A summary of the law on:

Unfair Dismissal and Redundancy

THOMPSONS NI

Employees are protected under the Employment Rights (Northern Ireland) Order 1996 from being unfairly dismissed or chosen unfairly for redundancy.

What is unfair dismissal?

Unfair dismissal is a statutory right giving employees the right to complain to a Tribunal that their dismissal was unfair or unreasonable. In most cases employee will need to have been employed for one year in order to pursue a claim for unfair dismissal – there is an exception to this rule in cases of automatically unfair dismissal.

What is an automatically unfair dismissal?

Certain dismissals are "automatically unfair". Where an employee is alleging that they have been dismissed for an automatically unfair reason, there is no qualifying period required in order to pursue such a case (i.e. an employee does not need to be employed for one year before bringing such a claim). Examples of automatically unfair dismissals include cases where an employee's employment is terminated due to:

- membership (or non-membership) of a trade union;
- trade union activities;
- health and safety activities;
- action taken to enforce certain statutory employment rights;
- pregnancy or maternity leave;
- parental leave, paternity leave, adoption leave or emergency time off to look after dependants;
- an application for flexible working;
- action taken to enforce their rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 or the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002;
- a refusal to give up a right under the Working Time Regulations;
- action taken to enforce their right to the National Minimum Wage;
- a protected disclosure made under the whistle blowing legislation;
- activities as a pension fund trustee;
- the employee's work being transferred to another employer under the Transfer of Undertakings (Protection of Employment) Regulations;
- taking part in lawful industrial action;
- acting as an employee representative for the purposes of collective redundancy consultation; for the purposes of consultation under the Transfer of Undertakings (Protection of Employment) Regulations; or consultation pursuant to the Information and Consultation of Employees Regulations (Northern Ireland) 2005;

- having sought to exercise their right to be accompanied at a grievance or disciplinary hearing (or having sought to accompany someone to a grievance or disciplinary hearing).

In certain circumstances, in addition to arguing that their dismissal is unfair, an employee might allege that it is also discriminatory on the grounds of race, sex, disability, religion, political opinion, sexual orientation or age. Where an employee is alleging that their dismissal amounts to unlawful discrimination, there is no qualifying period required in order to pursue such a case (i.e. an employee does not need to be employed for one year before bringing such a claim).

When is a dismissal fair?

The law says that it is fair for an employer to dismiss an employee for one of the following reasons:

- Misconduct at work
- Lack of capability (or qualifications) to do the job
- Redundancy
- A statutory requirement prevents the employer from continuing to employ the individual
- Some other substantial reason

Even if the employer convinces a Tribunal that they dismissed the employee for one of those reasons, they still have to show that they followed the statutory dismissal and disciplinary procedure otherwise the dismissal will be automatically unfair (although unlike other automatically unfair dismissals an employee does have to be have been employed for at least a year to pursue an unfair dismissal claim on this basis).

In general terms, the statutory dismissal and disciplinary procedure states that an employer should send the employee a written statement setting out the circumstances that have led them to contemplate dismissal and setting out an invitation to a meeting to discuss the matter. A meeting should then take place, after which the employer should inform the employee of the disciplinary decision and of their right to appeal. If an employee exercises their right of appeal, an appeal hearing should take place, after which the employer should inform the employee of their final decision.

Further information on the statutory dismissal and disciplinary procedure (including the right to be accompanied at a disciplinary hearing) can be found in the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures. The Code of Practice is available from the Labour Relations Agency's website – www.lra.org.uk.

If the employer convinces a Tribunal that there was a fair reason for dismissal and that a fair procedure was followed, the dismissal may still be unfair if the decision to dismiss fell outside the band of reasonable responses open to the employer in the circumstances.

Are employees protected if they go on strike or are locked out?

To be protected against unfair dismissal in connection with a strike or lock out, one of the following conditions needs to be fulfilled:

- The dismissal must have taken place within 12 weeks of the start of the protected industrial action;
- The dismissal took place more than 12 weeks after the start of the protected industrial action but the employee had ceased taking part in the action within the 12 week period;
- The dismissal took place more than 12 weeks after the start of the protected industrial action, the employee had continued to take part in that industrial action but the employer had failed to take such procedural steps as would have been reasonable to resolve the dispute.

There is also a right to bring a claim for unfair dismissal if all or some employees are dismissed during an official strike or lockout but only a selected few are re-engaged within three months.

The protection outlined above will not apply if the industrial action is unofficial.

What is the procedure for bringing a claim for unfair dismissal?

The time limit for lodging a claim for unfair dismissal at the Tribunal is three months from the effective date of termination of the contract of employment.

What remedies are available?

If a Tribunal finds in favour of the employee it can order:

- Reinstatement – an order that the employee should be given their job back (with no loss of earnings or security). Tribunals rarely order reinstatement;
- Re-engagement – an order that the employee should be given another job with the same employer. Tribunals rarely order re-engagement;
- Compensation – a basic award calculated in a similar way to a redundancy payment plus a compensatory award to compensate the employee for the financial losses incurred as a result of the dismissal.

The maximum compensatory award is currently £72,300 (the figure is usually updated annually). It is rare for Tribunals to award the maximum sum (such awards usually occur where the employee is a high earner). Most Tribunals will order a compensatory award which includes loss of earnings to the date of hearing plus a limited amount to compensate for future loss following the hearing.

Compensation may be increased or reduced if either party fails to follow the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures. The Code of Practice is available from the Labour Relations Agency's website – www.lra.org.uk.

What is interim relief?

In some special cases, employees can apply urgently for an order for interim relief. Examples of such cases include where the reason for dismissal was that the employee carried out trade union or health and safety activities; that the employee was a pension fund trustee; that the employee was acting in relation to union recognition; or that the employee was exercising their right to be accompanied at a disciplinary or grievance hearing.

If the application for interim relief is successful, the Tribunal will order that the employee is reinstated to their job pending the outcome of the full hearing of their case. Successful interim relief applications are rare.

Any application for interim relief has to be lodged with the Tribunal within seven days of the dismissal. There are other strict procedural requirements that need to be followed when lodging an application for interim relief. It would be sensible to seek advice about the procedural requirements if you are contemplating making an interim relief application.

What is constructive dismissal?

Constructive dismissal is when an employee resigns in response to a significant and fundamental breach of their contract of employment by their employer.

In an ordinary unfair dismissal case, it is usually clear that the employee has been dismissed and it is then for the employer to establish a fair reason for that dismissal. In a constructive dismissal case, the employee has resigned and on the face of it there has been no dismissal by the employer.

As a result, the first stage in any constructive dismissal case involves the employee establishing that their resignation actually amounts, in legal terms, to a dismissal by the employer. To do this the employee must establish the following:

- That the employer breached the contract of employment;
- That the breach of contract was sufficiently serious as to justify the resignation (i.e. it must have been a fundamental breach of contract);
- That the employer's fundamental breach of contract caused the resignation (i.e. that the resignation was not for some other unrelated reason);
- That the resignation did not take place too long after the alleged fundamental breach of contract (i.e. if there is a long delay before the decision to resign is taken the employee may be held to have accepted the alleged fundamental breach of contract and as a result the right to claim constructive dismissal will likely be lost).

An employee should think long and hard before resigning. Constructive dismissal cases are notoriously difficult to win. Once the employee has resigned they will have no income and there will be no guarantee that they will have a viable claim for constructive unfair dismissal.

A claim for constructive unfair dismissal must be lodged with the Tribunal within three months of the date the employee's employment ends.

Compensation may be reduced if the employee fails to follow the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures. The Code of Practice is available from the Labour Relations Agency's website – www.lra.org.uk.

What is wrongful dismissal?

Wrongful dismissal occurs where the employee is dismissed in a manner which breaches the terms of their contract of employment. For example, a wrongful dismissal will arise if the employee is dismissed without being given the correct contractual notice. In such circumstances the employee can potentially claim compensation for the loss of earnings sustained during the notice period they should have received.

An employee is entitled to receive the following minimum statutory notice from their employer (although the notice period in their contract may be more generous):

- One week's notice where the employee has been employed for a period of between one month and two years;
- A week's notice for each year of service where the employee has been employed for a period between two years and 12 years;
- 12 weeks' notice where the employee has been employed for 12 years or more.

An employee will not be entitled to notice if they have already committed a fundamental breach of their contract. In those circumstances the employer can dismiss the employee without notice (e.g. in a case of gross misconduct).

What is a payment in lieu of notice?

In some cases an employer will not require the employee to work their notice and will instead give them a payment to cover the earnings they would have received had they worked their notice.

What is redundancy?

The law says there is a genuine redundancy situation if an employee is dismissed because the business as a whole (or the particular workplace where the employee worked) has closed down. A business does not have to shut down or be in financial difficulties for there to be a genuine redundancy situation. A redundancy situation can occur if the employer believes that the required work can be done with less employees (e.g. through the use of new machinery).

What is a redundancy payment?

If there is a genuine redundancy situation an employee is usually entitled to a statutory redundancy payment. An employee is generally eligible for a statutory redundancy payment if they have been continuously employed for two or more years since the age of 18.

The amount of a statutory redundancy payment is based on the employee's age and their length of service. An employee is entitled to receive:

- Half a week's pay for each completed year of service up to the age of 21;
- One week's pay for each completed year of service between the age of 22 and 40;
- 1½ weeks' pay for each completed year of service at age 41 or over.

The maximum number of years taken into account is 20. Where an employee has more than 20 years of service, the most favourable 20 years are taken into account. The maximum redundancy payment available is 30 weeks' pay (i.e. 20 years of service all at age 41 or over),

The amount of a week's pay is based on the employee's gross salary and is subject to a statutory maximum figure. The current statutory maximum is £430 (the figure is usually updated annually).

Employees can lose their right to a statutory redundancy payment if:

- They are offered their old job back (or a suitable alternative) and they unreasonably refuse the offer;
- They are dismissed for gross misconduct (or resign) during the period after they have received notice that they are due to be made redundant.

What is a contractual redundancy payment?

Some employees also benefit from more generous contractual redundancy payments (over and above their statutory entitlement). An employee will only be entitled to an enhanced redundancy payment if it is a contractual right. Sometimes employee handbooks etc refer to enhanced redundancy payments which are stated as being subject to the employer's discretion. Unless very specific legal requirements are met, employees will not be able to enforce an entitlement to a discretionary enhanced redundancy payment.

What happens if an employer does not make a redundancy payment?

Employees have three months to bring a claim to the Tribunal in relation to an employer's failure to pay a contractual redundancy payment. Such a claim would be pursued as a breach of contract claim in the Tribunal. The Tribunal only has jurisdiction to deal with breach of contract claims where the amount claimed does not exceed £25,000. If the contractual redundancy payment claimed is more than £25,000 the claim would have to be pursued in the civil courts where the time limit is six years.

If an employee is contemplating pursuing a claim to the Tribunal for a statutory or contractual redundancy payment, they must follow the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures. The Code of Practice is available from the Labour Relations Agency's website – www.lra.org.uk. Compensation may be reduced if the employee fails to comply with the Code.

What are protective awards?

Before making 20 or more employees redundant, employers have to consult in good time with any independent trade union which is recognised for collective bargaining proposes (where there is no recognised union, the employer has to consult with elected representatives). Appropriate information must be provided to the union and the employer has to consult with a view to reaching an agreement.

The consultation must be at least 90 days where it is proposed to make 100 or more employees redundant (or at least 30 days where it is proposed to make between 20 and 99 employees redundant).

If the employer fails to do so, the union can apply to the Tribunal for a "protective award". Depending on the circumstances, the "protective award" can be anything up to 90 days' pay for each employee affected. The time limit for lodging such a claim with the Tribunal is normally three months from the date the dismissals take effect.

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