VIBERTS
EMPLOYMENT FACTSHEET

Topics covered: Disciplinary & Grievance / Unfair Dismissal / Constructive Dismissal / Notice & Breach of Contract / References

Disciplinary & Grievance

The Minister for Social Security issued a Code of Practice on Disciplinary and Grievance Procedures which applied from 1st April 2014. The purpose of the Code of Practice is to assist both employers and employees in dealing with matters relating to discipline and grievance in a fair and appropriate way. Failure by an employer to observe the Code of Practice will not in itself render an employer liable to legal proceedings, however, the Code of Practice is admissible in evidence before the Tribunal. Compliance with the Code of Practice will be relevant to the Tribunal in reaching its decision as to whether or not an employer has acted reasonably.

Every employer must familiarise themselves with the provision of the Code of Practice and have its own disciplinary and grievance policies and procedures in place that meet with the requirements of the Code of Practice and set out how disciplinary and grievance matters will be dealt with within the business.

Unfair Dismissal

Who is eligible to claim for unfair dismissal?

Any employee who was employed before 1st January 2015 and has six months' continuity of service. Any employee who was employed after 1st January 2015, and has one year's continuity of service. To bring a claim for unfair dismissal the employee must have been dismissed.

What counts as unfair dismissal?

For a dismissal to be fair, the employer must show that it had a potentially fair reason for dismissal and that it acted reasonably in treating that reason as sufficient to justify dismissing the employee.Potentially fair reasons for dismissal are capability (poor performance or ill health) or qualifications, conduct, redundancy, breach of a restriction imposed by law (for example Control of Housing and Work legislation). Failing any of these reasons, what is referred to as 'some other substantial reason'. 'Some other substantial reason' is a category designed to catch potentially fair dismissals that do not fall into any of the other categories. For example, a failure by an employee to accept changes to terms and conditions, or a personality clash.

Once the employer has established a potentially fair reason for dismissal, the Tribunal will then decide if the employer acted reasonably in dismissing the employee for that reason. The question of fairness is usually divided into two parts. Firstly, was the dismissal procedurally fair and secondly, was it substantively fair?

Procedural fairness

Where the employer fails to carry out a fair procedure prior to dismissing an employee, the employer cannot successfully argue that the dismissal should be regarded as fair, because even if a fair procedure has been carried out, it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. In such circumstances, having found that the dismissal was unfair because of the procedural failings, the Tribunal will usually reduce the amount of compensation the employee would have otherwise received, to reflect the possibility that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

The procedure the employer should follow prior to a dismissal will depend upon the reason for dismissal. For example, in conduct dismissals, the Code of Practice on Disciplinary would be relevant. There are some principles of fairness that apply to all dismissals. For example, the employee should know that they are at risk of dismissal and the reason why, and should be allowed to put forward their case at a meeting. The employee should also be given the right to appeal the decision to dismiss them. In dismissals for poor performance or conduct, the employer should investigate the issue and inform the employee in writing that there are issues. A capability or disciplinary hearing should be conducted and the employee should be informed of the decision in writing. The employee should be given the right to appeal the decision. In redundancy dismissals the procedure for individual and possibly collective consultation should be followed.

Substantive fairness

When applying the substantive fairness test, the Tribunal will consider whether the actions of the employer were within the band of reasonable responses of a reasonable employer, taking into account all the circumstances of the case. The Tribunal must not substitute its own view and must only take into account facts known to the employer at the time the decision to dismiss was made. The Tribunal will also consider the size and administrative resources of the employer's organisation.

The Tribunal will expect larger organisations to have more sophisticated policies and procedures than small organisations.

Constructive Dismissal

Constructive dismissal occurs when the employee terminates employment. However, it can be said that the real reason for the termination was a fundamental breach of the contract of employment on the part of the employer. An employer threatened with a claim for constructive unfair dismissal should take legal advice. The issue will be whether the employee was in fact forced to leave employment due to the employer's conduct. What amounts to a fundamental breach of contract will depend upon the facts of the case and it is possible that a series of events, followed by a last straw event (which may not in itself constitute a fundamental breach of contract) is sufficient to justify the employee leaving.

Notice & Breach of Contract

The contract of employment usually sets out what notice the employee is bound to give the employer, and vice versa, on termination of employment. Failure to comply will constitute a breach of contract (wrongful dismissal). Where no notice is stipulated, reasonable notice must be given.

What is reasonable in any given situation will depend upon the circumstances. However, the Employment (Jersey) Law 2003 sets out minimum periods of notice. These equate to one week's notice for those employed for more than a week and less than 2 years and thereafter one week's notice per year of service, with a maximum of 12 weeks.

Where contractual notice is less than the minimum period of notice set out in the Law, the minimum periods of notice set out in the Law prevail. The employer and employee may agree to waive notice or agree to a shorter notice period.

The employment contract may detail how notice is to be given, for example; in writing. Furthermore, the employer may include in the contract the power to make a payment in lieu of notice to the employee. There are a variety of issues that may arise in relation to notice, for example; giving effective notice, whether notice may be withdrawn, short notice, waiver of notice and payments in lieu of notice. It is important for the employer to have clear notice policies in place.

References

There is no general or statutory obligation on the employer to provide a reference for a former employee. Generally speaking, references merely state the position of the employee, the dates of employment and sometimes the reason for leaving. Providing a misleading or inaccurate reference may leave the employer open to litigation so they tend to keep references factual.

For expert legal advice on employment law or any of our legal services, please contact us

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