put a self-employed 'label' on the relationship to avoid tax liabilities and/or employment rights.)
- is working under an illegal contract

If an employee is dismissed in breach of their contractual notice period, they may claim damages amounting to the wages the employee would have earned during the notice period.

Period of employment required to bring a claim

Unfair dismissal

There must be continuous employment for a period of not less than one year before your employee is entitled to bring a claim for unfair dismissal unless it falls into the exceptions listed above under the heading 'Can the employee bring a claim?'. The period of one year is calculated from the date work started and ending on the effective date of termination.

Redundancy payment

In order for your employee to be entitled to claim redundancy payments, they must be over the age of 16 have been employed for a period of at least two continuous years. They must also have been in employment that is insurable under the Social Welfare Acts.

Effective date of termination

The effective date of termination means that:

- where the contract is terminated by notice (including where the employee is given notice but is not required to work their notice period, usually referred to as 'garden leave'), whether notice is given by you or by your employee - the date on which that notice expires
- where the contract is terminated without notice (including where a payment in lieu of notice is paid) - the date on which termination takes effect
- if there is a fixed-term contract that expires without renewal - the date on which the term expires

Usually there is no difficulty in calculating the effective date of termination and, in most cases, it is the last day on which your employee worked for you.

If you dismiss an employee without notice, but still pay them their wages for the notice period (called payment in lieu of notice), the effective date of termination is the date upon which notice expires. In the case of constructive dismissal, the effective date of termination is the date of your employee's departure.

In certain circumstances, the effective date of termination can be extended. The purpose of this rule is to ensure that an employee is not deprived of their statutory rights by wrongfully dismissing them without notice just before they reach the qualifying period to present a claim.

Extension of effective date of termination

In certain circumstances the effective date of termination can be extended. The purpose of this rule is to ensure that an employee is not deprived of their statutory rights by wrongfully dismissing them without notice just before they reach the qualifying period to present a claim.

A typical example of an extension of the effective date of termination is where an employee is employed continuously for more than one month but less than two years, and is then wrongfully dismissed without notice a couple of days before completion of their two-year period of employment. The employee would be entitled to one week's statutory minimum notice.

In this particular case the effective date of termination can be extended by one week which gives the employee the necessary two years' continuous employment to present an unfair dismissal claim to an employment appeals tribunal.

An extension of the effective date of termination can similarly be utilised to ensure that an employee will have the necessary two years' continuous service to claim a statutory redundancy payment.

Continuity of employment

The period of employment must be continuous. If the employment period is broken so that it is not continuous with a later period, a new period of employment will commence after the break, starting again at week one. The old period cannot be added to the new.

Weeks during which an employee is not employed under a contract of employment do not count as part of their continuous employment, except in the following circumstances:

- if absence is due to sickness, injury, pregnancy or confinement up to a maximum of 26 weeks
- if there is a temporary stoppage of work
- if the employee is absent in circumstances where, by arrangement or custom, the employee is regarded as continuously in employment

If there is a contract of employment, the question of continuity of employment is not an issue as there is a continuing contract and continuity of employment will be preserved, even though the employee may not work as a result of sickness or holiday.

Industrial action does not break continuity of employment, but days during which an employee may be on strike or locked out by the employer do not count in computing the length of employment.

If an employee is made redundant and is due to start another job (under a new employment contract) with the same employer then continuity of employment will be preserved so long as they start their new job within four weeks of the effective date of termination of their previous employment contract.

Change of employer

For employment to be continuous, the employee must be with the same employer. If there is a change in employer, continuity will be broken in most cases. Although a change of employer breaks continuity, a change in job with the same employer will not break it.

There are circumstances, however, where continuity of employment will be preserved despite a change of employer. For example, where an employer has died, his or her personal representatives (e.g. executors) will take control of the deceased employer's estate including the business. If the personal representatives agree to continue to employ the employee then continuity of employment is preserved. Another example would be where there is a change of partners; again there is no break in continuity.

Constructive dismissal

An employee who resigns can still bring a claim for unfair dismissal and be awarded compensation if they can show that they were 'constructively dismissed', i.e. that the employer's conduct justified him/her leaving. You must therefore treat all employees consistently and, in particular, you should not:

- reduce an employee's pay without his/her agreement
- lower an employee's status or change any of his/her conditions of employment without his/her agreement
- treat an employee in a discriminatory manner
- demand a higher performance from one employee than from others with similar jobs
- consistently undermine an employee's authority
- deny an employee any of his/her rights under his/her contract of employment
- be deliberately unfair to an employee in any way
- require an employee to do work other than his/her own against his/her wishes (unless their contract of employment permits it)
- openly ridicule or treat an employee with flagrant discourtesy
- attempt to influence an employee to resign
- allow an employee to be harassed or victimized by other employees or members of the public while at work

Please note that the above list is not intended to be exhaustive, merely to illustrate those areas where a problem may arise.

Signing away rights

If the employee has raised their claim with their employer prior to making a claim at an employment tribunal and, following negotiations, he or she has agreed a settlement then they should be asked to enter into a 'compromise agreement' in order to formally settle their claim.

The terms of the compromise agreement will usually specify the amount of compensation to be paid to the employee and in return, the employee will agree not to pursue certain legal claims that he or she may have against the employer that relate to their employment and its termination (as well as agreeing to any further conditions that the employer may impose). Consequently, if the employee has signed a legally binding compromise agreement, the employee may be prevented from pursuing proceedings before an employment tribunal. See the section on compromise agreements for further information.

Illegal contracts and unprotected industrial action

Illegal contracts

If the employee's contract is illegal (such as where an employee does not have the necessary immigration rights to work or remain in the country) or if the employee knows that it is being operated unlawfully (the parties use an otherwise legal employment contract to undertake unlawful activities such as where the employer and employee enter into an arrangement to evade PAYE or national insurance payments) then they will not be able to

pursue a claim for unfair dismissal or a redundancy payment. The reason for this is that it would be against public policy to legitimise an illegal contract.

Whether or not an employee will be able to pursue a claim in the employment tribunal will depend of the facts of each case. However, the courts will consider the following:

- the extent of the employee's knowledge of the illegality – whether the employee knew that something illegal was going on
- if the employee gained any benefit from the unlawful act

Unprotected industrial action

Industrial action, such as strikes, should only take place after a trade union has complied with certain strict statutory requirements which include balloting their members and serving notice on the employer. If these requirements have been complied with then the industrial action will be 'protected' meaning that an employer will not be able to issue civil proceedings against the trade union and will not be able to fairly dismiss their members for taking part in any action.

However, if the trade union fails to follow the correct procedures or if their members take unauthorised action, the strike (or picketing) will be unlawful and therefore 'unprotected'. In such circumstances, an employer may fairly dismiss any employees who take part in the industrial action although we would recommend that legal advice should be sought before making any dismissals.

Reasons for dismissal

Overview

The burden of proof for establishing that the dismissal as fair usually lies with the employer. You must be able to establish the only or principal reason for the dismissal. If you are unable to show that the dismissal was for one of the five permitted reasons, or you plead the wrong reason before the employment appeal tribunal, the dismissal will be held to be unfair.

In determining whether a dismissal was fair or unfair, it is for you to establish that the only and principal reason for the dismissal relates to the following:

- your employee's capability or qualifications to do the work of the kind for which he or she was employed
- the employee's conduct
- a redundancy
- the employee's retirement
- the fact that the employee could not continue to work in the position held without contravening some statutory provision
- some other substantial reason justifying the employee's dismissal from the position they were holding

Capability and qualifications

Incapability or lack of qualification for which your employee is dismissed, must relate to the work that they were doing. In other words, the employee was incapable of doing the job by virtue of incompetence, or an inherent inability to perform the job. It also extends to an inability to do the job by reason of illness or injury. Therefore sickness may be reason to justify a dismissal.

Conduct

This reason is fairly general and can cover virtually any form of misconduct, but would usually be misconduct within the employment. It would include, for example, disobedience of orders, breach of a duty of fidelity, dishonesty, fighting, sexual harassment, absence without permission, lateness and other breaches of contract or breaches of work rules.

To minimise potential liability for unfair dismissal, you should have a comprehensive set of disciplinary rules.

In addition to conduct within the workplace, dismissal for conduct outside employment, such as criminal offences committed elsewhere, will also provide a valid reason for dismissal. For such a dismissal to be fair, the outside misconduct must usually have an effect on the employment relationship.

For example, if your employee is a cashier and charged with a motoring offence, this should not have any effect on your working relationship. However, if the employee is charged with theft it could have a substantial effect on the employment relationship.

In order for you to rely on misconduct to justify a dismissal, the misconduct must have been known to you at the time of the dismissal. You cannot rely on subsequently discovered misconduct to justify the dismissal. In other words, if your employee is dismissed for a reason that is unfair, and subsequently you find out that he or she has committed some serious offence, you cannot rely on the later conduct when giving reasons for the dismissal.

However, if you are notified of some serious offence prior to the dismissal but after giving notice of termination of employment, you are entitled to use that conduct in justifying the dismissal.

Redundancy

Redundancy is a potentially fair reason for dismissing your employee. See the section on redundancy for more information.

Retirement

For many workers the removal of the default retirement age means that they are entitled to work for as long as they want, without being forced to retire once they reach a specific age.

However, it is still possible for employers to lawfully require an employee to retire at a specified age, so long as the chosen age can be objectively justified as being a 'proportionate means of achieving a legitimate aim'.

What constitutes a 'legitimate aim' will depend on issues such as the type of work performed by employees in particular roles, or the demographic profile of the workforce. Employers should take into consideration such factors as:

- whether the role that the employee will be required to perform requires high levels of physical or mental fitness
- the safety of the general public and other workers
- what effect, if any, no set retirement age for employees performing a particular role would have on the workforce. For example, not having a compulsory retirement age may affect an employer's ability to recruit and retain high-quality personnel (as the scope for promotion is limited).

If an employee challenges the lawfulness of an employer requiring them to retire at a specified age, then the employer will need to provide evidence that it was objectively justified. This may prove hard to do as the age may have been fixed many years before the employer has tried to enforce the requirement to retire.

It is advised employers write down their reasons for requiring an employee to retire at a particular age; consider whether they have good evidence to support their reasons; and

then consider if the same result could be achieved using an alternative or non-discriminatory way. It also advises that employers should encourage employees to have more open discussions about their future plans.

Employers may become liable to pay damages for unfair dismissal and/or unlawful age discrimination, if they get it wrong.

It also advises that before enforcing a fixed retirement age, an employer should give the employee adequate notice of their impending retirement and consider whether they will be permitted to apply to stay beyond the compulsory retirement age.

Employers must use a fair procedure when dismissing any employee, including when dismissing employees once they have reached a fixed retirement age.

The government has stated that people will need to work for longer before they can retire and are implementing new laws increasing the age from which the state pension can be taken. With this in mind, it is likely that any attempt by employers to dismiss employees by making them retire before they reach the state pension age will be regarded as unfair and contrary to public policy.

If you are unsure whether or not you can justify requiring the employee to retire at a particular age, then you should seek legal advice.

Acting illegally

This covers a situation where it becomes illegal either for your employee to work in the position held, or for you to employ him or her in that position. One of the more common types of dismissal for this reason is where your employee is a driver of a motor vehicle. The court disqualifies the employee from driving because of a motoring offence. The employee is therefore not in a position to drive a motor vehicle.

Some other substantial reason

This is a separate category, but the onus of proof is on you to show that it is for some other reason that you justifiably dismissed your employee. For example, your employee marries a competitor. In these circumstances, depending upon where your employee works, his or her normal participation in corporate decisions and the nature of your business, there may be a real risk of a leak of trade secrets.

Statement of reasons for dismissal

If your employee has been continuously employed for at least one year, they are entitled to request a written statement from you of the reasons for the dismissal, within 14 days of the request. The statement will be admissible in evidence in any proceedings.

In the case of a woman, if she is dismissed while pregnant or during a maternity period, she is entitled, without prior request, to a written statement. Should you fail to comply with the request, the employee may present a complaint to the employment appeals tribunal.

Fairness and acting reasonably

Acting reasonably

Once you have shown that a dismissal was for a permitted reason, the employment appeals tribunal must then decide whether you have acted reasonably. In practice it is usually relatively easy for you to show the reason for the dismissal, but persuading the tribunal that you have acted reasonably may be a little more difficult.

The Employment Appeals Tribunal will have to consider each case on its own facts. There are a number of principles that the tribunal must follow in determining reasonableness:

- The tribunal must first decide whether the dismissal was fair or unfair and whether the employer acted reasonably or unreasonably.
- The tribunal must also consider the reasonableness of your conduct, not simply whether the tribunal considered the dismissal to be fair.
- In judging the reasonableness of your conduct the tribunal must not substitute its decision as to what is the right course to adopt for you.
- In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another.
- The tribunal must determine whether in the particular circumstances of each case the decision to dismiss an employee fell within the band of reasonable responses that a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair.

The tribunal is also entitled to take into account the size and administrative resources of the business. If you have a small workforce, you may find it more difficult than a larger firm to find other employees to do the work of a particular employee if they are absent through sickness for a long period. This might justify the employee's dismissal and replacement in circumstances where a larger firm would not be acting reasonably.

A small firm is also less likely to have suitable alternative employment if a job is lost through redundancy. A small firm may also have less formal disciplinary and consultation procedures than a large one.

You may be justified in dismissing your employee, but the dismissal may still be unfair if there are procedural defects, for example if the employee is dismissed for misconduct without being given an opportunity to explain his or her actions. The same applies if the employee is made redundant without any consultation.

In deciding what is reasonable or unreasonable, the tribunal will also look to whether there was an alternative to dismissal, for example, suspension or demotion.

Where industrial action was taken or you were threatened with industrial action, the tribunal cannot take into account any pressure put on you by way of such action.

The fact that a dismissal is a breach of contract will not of itself render it unfair. The test is whether you acted reasonably.

A long serving employee may well deserve more consideration before dismissal. The employee has worked for 20 years and is then convicted of an offence of dishonesty unrelated to their employment. A fair and reasonable sanction may well be a demotion to a position that could not give an opportunity of a breach of trust, rather than a dismissal.

Particular reasons

A particular reason for dismissal may require a particular application of certain principles. For example, an employer may move premises and request that its employees travel a reasonable distance to the new offices. If an employee decides to refuse to travel because it is less convenient for him or her, the employee's dismissal can be reasonable because there is a sound business reason for the dismissal.

Capability and qualifications

Whether your employee is capable or has the relevant qualifications, should vary depending on whether the incapability is due to incompetence or sickness.

Before dismissing your employee for incompetence, you should normally have warned him or her about the standard of work and given him or her the opportunity to improve. Where appropriate, you should provide adequate training. For example, where your employee has been moved to a job beyond his or her capabilities, you should consider whether it is possible to move him or her to a job within his capabilities.

In the case of long-term illness, it may well be fair to dismiss your employee. The nature and likely duration of the illness and the length of service will be relevant, as are your needs and requirements.

You may replace an employee in a key position or in a small business more quickly than if the employee was in a less vital position or in a much larger firm. Ultimately, the test is whether you could reasonably be expected to wait any longer for the employee to return.

It is advisable that you consult with your employee concerning the nature and likely length of his or her illness. The employee should seek medical advice relating to their condition and consider whether suitable alternative employment can be offered. You will however require written consent from your employee before you can obtain any medical reports from the specialist or doctor.

In the case of permanent disability, the contract may be frustrated. It is most likely that in these circumstances dismissal is no longer an issue.

Fair procedure and misconduct

Conduct

The type of misconduct can vary greatly. A minor incident would be arriving late for work. Gross misconduct would involve theft or divulging trade secrets. The important feature here in considering reasonableness of your actions is how you handled the situation.

When faced with misconduct, you should tell your employee what they have done wrong and provide them with an opportunity to explain their position.

If, following this, disciplinary action is taken, your employee will have an opportunity to appeal against a decision.

Disciplinary action need not mean dismissal. In the event of minor misconduct, warnings should be given prior to this. The code recommends:

- oral and/or written warnings
- a final written warning
- dismissal (or sanction example suspension)

For serious misconduct, it may be appropriate to skip an oral or written warning and move straight to a final warning; for gross misconduct it can be appropriate to dismiss without warning.

In most cases of misconduct, notice or payment instead of notice should still be given in accordance with a contract. However, in the case of gross misconduct you will most probably be entitled to terminate without notice.

In certain cases, the position may not be entirely clear. You may merely suspect that your employee has committed a theft. You may still have acted fairly by dismissing him or her, provided the tribunal is satisfied that you carried out a proper investigation and following such investigation, you came to a genuine and reasonably held belief in his or her guilt.

If your employee is charged with a criminal offence but denies guilt, this should only be ground for dismissal where it has employment implications. Was the offence committed in the course of employment? Was it an offence of dishonesty? Was the particular employee in a position of trust? Is the employee to be detained in custody? The outcome of any subsequent criminal proceedings does not necessarily have any bearing on the issue of whether you were reasonable in dismissing your employee prior to the hearing of the case.

You do not have to delay your decision pending the outcome of any criminal proceedings if you have contractual rights to do so. You may, however, decide to suspend your employee pending the decision of the criminal court.

If you have not followed a fair procedure, it is no defence for you to argue that it would have made no difference to the decision to dismiss your employee, had proper procedures been followed. This may, however, be a relevant factor in assessing the amount of compensation that the employee may be entitled to.

Redundancy

You must act fairly and reasonably. In order for you to act reasonably you must:

- warn and consult your employee and any of his or her fellow employees affected or their representatives
- adopt a fair basis on which to select for redundancy
- take such steps as may be reasonable to avoid or minimise redundancy by a re-deployment within your organisation

Unfortunately there are no hard and fast rules and what amounts to 'acting reasonably' will depend on the particular circumstances.

It used to be common practice to use the 'last in, first out' approach as a basis for selection. However, this approach is now widely regarded as potentially breaching the age discrimination regulations and should not be used as the sole criteria. In other cases, it may be fair to select an employee whose job has effectively disappeared. You should always consider whether there are any alternative vacancies before implementing redundancies.

There may be exceptional circumstances where you can show that at the time of the dismissal, consultation or warning would have been utterly useless.

Against the law

If it becomes illegal for your employee to continue in his or her employment because he or she has committed some offence, a dismissal may well be fair. However, you should consider whether it is possible to employ the person elsewhere. For example, your employee is a driver and is unable to drive as a result of disqualification by the court. It is possible that you can utilise him or her in the area of maintenance.

Fairness of dismissal - special cases

Special cases

There are a number of special cases where normal rules relating to unfair dismissal are varied and they are set out in this section.

Dismissals for trade union reasons

Employees are free to join the trade union or not to join as they choose. Consequently it would be unfair for you to dismiss your employees either because they are or are not a member of a trade union.

If the employee is involved in the activities of an independent trade union, those activities should take place during the appropriate time. This would be either outside working hours or within working hours where you have agreed.

There is no qualifying period of continuous employment to bring a claim for unfair dismissal on the basis of his or her membership or activities within an independent trade union.

Industrial action

If you dismiss your employee for taking part in industrial action, for example strikes, whether the employee is prevented from issuing a claim for unfair dismissal with employment appeals tribunal will depend on whether the industrial action was official or unofficial. Official is either where the industrial action is authorised or endorsed by a trade union, or where none of the employees who participate in the action are members of a trade union.

If, at the time of the dismissal your employee was taking part in unofficial industrial action, the employment appeals tribunal has no jurisdiction to hear the employee's complaint of unfair dismissal. This is not to say that the dismissal is fair, but merely that the employee is not eligible to present a claim.

Therefore, you may dismiss an employee or any other of their fellow employees, such as the ringleaders, for taking part in unofficial industrial action without fear of a claim for unfair dismissal, so long as this is the principal reason for the dismissal. If the real or principal reason for the dismissal is jury service, family, health and safety, working time, employee representative, protected disclosure or flexible working cases, then the employee will not be prevented from presenting a claim to the employment appeals tribunal.

To give an example, employees are dismissed during a lock out while taking part in a strike or other industrial action. Provided none of the exceptions apply, they may not present a complaint that the dismissal is unfair, unless other employees of the same establishment were treated differently. For example, they were locked out or took part in the strike or other industrial action, and either not dismissed, or dismissed but were offered re-engagement within three months of the dismissal.

If all the other employees taking part in the industrial action are dismissed and not re-engaged within three months, the tribunal cannot hear any complaints of unfair dismissal.

If some employees are singled out either for dismissal or non- re-engagement, within three months an employee may present a claim of unfair dismissal in the normal way. You will have to show a reason for dismissal or non- re-engagement and the tribunal must decide whether you acted reasonably. In other words, you must have some justifiable explanation for singling out a particular employee.

Dismissal for asserting a legal right

If you elect to dismiss your employee because they have brought proceedings against you to enforce a legal right, or they allege that you have infringed a right, a dismissal will be seen to be unfair and there is no qualifying period of continuous employment necessary to bring the claim.

Health and safety dismissals

Where your employee stops his or her job on health and safety grounds, it would be regarded as unfair if you dismissed the employee on those grounds. No period of continuous employment is required.

In the case of pregnancy or maternity related dismissals, dismissals for trade union reasons, dismissals for asserting a legal right, health and safety dismissals and dismissals for reasons connected with a transfer of a business, the dismissal will automatically be unfair. This means that the tribunal will not have to consider the reasonableness of the decision.

Whistleblowing

'Whistleblowing' occurs when an employee or former employee of an organisation reports employer misconduct to people or entities that have the power to take corrective action. An employee must not be dismissed for making a 'protected disclosure'. For a disclosure to be protected by legislation it must relate to matters that 'qualify' for protection under such acts.

Qualifying disclosures are disclosures which the worker reasonably believes tend to show that one or more of the following matters is either happening now, took place in the past, or is likely to happen in the future:

- a criminal offence
- the breach of a legal obligation
- a miscarriage of justice
- a danger to the health and safety of any individual
- damage to the environment
- deliberate concealment of information tending to show any of the above five matters

An employee need only show that he or she has a 'reasonable belief' that the employer has committed one of the qualifying offences. The employee will then be protected in making a disclosure if it is made in good faith to his or her employer or to one of a limited category of persons, e.g. a government minister or an appropriate regulatory authority.

The act stipulates that an employee should, in the first instance, raise concerns with his or her employer or the appropriate regulatory authority, e.g. the Health and Safety Executive. In other cases, where disclosures are made in the wider public domain, e.g. to the press, more stringent conditions apply.

A disclosure attracts protection only where an employee satisfies the precondition that he or she has previously disclosed the matter to the employer or a prescribed body, (or can show that he or she has not done so because of a reasonable belief that he or she would be victimised, or that disclosure would lead to evidence being concealed or destroyed). He or she must also:

- make the disclosure in good faith
- reasonably believe that the information is substantially true
- not act for personal gain
- act reasonably

The legislation sets out a number of factors to be considered by a tribunal in deciding whether an employee acted reasonably in making the disclosure through external channels. These include:

- the seriousness of the failure complained of
- whether the disclosure breaches the duty of confidentiality between the employer and another person
- whether the disclosure was made in accordance with any internal procedures approved by the employer

In the cases of an 'exceptionally serious failure', an external disclosure will be protected without an employee having to satisfy the precondition of prior notification to his or her employer, as is required for other external disclosures. It is not possible for either an employee or an employer to contract out of the legislation, and any agreement to that effect is void to the extent that it restricts the making of protected disclosures.

Awards for unfair dismissal

If an employee is unfairly dismissed, their remedy is reinstatement, re-engagement or compensation.

Reinstatement or re-engagement

In very few cases will an order for reinstatement or re-engagement be made, and there are numerous complications. It will of course depend on the type of organisation, whether an employee wishes to be reinstated or re-engaged.

One also has to consider whether it is practicable to comply with the order and whether it is just to make the order where an employee has caused or contributed to a dismissal. All the circumstances will be taken into account.

If an employee wants a reinstatement or re-engagement, they must specifically ask for such an order. If a tribunal makes an order for reinstatement, the tribunal will ensure that the order incorporates provision for repayments as well as maintenance of seniority and pension rights. In the case of an order for re-engagement, the tribunal will take into account the nature of employment, remuneration, arrears of pay, seniority and pension rights.

Should the employer fail to comply with the order, it is extremely difficult for the tribunal to enforce such an order. The tribunal will have to look at compensation consisting of various awards.

Compensation

If the tribunal considers that an employee has a well-founded complaint and the tribunal is unable to make an order for reinstatement or re-engagement, it must make an award of compensation.

Compensatory award

This award is designed to compensate an employee for the loss that they have suffered and includes:

- immediate loss of net earnings to which he or she is entitled from the date of dismissal to the date of the hearing or until he or she finds a new job, if earlier
- future loss of net earnings to which he or she would be entitled from the date of the hearing until he or she obtains new employment, also If he or she is re-employed in an equally well-remunerated job at the date of the hearing, he or she will not be entitled to an award under this heading
- loss of pension rights and fringe benefits
- loss of statutory rights, for example, if the employee has 20 years' service they would have been entitled to the maximum eight-week notice period, the employee may

therefore be awarded the net weekly pay for the eight weeks to compensate them for this loss

- expenses in looking for work, removal expenses etc.,
- financial loss caused by the manner of dismissal, for example, if there is evidence that the manner of dismissal makes it more difficult for him or her to find future employment

The compensatory award is subject to a maximum award of two years' salary after any reduction for contributory fault. In other words, if the tribunal orders the employer to pay €30,000 but at the same time finds that the employee was a twenty per cent contributor to the dismissal, the claim will be reduced by €6,000 and the employee will receive the difference, namely €24,000.

A compensatory award can also be reduced in certain circumstances. The employee will be under a duty to mitigate his or her loss by taking reasonable steps to obtain alternative employment. The employment tribunal will not award compensation for any loss that should have been mitigated but was not.

In practice, the employee should keep records of their job applications to show the tribunal that they have tried to mitigate their loss. Failure to mitigate can reduce the compensation.

If the employee fails to take advantage of an internal appeal procedure, a tribunal can deduct compensation for such failure. Similarly, if the employee secures an alternative job by the time of the hearing, wages from the new job will be taken into account.

Employee's conduct

The award may also be reduced by such sum as is just and fair, having regard to the employee's conduct before dismissal. The compensatory award should be a sum that the tribunal considers to be just and fair, having regard to the loss that the employee has sustained as a result of the action taken by the employer.

These reductions most commonly apply where the employee contributed to the dismissal. In such a case the tribunal may well reduce the basic and compensatory awards by such proportion as the tribunal considers just and fair in all the circumstances.

If the employee has substantially contributed towards their dismissal, then the award of compensation will correspondingly be reduced by a larger percentage, and of course if the employee was wholly responsible for the dismissal, no compensation will be payable at all.

A tribunal is entitled to take into account misconduct discovered after dismissal, and reduce both the basic and compensatory awards. However, conduct subsequent to the dismissal is not relevant to the proceedings.

If the employee receives a payment instead of notice such as a one-off payment or a contractual redundancy payment, this will be taken into account in assessing compensation.

This should be deducted after a tribunal has reduced the award on the grounds of contributory fault or a procedurally unfair dismissal.

Recoupment of social security benefits

Specific regulations allow the Government to recoup jobseeker's allowance and income support paid to an employee.

Redundancy

Introduction

The law on redundancy is complex and our guide is designed to provide information about the key provisions. If you are an employer considering undertaking or announcing any redundancy dismissals, we recommend that you obtain legal advice - check this website to see what might be available to you.

What constitutes redundancy?

Redundancy arises in situations such as:

- closure of the entire business
- closure of the employees' workplace
- diminishing need for employees to carry out work of a particular kind

In any of these circumstances, there are well-established obligations for employers and failure to meet them could result in a claim for unfair dismissal being made at the Employment Appeals Tribunal.

It is important to establish whether a dismissal falls within the legal definition of redundancy both to ensure that the dismissal is fair and to determine the entitlement to a redundancy payment.

If fewer employees are required to do a particular job, or the business (or part of it) is being closed down, that will normally constitute a redundancy. Depending on the circumstances, employees may be able to claim redundancy if they are asked to relocate to new premises or are laid off for more than a certain length of time. The sale of a business, as opposed to assets, will not normally constitute a redundancy situation and would be governed by the Transfer of Undertakings Regulations, better known as TUPE. For further reading material on TUPE, please see below.

Redundancies may also result from a reorganisation of the business due to an economic, technical or organisational reason such as, for example, changes in working hours or technological changes..

Employees eligible for redundancy

A redundant employee will not be entitled to redundancy pay unless he or she has at least two years' service. There are several categories of employee who are excluded from the right to statutory redundancy pay, such as members of the armed forces or police services.

Redundancy pay

The amount of statutory redundancy pay due to an employee is related to length of service and weekly pay. Employers must provide the employee with a written statement of how the amount has been calculated. An employee is entitled to two weeks' pay for every year of service with a bonus week added on, subject to prevailing maximum ceiling on gross weekly pay.

If an employee is eligible for a redundancy payment and has been dismissed by reason of redundancy, they will be entitled, at a minimum, to a statutory redundancy payment from their employer. If there is a contract of employment, it may contain a provision for the employee to be paid more than the statutory minimum. This is known as an 'enhanced' redundancy payment.

A redundancy payment is intended to serve as compensation where an employee is dismissed through no fault of their own. Employees are entitled to receive the full redundancy payment upon being dismissed, even when they manage to find another job immediately. In most cases, the employer will make the redundancy payment without the need for any formal application to the employment appeals tribunal. However, where there is a dispute over the right to receive payment or over the correct amount, an application may be made and the employment appeals tribunal will determine these matters.

Types of redundancy

Introduction

If an employee is dismissed because the work they are doing has ceased or diminished, or because their place of work is closing or being relocated, then the employee is dismissed by reason of redundancy.

This will clearly cover the situation where the job has disappeared through lack of work. The provisions of the Redundancy Payments Act 1967 as amended, which sets out the definition of redundancy, must be carefully considered when determining whether employees are redundant, however, because some situations are not as clear, some of which we consider below.

Surplus employees

If the same amount of work is still being done by employees, but there is less of a requirement to do the work due to lack of demand for a product, for instance, this will come within the scope of the provisions of the Act. For example, initial over-staffing may mean that certain employees are superfluous and their workload can be absorbed by fellow employees.

With new technology, machines may replace employees. Reorganisation of work methods may produce a more efficient system requiring less manpower.

Work of a particular kind

If employees are dismissed because the nature of the work their employer is engaged in has changed so fundamentally that the particular kind of work those employees used to carry out has ceased or diminished, even though it has been replaced by different work, those dismissals will amount to redundancy. A mere relocation of duties or introduction of new methods will not amount to redundancy.

The accepted test to establish whether or not a redundancy situation exists on account of the scenario described above is a three-stage process:

1) Was the employee dismissed?

If so:

2) Had the requirements of the business for the carrying out of work of a particular kind ceased or diminished, or were they expected to cease or diminish?

3) Was the dismissal caused wholly or mainly by that state of affairs?

In determining whether there was a true redundancy situation due to a reduction in the nature of the work, the only question to be asked is whether there was a reduction or an

end to the requirements for the employee to carry out work of a particular kind, or an expectation of such reduction or end in the future.

Outsourcing

If an employer decides to outsource the work being done by a particular group or class of employees then despite the fact that this would technically give rise to a redundancy situation, since the employer will cease to carry on the particular type of work, TUPE regulations will mean that the affected employees will automatically transfer from the employer to the organisation that has been contracted to provide the outsourced services.

An employee has the right to object to the transfer and, by doing so, will have resigned from their job. In most cases, this will mean that the employee will not have a right to a redundancy payment or to claim unfair dismissal as they have not been dismissed. If the employee resigned because the transfer to the new job would have resulted in a substantial and detrimental change to their working conditions, they may have a claim for constructive/wrongful dismissal.

Note that if an employer dismisses an employee because of a TUPE transfer, or for a reason related to it, it will automatically be an unfair dismissal, unless the employer can show that the reason for the dismissal was due to an economic, technical or organisational change to the workforce.

Closure of business

If an employee is dismissed by reason of the closure of a business, there will be a dismissal by reason of redundancy. This will be the case, whether the closure of the business is permanent or temporary.

Change of employer (partnership)

If a business closes down by virtue of the death or dissolution of a partnership, then, notwithstanding the fact that the employee's contract of employment may be frustrated, it will be treated as a dismissal by reason of redundancy.

However, if the employee continues in the employment, or if there is effectively only a change in the partners despite the partnership being dissolved, the employee will not be dismissed and there will be continuity of employment. If the employee is re-employed by an associate employer, this will be a re-engagement.

Where a business is sold as a going concern, this will technically give rise to a redundancy situation, as the employer will cease to carry on the business. However, under the Transfer of Undertakings Regulations (TUPE) employees are protected and should automatically transfer to the new business. An employee who has transferred to a new employer will not be entitled to a redundancy payment.

Place of work redundancy

In this situation the place of employment is either closing or being relocated. As simple as this may appear, difficulties do arise. One has to determine whether the place of business being closed or relocated is where an employee works or could be required to work according to the contract of employment. In order to establish what the position is, certain tests are applied:

- If an employee has only worked in one location, then that is the place of work, regardless of any mobility clause in the contract.
- If an employee has worked from several locations then the place of work must be established by a factual enquiry, taking into account any contractual terms that might assist in determining the place of work.

Mobility clauses

Mobility clauses require employees to relocate as a result of business needs and cannot be ignored when considering the question of whether an employee is entitled to a redundancy payment.

A mobility clause can be used by you to require an employee to relocate as an alternative to proposing redundancies. This would give you the advantage of not having to comply with the legislation regarding redundancies including the duty to consult. However you should decide whether you want to rely on a mobility clause before making any announcement to the workforce about proposed redundancies as, once you have done this, you will be obliged to follow the legal rules and procedures relating to the conduct of redundancies.

If there is a mobility clause in the contract, but an employee refuses to obey a lawful request from the employer to move in accordance with the contractual term, then the dismissal may be due to the employee's misconduct as opposed to redundancy. In such circumstances, the employee would not be eligible to receive a redundancy payment.

Factors such as the following would need to be considered:

- the wording of the mobility clause used in the employment contract
- when and in what circumstances an employer has evoked the clause
- whether this would result in a breach of the employer's duty of trust and confidence to the employee

If the wording used in the mobility clause is unclear or ambiguous then, in the majority of cases, an employment appeals tribunal will interpret the effect of the clause in favour of the employee.

Presumption of redundancy

The facts of each particular case will decide whether or not an employee has been made redundant.

In many cases, there will be no dispute as to whether or not your employee is redundant, although sometimes claims are made on the grounds that there was no redundancy situation.

However, if you do not accept the claim and your employee refers the matter to the employment tribunal claiming that they are entitled to a redundancy payment, then the tribunal will be entitled to presume that the employee was dismissed due to being made redundant unless you are able to prove that the reason for the employee's dismissal was not redundancy but for some another reason, such as misconduct.

Employer obligations

Selection for redundancy

Fair selection is of critical importance and needs great care. Objective criteria should be used when determining which employees are to be selected for redundancy. If you have well-established or agreed procedures for selection, they must be carefully observed, provided they are reasonable.

The pool for selection

Employers have a reasonable degree of flexibility when deciding which 'pool' or group of employees should be targeted for proposed redundancies. The pool of employees should be as wide as possible to avoid claims for unfair dismissal on the grounds that an employee who was omitted from the pool should have been dismissed instead of the chosen employee.

In cases of collective redundancies, the selection pool should be discussed and agreed with the employees' representatives before being applied.

When choosing which employees should be included within the pool, you should consider:

- whether other groups of employees in the business perform a similar role - this may include employees at other sites or parts of the business, and if so, they should be included in the pool
- employees whose roles are interchangeable with the roles performed by the employees in the pool
- if the role or position of the employee is consistent with the roles/work performed by the employees included within the pool

The selection criteria

The selection criteria is the basis upon which employees who are at risk of redundancy will be scored in order to decide which of them will be made redundant.

When creating the selection criteria, subjective factors or personal opinions should not be used. Instead, an employer should, as far as possible, use objective factors that are relevant to the needs of the business and which can be verified using available records and information such as performance appraisals and attendance records.

In cases of collective redundancies the selection criteria should be discussed and agreed with the employees' representatives before being applied.

You should avoid:

- including trade union membership as part of the selection criteria as this will make the eventual dismissal automatically unfair

- selecting employees on the basis of 'last in, first out' as this is likely to breach age discrimination laws. It may be possible to use this selection criterion provided it is not the only one or if all other selection criteria have been applied and a stalemate situation arises. You should obtain legal advice before applying this criteria.
- using the amount of salary earned by an employee as a factor for the selection criteria as this is likely to indirectly breach age discrimination laws
- applying the performance of the employee as part of the selection criteria if you do not have any records which can be used to support it or if the performance has been measured solely using subjective measures
- applying any absences due to maternity leave, paternity leave or because of the disability of the employee or one of their dependants if attendance forms part of the selection criteria (A note should be made that this has been excluded when considering the employee's score.)
- applying any absences due to injuries suffered at work, unless you can show that this has been consistently applied to all employees, if attendance forms part of the selection criteria (A note should be made of that this has been excluded when considering the employee's score.)
- discriminating, whether directly or indirectly, against employees on the grounds of sex/gender, sexual orientation, race, age, disability, religion or belief, civil or family status, and/or membership of the Traveller Community

The burden of proof will rest upon an employer to show that their selection criteria were fair.

Obligation to explore possible alternative work

There is a legal obligation to explore thoroughly whether there are any suitable alternative jobs which can be offered to redundant employees, either within the business or any associated business (including subsidiaries and parts of the business located on other sites).

Whilst there is no obligation to create a new job, a reasonable employer might be expected to make minor changes to an existing vacancy, if these would make it suitable or acceptable to a redundant employee.

You should also consider whether the redundant employee is prepared to be demoted or accept a job at a lower grade/status in order to remain in employment. Do not assume that the employee will not accept this. Also consider 'bumping'.

If an employee unreasonably refuses an offer of suitable alternative work, he/she may forfeit his/her right to a redundancy payment.

If the vacancy is lower paid and/or of lower status but within the employee's competence, they should still be offered it as alternatives to redundancy. In such cases, the employee should be told that he/she will not lose the right to redundancy pay if the offers are refused.

An employee who accepts an offer of alternative work may still be entitled to claim a

redundancy payment if during the first four weeks in the new job, he/she resigns on the grounds that it is unsuitable.

Time off

Employees with two years' service who are under notice of dismissal because of redundancy are entitled to reasonable time off from work, either to look for new employment or make arrangements for training. They are also entitled to be paid their normal hourly rate for such time off, up to an amount not exceeding 40% of a week's pay for the whole notice period. You should check the employee's contract or the staff handbook in case they are entitled to enhanced payments or time off for other reasons, with or without pay.

Notifying the Minister for Jobs, Enterprise and Innovation (“the Minister”).

In any circumstances where 20 or more employees are to be made redundant, you must notify the Minister.

This must be sent at least 30 days before the first dismissal takes effect.

Failing to provide the notice is a criminal offence which could result in a fine of up to €250,000.

Notice

The redundant employee who is dismissed is entitled to his/her proper notice or pay in lieu of notice (as may be set out in their contract of employment), in addition to any redundancy pay.

If the employee does not have a contract of employment, or if the contract does not state the notice period to be given by the employer, then the following statutory minimum periods of notice which will apply:

- to the employees with under 13 week's continuous service - no notice requirement
- to employees with between 13 weeks to 2 years' continuous service - 1 weeks' notice
- to employees with between 2 years to 5 years' continuous service - 2 weeks' notice
- to employees with between 5 years to 10 years' continuous service – 4 weeks' notice
- to employees with between 10 years to 15 years' continuous service – 6 weeks' notice
- to employees with more than 15 years' service – 8 weeks' notice

Employees are also entitled to be paid for untaken holiday entitlement

Consultation before redundancy

Information and consultation before redundancy

An employer who is proposing to make redundancies must consult with the employees who are at risk of being dismissed.

The consultations must focus on:

- ways of avoiding the proposed redundancies
- how the employer could reduce the number of proposed redundancies
- mitigating the consequence of the redundancies

The employer must genuinely consult with their employees to try and reach agreement about how to avoid job losses.

Consultations should begin once an employer 'proposes' to make redundancies.

If an employer intends to make 20 or more redundancies over a period of 30 days or less then it must enter into 'collective consultation' with the employees' 'appropriate representatives'.

Depending on the circumstances, an employer may also need to consult with its employees on an individual basis, such as to explain an employee's personal situation having been provisionally selected for redundancy.

If an employer proposed to dismiss fewer than 20 redundancies over a 30-day period, then it must only consult with its employees on an individual basis.

Collective consultation

You must consult with all employees who are affected:

- by the proposed redundancies
- by the measures associated with the redundancies (These will be organisational changes that are connected with or come about as a result of the redundancies, such as new technology, working hours, working systems or procedures or lines of communication/reporting)

Note that you must consult with all the employees who are at risk of redundancy even if they are prepared to take voluntary redundancy.

Trade unions

If you recognise an independent trade union, you are required to consult with that union about any proposed redundancies, affecting the employees who fall within the job

categories that the union acts for (whether or not the employee is actually member of the union).

It is possible to recognise a union without realising you have done so and without there being any formal recognition agreement. If there is a possibility that you may have inadvertently recognised a union through partaking in negotiations on previous occasions, no matter how informal, we suggest that you contact Labour Relations Commission (www.lrc.ie) before taking any further steps.

If there is no trade union

If there is no trade union, or if there are employees whose jobs are not covered by the activities of the trade union, then you can ask the affected employees to either:

- give authority to any representatives whom they have already elected to represent them for other matters (not relating to the redundancies) to consult on their behalf; or
- elect and appoint representatives with whom you must consult

Note that the choice is yours to make. You can also choose the amount of representatives to be elected and whether they represent the employees as a whole or different groups or classes of employees. Generally, the majority of employers choose the latter as an employer has a duty to ensure that any elected representatives have authority to consult with them and proving this can be difficult in respect of pre-elected representatives, rather than representatives who are elected for the very purpose of consulting due to the proposed redundancies.

As the employer it is your responsibility to ensure that:

- practical arrangements are made to ensure the election is fair
- there are a sufficient amount of representatives having taken into consideration the different groups or classes of employee affected by the proposed redundancies and that they remain elected for enough time in order to complete the consultation process
- the candidates for election come from the employees who are at risk of being made redundant
- the votes are made in secret and are counted correctly
- the elected representatives have the authority to represent the employees

Otherwise you risk a complaint being made at the Employment Appeals Tribunal.

The consultation period

Consultation must begin at the earliest opportunity and at least 30 days before the first notice of dismissal is given

Consulting the parties

The general purpose of consultations is to investigate whether the proposed redundancies can be avoided altogether or if the numbers at risk of redundancy can be reduced in any way. Notices of termination of employment should be given after the consultations have come to an end.

You must be careful to ensure that the subject matters of the consultations are relevant to the circumstances. In the majority of cases, the consultations should include the business reasons giving rise to the proposed redundancies and should not just concentrate on the effect that the redundancies will have on the employees. However, you should also bear in mind that the proposed dismissals themselves should also be subject of the consultations and matters such as the period of time over which any dismissals will take effect, alternative work patterns or job share proposals, for example, should also be considered.

The union or employee representatives **must** be given the following information in writing:

- the reasons for the proposed redundancies
- the number employees who are at risk of being dismissed
- their general job description/title
- the total number of employees of this description employed in the establishment
- the proposed methods of selection and of carrying out the dismissals including the period over which the dismissals will take effect
- the method of calculation of the redundancy payments other than those required by statute

In addition, the union or employee representatives should be given a copy of any documents relevant to the consultation process, such as documents that support the reasons for the redundancies

The requirement to consult obliges an employer to try to reach an agreement with the trade union or employee representatives on three things in particular:

- the actual need for redundancy
- the number of employees to be made redundant
- the steps to be taken by the employer to alleviate the effects of redundancy

Individual consultations

In a situation where an employer must consult with its employees individually, it should consider the following:

- whether the selection criteria it has used is fair and objective
- whether the selection criteria has been fairly applied to the employees

- whether the employees have been warned about the impending redundancies and consulted
- if there is a union – whether it has been asked for its view, such as on the selection criteria, (even though there is no obligation to consult with the union itself)
- whether there are any alternative jobs available

Note that you must consult with all the employees who are at risk of redundancy even if they are prepared to take voluntary redundancy.

When to consult

Individual employees who are likely to be made redundant must be informed of this as soon as possible after a decision has been made to make redundancies. Consultations should then take place once the employer has decided the selection criteria it will use to choose those employees to be dismissed.

Procedure to follow

The redundancy procedure used by an employer must be reasonable and fair; otherwise you risk a claim for unfair dismissal being brought to the employment appeals tribunal.

What amounts to a fair procedure will depend on the particular circumstances of each case; however, an employer should initially check the following before deciding which procedure to follow:

- the employee's contract and/or any staff manual/company handbook in case they set out any procedural steps that must be taken when contemplating making redundancies (an employer may be bound by contract to follow the procedure and should only depart from it if they have obtained the written agreement of the affected employees)
- whether the employer has historically used a particular procedure, which remains fair and up to date that should be applied to the employees (an employer can depart from using this procedure if it would be reasonable to do so)

If these do not apply then an employer should consider using (as a minimum) the Code of Practice on Grievance and Disciplinary Procedures SI 146/2000. Note that this procedure is not designed for dealing with individual redundancies and will need to be amended significantly.

Whichever procedure you decide to use, you should consider the following:

- Ensure that the procedure is applied consistently - otherwise you risk a claim being made against you on grounds of discrimination.
- Discuss the reasons why you are considering making redundancies with the employees in case they have any ideas which may avoid or reduce the scope of the proposed redundancies.

- Obtain the employees' views and feedback about the proposed selection criteria and amend it where necessary - this helps avoid any errors and may assist if you have to defend the fairness of the criteria at an employment tribunal.
- Ensure that you provide each employee selected for redundancy with a copy of their score (having applied the selection criteria to them) and a breakdown of how it was calculated prior to a meeting to discuss it to help prevent a claim for unfair dismissal.
- Provide all employees selected for redundancy with details of how much they will be paid on being dismissed and a breakdown of your calculations.
- Look for (and keep records of all attempts to find) alternative jobs for the employees who have been chosen for redundancy within the businesses' whole group (including subsidiaries and parts of the business operating at other sites). Do not assume that the employee will not accept a demotion in order to be kept in employment.
- Discuss how the employee should go about organising time off so that they may look for alternative employment (if they are being made redundant).

Ensure you have a reasonable and fair appeal process in place. You should check whether the contents of the employee's appeal also amount to a grievance in which case you should follow the Code of Practice on Grievance and Disciplinary Procedures SI 146/2000.

Consulting the parties

The consultations must focus on:

- ways of avoiding the proposed redundancies
- how the employer could reduce the number of proposed redundancies
- mitigating the consequence of the redundancies

An employer must genuinely consult with their employees to try and reach agreement about how to avoid job losses. Consulting after having made your mind up, and on the basis that you do not intend to change your mind, would not be regarded by the employment appeals tribunal as genuine consultations.

Consequences of failing to consult and/or not using a fair procedure

A large majority of applications to the employment appeals tribunal made after the dismissal of an employee on grounds of redundancy claim that the employer failed to properly consult with the employee on how to avoid job losses. This is usually accompanied by alternative claims that the procedure used as a whole was unfair or unfairly applied to the employee and that the score they were given having applied the selection criteria was unfair as compared to their peers.

You should therefore have as much documentary evidence as possible to counter the claims being made, including the following:

- letters sent to the employee at each stage of the procedure and any documents provided to them at meetings

- notes taken at each meeting (preferably signed by the employee and their representative)
- a written selection criteria and guide on how it should be applied
- previous performance appraisal records and other records used as part of the selection criteria – such as attendance records

Where the circumstances permit, an employer can argue that any defects in the procedure used would have made no difference to the decision to dismiss the employee as a potential defence to reduce the amount being claimed.

Redundancy payments

Statutory redundancy pay

A redundant employee will not be entitled to a statutory redundancy payment unless he/she has at least two years' service. The amount of statutory redundancy pay due is related to age, length of service and average earnings and you must provide the employee with a written statement of how the amount has been calculated.

The Statutory redundancy payment is a lump-sum payment based on the pay of the employee. All employees are entitled to two weeks' pay for every year of service plus one further weeks' pay. There is an upper limit on a week's pay for redundancy purposes, which is reviewed annually. Currently the limit is €600 per week.

Statutory redundancy pay is not taxable. This is the minimum amount you are entitled to. However, if your employer decides to pay more than the statutory redundancy amount then the additional sums are taxable. An employer is no longer entitled to a rebate on redundancy payments.

The Department of Social Protection has a redundancy calculator to calculate how much statutory redundancy pay your employee will be entitled to.

Enhanced redundancy pay

Depending on the terms of your employee's employment contract and/or any staff handbook, your employee may be entitled to a contractual redundancy payment in addition to the statutory redundancy pay.

Failure to pay this will be a breach of contract and may result in a court claim or a complaint being made to the employment appeals tribunal.

Enforcement of payment

The employer is primarily responsible to pay a redundancy payment. You must give your employee a written statement of how the amount has been calculated.

If you fail to make a payment or there is a dispute about the amount, your employee is entitled to refer the matter to the employment appeals tribunal.

Your employee will be entitled to make a claim to the employment appeals tribunal for a redundancy payment or to challenge the amount of the payment if within six months of the dismissal (the 'initial period') any of the following are true:

- payment is agreed and made
- you receive written notice from the employee claiming a redundancy payment
- the employee has referred the question of a right to a redundancy payment, or the amount of the payment to the employment tribunal

- a complaint of unfair dismissal has been presented to the employment tribunal (within three months of the effective date of termination of employment)

However, please note that the six month initial period can be extended if the employee does any of the above after the initial period and so long as it appears to the employment appeals tribunal that it would be just and equitable for the employee to receive a redundancy payment having regard to all the relevant circumstances including why the employee failed to take these steps within the 'initial period'.

Where your employee is entitled to a statutory redundancy payment from you, but you are insolvent and the redundancy payment remains unpaid, the employee may apply to the Social Insurance Fund at the Department of Social Protection for payment.

Re-employment offers

A redundancy payment is intended to compensate your employee for loss of his or her job. Therefore, if he or she is re-employed by you, or by an associated employer, he or she does not need compensation and may not be entitled to a redundancy payment.

Offers to renew or re-engage

An offer to renew employment is the offer of an old job back where, for example, you secure a new customer and find that work is beginning to increase again. An offer of re-engagement involves an offer of a different job with the same or an associated employer.

Even if dismissed by reason of redundancy, employees will lose the entitlement to a redundancy payment if they unreasonably refuse an offer of suitable alternative employment.

It could be provided that your employee is not entitled to a redundancy payment if he or she unreasonably refuses an offer, whether oral or written:

- made by you or an associated employer; or
- made before the contract of employment comes to an end; or
- to re-employ him/her in the same or some other suitable employment

If the offer does not comply with the above requirements, then the employee will be entitled to a redundancy payment, even if they unreasonably refuse it.

Employees who accept an offer that complies with all the requirements are treated as though they had not been dismissed. Employment is not broken, but as there is deemed to have been no dismissal, there is no entitlement to a redundancy payment. This will be the case whether or not the alternative employment was suitable.

If an offer is rejected, then the question of whether or not your employee is entitled to a redundancy payment will depend on whether the alternative employment was suitable.

If the alternative offered was unsuitable, the employee will be entitled to a redundancy payment. If the employee acted unreasonably, the right to the redundancy payment is lost.

Whether or not an alternative offer of employment is suitable is ultimately a question for the employment appeals tribunal to decide. They will objectively look at the key factors that include pay, nature of duty, status, hours, place etc. The question is whether the new job is substantially equivalent to the old job.

It is not always easy for your employee to decide whether they should take up alternative employment or whether such alternative employment is suitable. You may also have doubts as to the employee's suitability for the new job. You could provide that there shall be a 'trial period' of four weeks, beginning with the date on which your employee starts work under the new contract.

If either you or your employee terminates the contract during the trial period for a reason connected with the redundancy, the original dismissal by reason of redundancy will be revived. Whether or not the employee is entitled to a redundancy payment will still be based on whether the alternative employment was suitable. The trial period will now provide some evidence of suitability.

If the terms of employment do not change, but there is merely a change in the identity of the employer, then there is no trial period. If the new employment involves retraining, you and your employee can agree before work starts under the new contract, that the trial period be extended. The agreement must then specify the date on which the extended period ends.

Workplace Relations Act 2015

Introduction

The Workplace Relations Act 2015 commenced on the 1 October 2015 and provided for a range of changes to the bodies and procedures which deal with:

- the resolution, mediation and adjudication of industrial disputes; and
- the resolution of complaints about breaches of employment legislation.

The Workplace Relations Commission was established to take over the functions of National Employment Rights Authority, the Labour Relations Commission and some of the functions of the Employment Tribunal.

The appeal function of the Employment Tribunal was transferred to the Labour Court. All industrial relations, employment law and employment equality disputes are now referred to the Workplace Relations Commission. If there is an appeal, it is made to the Labour Court in all cases.

The Act also provided for a number of changes to a range of employment laws and for new compliance measures. In addition it amended 24 acts and a number of Statutory Instruments. It should be noted that these amendments do not affect cases which were already before a Rights Commissioner when the Act came into effect.

New arrangements

The Act provides that there are two bodies which deal with complaint and disputes in relation to industrial relations and employment law - these being the Workplace Relations Commission (WRC) and the Labour Court.

The WRC took over the functions of the Labour Relations Commission (which was abolished) and also those of the Equality Tribunal other than the appeals process.

The Labour Court continues in existence with a number of different functions. Any appointment as chair and deputy chairs are now made by public competition.

Workplace Relations Commission

The WRC has a board consisting of a chairperson and eight other members. Representatives of employers and employees have two members each - one of these is from a body which seeks to promote equality in the workplace and three are people who have experience and expertise in relation to workplace relations, resolution of disputes in the workplace, employment law or equality law. The main functions of the WRC are to:

- promote the improvement of workplace relations, and maintenance of good workplace relations
- promote and encourage compliance with the relevant laws

- provide guidance in relation to compliance with codes of practice
- conduct reviews of, and monitor developments as respects, workplace relations
- conduct or commission relevant research and provide advice, information and the findings of research to Joint Labour Committees and Joint Industrial Councils
- advise the Minister for Jobs, Enterprise and Innovation in relation to the application of, and compliance with, relevant laws

Making a complaint

Complaints may be made by the person directly affected, that is, the direct complainant or, in some cases, by a specified person acting on behalf of the direct complainant. Complaints can fall under the following headings:

- Pay
- Hours of work
- Term and conditions of employment
- Unfair dismissal
- Industrial relations issues
- Discrimination, equality and equal status issues
- Penalisation
- Whistleblowers
- Redundancy and insolvency
- Protection of young people at work
- Minimum notice
- Transfer of undertaking
- Fixed term and part-time work
- Parental, carer's, paternity, parent's maternity and adoptive leave
- Agency working

Mediation

A complaint can be referred to a mediation officer if it is considered that the complaint can be resolved without being referred to an adjudication officer and the parties don't object to it being dealt with in this way. Mediation will be conducted in private. Any agreement reached as a result of mediation will be legally binding on the parties.

Adjudication

If the parties involved decide not to go to mediation, or it is unsuccessful, the complaint or dispute will be referred to an adjudication officer. The adjudication officer will then conduct an inquiry. The parties will have an opportunity to be heard and to present any relevant evidence. The adjudication officer then makes a decision in accordance with the relevant law and gives that decision in writing to the parties.

Changes to employment legislation

Organisation of Working Time Act 1997

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The Organisation of Working Time Act 1997 was amended to provide for the new mechanisms for dealing with disputes and complaints. Another amendment has been implemented following the decision by the Court of Justice of the European Union in the Schultz-Hoff case. This case dealt with how time spent on sick leave should be treated for the purposes of the accrual of annual leave. Thus, if you are on long term sick leave, you may accrue and retain annual leave for up to 15 months from the end of the year in which it accrued. If you leave employment and you have accrued such annual leave you are entitled to payment in lieu.

Unfair Dismissals Act 1977

It used to be the case that claims in relation to unfair dismissals could be dealt with by a Rights Commissioner (where both parties agreed) or else by the EAT. Now such claims are brought to the WRC and dealt with by an adjudication officer. The adjudication officer's decision may be appealed to the Labour Court. The decision by the Labour Court may be appealed to the High Court on a point of law.

Equal Status Act 2004

Complaints in relation to a breach of this Act are made to the WRC. If there is an appeal it is made to the Circuit Court.