LEWIS SILKIN

Ius Laboris UK Global HR Lawyers
LEWIS SILKIN

Termination of employment

Inside

Wrongful dismissal

Unfair dismissal

Unlawful discrimination

Redundancy

Transfer of undertakings

Introduction

Terminating employment can create a plethora of unwanted issues for the employer, including claims of wrongful or unfair dismissal.

To minimise the likelihood of such claims arising, and to ensure that the process is managed in the best possible way, it is important that employers are alive to the issues that may arise if a contract of employment is terminated.

See also our Inbrief on *Settlement agreements*, which looks at the most common means for employers and employees to settle claims and/or effect a clean break from the employment relationship.

Claims on termination of employment

There are two different types of claim that may be brought by an employee which relate to the actual termination of employment:

- Wrongful dismissal: This is a common law claim that the dismissal was in breach of the terms of the contract of employment
- Unfair dismissal: This is a statutory claim under the Employment Rights Act 1996 (ERA) focusing on the reasonableness of the employer's decision to dismiss the employee or the way in which the dismissal was carried out

Each of these is discussed further below.

Wrongful dismissal

The most common situation leading to a wrongful dismissal claim is the employer's failure to give proper or sufficient notice of termination of employment. Generally, an employee's entitlement to notice is as follows:

- Employees with at least one month's but less than two years' continuous service must receive a minimum of one week's notice. After that, employees are entitled to at least one week's notice for each year of service, up to a maximum of 12 weeks' notice after 12 or more years' service ("statutory minimum" notice)
- If there is a notice provision in the contract of employment, then that applies (unless it is less than the statutory minimum in which case that minimum is substituted)
- In the absence of any contractual provision, a "reasonable" notice period will be implied into the contract, which may be more than the statutory minimum

In a fixed-term contract, unless there is provision for earlier termination by notice, the contract will continue until the fixed-term expires.

Summary dismissal

Dismissal without notice is often called "summary dismissal". Employment contracts often contain provisions for dismissal without notice in certain situations (e.g. insanity, insolvency, serious breach of the terms of the contract). In any event, under the common law, an employee may be summarily dismissed for gross misconduct without notice or pay in lieu of notice. To justify summary dismissal, the misconduct must be so grave as to be a fundamental breach of the contract of employment.

Dismissal without notice where the employer is not entitled to do so - for example, because the employee is not guilty of the gross misconduct in question - constitutes a wrongful dismissal. An employee can also claim wrongful dismissal where he or she resigns in response to a serious breach of contract by the employer, which can include a breach of the duty of trust and confidence which is implied into all employment contracts.

Compensation

A wrongful dismissal entitles the employee to damages to compensate for the breach of contract. These are calculated by reference to the employee's contractual entitlement. The court or tribunal seeks to put the employee in the financial position he or she would have been in had the contract been honoured. The calculation therefore takes account of:

- the effects of taxation
- mitigation (i.e. whether the employee has a new job)
- the effect of accelerated receipt of lump sum compensation
- specific contractual provisions, e.g. bonus, commission, profit-related pay etc

Where an employee is entitled to a long notice period or has a fixed-term contract which does not allow for earlier termination, the damages can be substantial - particularly where the case involves a senior employee entitled to benefits such as bonuses and executive share options.

If disciplinary procedures are incorporated into the contract of employment, then failure to follow these on the employer's part can amount to a breach of contract and therefore wrongful dismissal. The employee can claim for losses incurred during the period by which the employment would have been extended while the employer was following the correct disciplinary procedure.

Pay in lieu of notice

Employers may wish to give a payment in lieu of notice if they do not wish an employee to work

during the notice period. Some contracts expressly allow pay in lieu of notice; others do not. If the contract permits pay in lieu, then to do so is not a breach of contract.

If the contract does not say that the employer can pay in lieu, then the payment effectively amounts to payment in advance of the damages for the employer's breach of the contractual notice provisions. Where a contract is terminated in breach in this way, the employee may choose not to accept the termination, or may bring a claim for breach of contract. To reduce the incentive for an employee to claim damages for breach of contract, the payment in lieu of notice should cover the value of any fringe benefits, commission, etc. which the employee loses during the notice period. As a result of the technical breach of contract by the employer, its rights under the contract fall away, such as the right to enforce any post-termination restrictive covenants.

Prior to 6 April 2018, "non-contractual" PILONs were not taxable as earnings and would generally have benefited from the £30,000 tax exemption.

The tax treatment of PILONs no longer depends on whether there is a pay in lieu of notice clause in the contract. In all cases where a post-employment termination payment is made, an employer must now split the payment between amounts which should be treated as earnings (including any part which reflects basic pay for the notice period) and subject that to tax and NIC, and amounts benefiting from the £30,000 tax exemption. Please see our Inbrief on *Frequently asked questions on termination payments* for further details.

Unfair dismissal

Unfair dismissal is the most common type of claim pursued by employees in the Employment Tribunal (ET). In contrast to a wrongful dismissal action - where the sole issue is whether the employer acted in breach of the terms of the contract - an unfair dismissal claim under ERA focuses on the reasonableness of either the employer's decision to dismiss and/or the procedure followed by the employer in carrying out the dismissal. A dismissal which is in accordance with the terms of the contract of employment may nevertheless be held unfair.

In most situations, to qualify for the right to claim unfair dismissal, an employee has to have a period of two years' continuous employment.

Compensation

In the event of a successful claim for unfair dismissal, the tribunal may order reinstatement or re-engagement of the employee if this is practicable in the circumstances, but this is very rare in practice. In most cases, the remedy awarded is compensation. This comprises a basic award (equivalent to a statutory redundancy payment - see below) and a compensatory award. The upper limit on the compensation award is the lower of £89,493 (from 6 April 2021) or 52 weeks' pay. The compensatory award is what the tribunal considers "just and equitable" in all the circumstances taking account of the employee's losses since the dismissal and looking to the future. The employee is expected to mitigate their loss by making reasonable efforts to find a new job.

Various factors may go to reduce the unfair dismissal compensatory award. For example, the tribunal may make a percentage reduction to reflect the fact that the employee contributed to the dismissal by his or her own fault. Or, if the dismissal is unfair because the employer adopted an unfair procedure, the tribunal may reduce the award if the employee may have been dismissed in any event even if proper procedures had been followed.

The dismissal

In an unfair dismissal claim, it is for the employee to show that they were dismissed. This can either be a straightforward express dismissal (e.g. "You're fired!"), the expiry of a fixed-term contract without it being renewed by the employer, or a constructive dismissal (where the employee resigns in response to a serious breach of contract by the employer). The ET will uphold the claim unless the employer can show an acceptable reason for the dismissal. In outline, the acceptable reasons are:

- lack of capability (including ill health or injury)
- conduct
- redundancy
- that the employee could not continue in the job without contravention of a statutory duty or restriction
- "some other substantial reason" of a kind such as to justify the dismissal (e.g. a business reorganisation)

If one of these reasons is established, the ET goes on to determine whether the dismissal was fair or unfair, the key question being whether or not the employer acted reasonably in dismissing the employee for the reason in question. The outcome largely depends on whether the employer followed the procedure appropriate for the type of reason for dismissal.

Certain categories of dismissal are automatically unfair, for example:

- dismissal on grounds of an employee's trade union membership or activities
- health and safety-related dismissals
- dismissal for making a protected disclosure (whistleblowing)
- dismissal for asserting a statutory right
- pregnancy or maternity-related dismissals

In most cases, no qualifying period is necessary to bring an automatically unfair dismissal claim.

There is also no necessity for any qualifying period where the reason for dismissal is or relates to the employee's political opinion or affiliation.

Unlawful discrimination

The Equality Act 2010 applies to termination of employment, meaning that a dismissal may be an act of discrimination. It is unlawful to discriminate based on any of the following "protected characteristics":

- sex
- marriage or civil partnership
- gender reassignment
- pregnancy or maternity
- race
- religion or belief
- sexual orientation
- age
- disability

A dismissal may lead to a claim of direct discrimination, indirect discrimination, or

victimisation.

It is also possible for ex-employees to make a claim for discrimination, where discriminatory conduct by the employer is closely connected to the previous employment relationship – for example, providing a bad reference for an ex-employee.

Redundancy

Employees who have been continuously employed by their employer for at least two years are entitled to a statutory redundancy payment if they are dismissed on grounds of redundancy. An employee loses the right to a redundancy payment if he or she unreasonably refuses an offer of suitable alternative employment.

The amount of the redundancy payment is based upon the employee's age, length of service and gross average wage. The basic calculation is:

- one-and-a-half weeks' pay for each year of service when the employee was not below the age of 41
- one week's pay for each year in which the employee was not below the age of 22;
- half a week's pay for any other years of employment

The number of years' service that counts is limited to 20, so the maximum multiple will be 30 for those aged 41 or more (20 × 1½). The limit on a "week's pay" for these purposes is £544 (as of 6 April 2021), which means that the maximum possible statutory redundancy payment is currently £16,320.

Employees may be entitled to more generous redundancy/severance payments under the terms of their contracts of employment. If an employee is not paid the enhanced contractual redundancy pay to which he or she is entitled, there could be a claim for breach of contract in either the courts or the employment tribunal.

Employees who are dismissed as redundant may also claim unfair dismissal (see above). Even if the employer can establish a genuine redundancy as the reason for dismissal, it might still be found to be unfair - for example, because the employer adopted an unreasonable method of selection, or failed to engage in adequate consultation with the employee.

Where 20 or more redundancies are proposed, there are also extensive obligations on employers to notify and consult with recognised trade unions or elected employee representatives about the forthcoming redundancies – see our Inbrief on *Collective redundancies*.

Transfer of undertakings

The Transfer of Undertakings (Protection of Employment) Regulations 2006 - widely known as "TUPE" - provide special protection for employees when the business in which they are employed is transferred to a new employer. TUPE applies not only where a trade or business is sold to a new owner, but in a range of other situations as well, although share takeovers are not covered. It applies, for example, where part of an undertaking (such as its cleaning operation) is "contracted out" to an outside service provider, or where a contracted-out service moves from one service provider to another (i.e. a "service provision change" takes place).

TUPE is complex, but essentially provides for the employees affected by a transfer automatically to continue in their jobs with their existing terms and conditions and continuity of employment preserved intact. In essence, it is as if the new employer steps into the old employer's shoes. Dismissals before or after the transfer by reason of the transfer itself are automatically unfair.

TUPE also requires the provision of information to and collective consultation with recognised trade unions or elected employee representatives concerning the transfer. See our Inbrief *TUPE* for more information.

For further information on this subject please contact:

Shalina Crossley
Partner
+44 (0) 20 7074 8152
shalina.crossley@lewissilkin.com

LEWIS SILKIN

5 Chancery Lane – Clifford's Inn
London EC4A 1BL
DX 182 Chancery Lane
T +44 (0)20 7074 8000 | F +44 (0)20 7864 1234
www.lewissilkin.com

This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Please let us know by email (info@lewissilkin.com) if you would prefer not to receive this type of information or wish to alter the contact details we hold for you.

© 2021 Lewis Silkin LLP