FACTSHEET – Dismissing Short-Serving Employees – Redundancy

Employees with less than two years' continuous service at the date of dismissal, known as "short-serving", do not have the right to claim ordinary (i.e. general) unfair dismissal. Nor generally, to a statutory redundancy payment when dismissed for redundancy. But there are still other claims they may have e.g. automatic unfair dismissal, breach of contract etc.

This factsheet covers what legal provisions need to be considered before the decision is taken to follow a reduced redundancy process for a short-serving employee. For an example of a reduced redundancy process for a short-serving employee who is the only person performing their role, see Redundancy Process Example – Short-Service Stand-alone [3.1 RED EX].

Please note that this factsheet does not cover Northern Ireland where there are differences in law and separate advice from your advisers should be obtained.

Risk Evaluation

Some of the main claim risks are set out below but legal advice from your advisers on the particular facts and circumstances of individual case should always be obtained before following a reduced redundancy procedure. It will often be necessary to make a commercial decision based on weighing up the risks of dismissal versus the benefits to the business. The benefits of a quicker dismissal process may be saved management time and not having to place other employees at risk of redundancy or pay a redundancy payment to another employee or to this short-serving employee (since employees must also have two years' continuous service for a statutory redundancy payment – see Entitlement to Redundancy Pay [2.5 RED FS] for further information).

Dismissing close to the two-year mark

Generally, an employee can make a claim for ordinary unfair dismissal if they have been continuously employed for two years or more. It is important to note that their length of continuous employment will include their statutory notice entitlement and thus with this added on it may take them over the two-year mark where they are dismissed close to it.

For this reason, tactically, sometimes an employer dismisses an employee without notice (or without pay in lieu) in an attempt to prevent the employee from accruing the two-year period of employment. However, legislation operates to treat the employee as continually employed until the expiry of the statutory minimum period of notice. In the case of an employee employed for one month or more but less than two years, this period is 1 week. So, an employee dismissed at the 1 year 51-week mark without notice will be entitled to pursue a claim for unfair dismissal since the effective date of termination will be one week later due to the required notice period, at two years. (NB. Please note that how the end of the period of continuous employment is determined is different where the employee is seeking a statutory redundancy payment. The end date is usually identical in either case, but there are exceptions – see Entitlement to Redundancy Pay [2.5 RED FS] for further information.)

Step 1 - Check whether you are still within the two-year mark for dismissal

1. Check what the start date of continuous employment is for the employee. This will be the date they first started working for you (which may have been in a different job/under a different contract of employment to their current role so long as there is no break of more than one week between them) unless they transferred employment to you under the Transfer of Undertakings (Protection

of Employment) Regulations (TUPE) in which case it will be the start date of their previous employment.

2. Calculate how long they have been employed since that date (i.e. since the start date of continuous employment). Note both the first day and last day of the period counts. For example, an employee who starts employment on 10 January will have a month's continuous employment on 9 February and a year's continuous employment on 9 January the following year.

3. Then add on their statutory notice period. The statutory notice period is calculated as follows:
   - An employee who has been employed (as calculated per 2 above) for more than one month but less than two years is entitled to one week's notice of termination.
   - Where the employee has been employed (as calculated per 2 above) for two years or more they are entitled to one week's statutory notice for each year of continuous employment (so 2 weeks for 2 years, 3 weeks for 3 years etc) up to a maximum of 12 weeks (so after 12 years, their notice entitlement stays capped at 12 weeks).

4. This will then give you the length of their continuous employment under legislation. If this period is more than two years then a short dismissal process is not suitable and you will need to follow a full redundancy process in the normal way to stay compliant with the law. If you are close to the cut-off date of two years, then you need to take immediate advice from your advisers as to whether there is time to follow a shortened process.

The automatically unfair reasons for dismissal

There is a large list of categories where no qualifying period of employment is necessary and any dismissal will be deemed automatically unfair from day one of employment if the reason or principal reason for dismissal falls into one of the categories. These include dismissals connected to pregnancy or maternity, trade union activities, official industrial action, health and safety activities and assertion of a statutory right, to name a few. It is also automatically unfair to dismiss an employee:

- **by reason of redundancy where the employee was selected for redundancy for one of the automatically unfair reasons e.g. a family-related reason such as pregnancy.**
- if the reason or principal reason for dismissal is because they have made a protected disclosure. Such claims are commonly referred to as whistle blowing claims.

The full category list of automatically unfair dismissal claims please refer to the Checklist in the Disciplinary section, Automatically Unfair Reasons for Dismissal [3 DISP CL].

Step 2 - Check that the reason or principal reason for the employee's proposed dismissal does not fall into the automatically unfair reasons checklist referred to above.

Even where it does not fall into one of the automatically unfair reasons in the checklist but there is a possibility that an employee could argue that it was (e.g. the employee is the only person who is pregnant and the only one to be placed at risk), you will need evidence to demonstrate to an Employment Tribunal that the reason was because there was a genuine redundancy situation and that you followed a fair process. Therefore, in this situation, we would advise that you do not follow a shortened process, but that you follow the full normal process.

Unlawful discrimination

Discrimination claims also have no minimum qualifying service requirement. This means that if the dismissal can be connected to the age/disability/gender reassignment/marriage or civil partnership status/pregnancy or maternity/race (including colour, nationality and ethnic or national origins)/religion or belief/sex or sexual orientation then the dismissal will be high risk regardless of length of service. For full details on Discrimination see our factsheet, Discrimination Overview.

Where you are selecting employees from a pool to be made redundant, if you use as a sole criterion, LIFO (Last In First Out) and they are all short-service, this is likely to be indirectly discriminatory on the grounds of both age and sex. In the absence of justification, a dismissal may be both unfair and discriminatory. It is therefore unwise to rely solely on these criteria and follow a shortened redundancy procedure. Other objective factors should also be used and a full normal redundancy selection consultation process should be carried out.

Step 3 - Check that the reason or principal reason for the employee's proposed dismissal is not connected to a discriminatory reason including short-service.

Again, even where there is no discriminatory reason but there is a potential discrimination angle that the employee could argue e.g. because they are pregnant, disabled etc you will need evidence to demonstrate to a tribunal that the decision to dismiss was not based on such. As above, we would advise that you do not follow a shortened process, but that you follow the full normal process.

Do not use short-service as a sole criterion to select for redundancy from a pool or follow a shortened process in that instance. Follow a full normal redundancy selection consultation process.

Contractual claims

It is important to note that if you are found to be in breach of contract by any of the claims below (e.g. a failure to follow a contractual redundancy procedure or a failure to provide correct notice entitlement) the employee would no longer have to comply with their contractual obligations either and so you may lose your beneficial rights and protections under the employment contract, such as confidentiality obligations and restrictive covenants. See section on wrongful dismissal and restrictive covenants in our factsheet on Wrongful Dismissal for further information.

Contractual redundancy and dismissal procedure

Where it is a term of the contract of employment that the employer's redundancy procedure must be followed prior to the dismissal of an employee, if you dismiss without doing so you are at risk of a breach of contract claim for failing to follow your own procedure regardless of an employee's length of service. In such a case, if the employee can show that carrying out the full procedure would have taken longer and extended the period of employment, they may be able to claim damages for lost wages for that period it would have taken.

Therefore, if employers want the option of being able to follow a reduced redundancy procedure, it is recommended that contracts of employment and/or the employee handbook either don't refer to any redundancy procedure at all or clearly state that any redundancy procedure is non contractual and/or at the very least, expressly state that you reserve the right to depart from the procedure for short-serving employees with less than two years' service. We don't recommend to clients having a redundancy procedure and would not draft one in an employee handbook as there is no legal requirement to have one and any procedure should be tailored to the individual circumstances.

Step 4 - Check that any redundancy policy and procedure you have is non contractual and/or refers to not applying to employees with less than two years' service.

If you are a Full-Service* client, your advisers will check it if you send your current one to them along with the employee's contract. If it is contractual and/or does not refer to not applying to employees with less than two years' service, your advisers can draft you a new one which is appropriate to your organisation and advise you on any consultation process which will need to be carried out in order to implement it.

If you are not a Full-Service client, your advisers can talk through this over the phone to help you check yourself to see if it is a contractual policy or not.

Notice pay

A dismissed employee is always entitled to receive their notice period. This is whether they are dismissed on grounds of redundancy, conduct (apart from gross misconduct), capability, long term incapability, or for any other substantial reason.

The notice period to be given will be the longer of either the statutory minimum (as set out above in step 1 at 3.) or the notice period in the contract of employment.

Where an employee is dismissed without being given their correct notice period entitlement they will have a claim for Wrongful Dismissal (see our factsheet on Wrongful Dismissal).

If the employee's contract of employment contains no provision for notice or the employee has never been given a contract of employment, then you must give them a "reasonable" period of notice. This must not be less than the statutory period of notice, but may be more. Factors taken into account include seniority, pay interval and level of pay, length of service and what is normal in their trade/profession. See our factsheet on Wrongful Dismissal for further information.

Holiday pay

A dismissed employee is entitled to their pro rata annual leave which has accrued but have not been taken as at the date of termination of employment.

If more holiday than has accrued has been taken, then you can only deduct the amount equal to the excess holiday from any final salary payment if the contract of employment includes a deduction from wages clause for such a deduction. If you are a full-service client your Adviser can check the contract wording for you. See our factsheet on Unlawful Deduction from Wages for more information.

Outstanding wages

Remember a dismissed employee is also entitled to their accrued and outstanding wages/salary. Failure to pay as such, means the employee can make a claim for unpaid wages. It you intend to make a deduction from wages for whatever reason, you should always seek advice from your adviser as to whether the proposed deduction is legal. See our factsheet on Unlawful Deduction from Wages for more information.

**Full-Service means clients who have a contract with WorkNest covering the full service to include reviewing minutes of meetings, correspondence from employees, detailed documentation and drafting letters on a bespoke basis. If you are unsure about what level of legal service your contract with WorkNest covers, please contact your advisers or the CX team on 01244 687 603.*

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