



Legal Pitfalls of dismissing staff

Richard Brown, partner and head of employment law at Howell-Jones rhw solicitors in Guildford, explains how employers need to go about dismissals and redundancies to avoid major headaches.

In October 2004 the government introduced a statutory disciplinary and dismissal procedure. This set out the minimum requirement for any disciplinary or dismissal procedure to be considered fair.

However, it is only now that cases are coming through which show the true effect of these changes.

For some reason, perhaps in a misguided effort to save costs, clients will often act first and seek advice later when employment law is concerned. But this is often a false economy, which could cost them very dear.

The call that all employment lawyers dread starts with the words "I've just sacked someone – was that alright?" Very often it was not "alright" as employment law now requires that not only should there be a reasonable reason for any dismissal but also that the process of dismissal itself should be fair.

The client will then very frequently make matters worse by saying "It's OK, I just made him redundant." What the client does not realise is that redundancy has a specific legal meaning and is not a general catch-all that will turn an unfair dismissal into a fair one.

Disciplinary and Dismissal Procedures

Before October 2004 there was always a general rule that if an employee were to be dismissed then the procedure for doing so had to be "fair". Failure to follow a fair procedure could result in a finding of unfair dismissal even if the dismissal was otherwise justified.

Although ACAS and case law provided some guidance as to what would constitute a fair procedure, there were no specific requirements set out in employment legislation. The procedure to be followed when disciplining or dismissing an employee had to be fair in all the circumstances, which could vary from case to case.

The minimum steps, which should be taken when carrying out any disciplinary proceedings or any dismissal (including a redundancy), are as follows:

Step one – Statement of grounds for action and invitation to a meeting

The employer must set out in writing the employee's alleged conduct or other circumstances that led the employer to consider dismissing or taking disciplinary action. In other words, the employee must know the details of the allegations against him so that he can properly defend himself.

At the same time, the employer must invite the employee to a meeting to discuss the matter.

Step two – The meeting

This gives the employee the chance to respond to the accusations made against them. It is important that the matters discussed are restricted to those which were raised in the step one letter. The employer must not "ambush" the employee with new allegations.

The meeting must also take place after the employee has had a reasonable opportunity to consider his response. A minimum of a few days notice must be given, or even longer if the allegations are numerous or complicated.

The employee has the right to be accompanied by a colleague or a trade union official. The companion can act as both a witness and a representative of the employee.

After the meeting the employer must inform the employee of his decision and notify him of the right to appeal.

Step three – The appeal

If the employee informs the employer of his wish to appeal, the employer must invite the employee to attend a further meeting. Ideally, the person who considers the appeal should be a different and more senior person to the person who conducted the original hearing. Once again, after the meeting the employer must inform the employee of his decision.

These three steps are a minimum requirement only.

If it is important to realise that if a dismissal occurs which fails to follow all three of the required steps then the dismissal will automatically be unfair.

Furthermore, any award of compensation could be increased by up to 50 per cent because an employer has failed to follow the statutory procedure.

Following the procedure, however, does not guarantee a fair dismissal. The reason for the dismissal must be within one of the five recognised statutory categories. These are:

- Conduct
- Capability
- Redundancy
- Continued employment would be unlawful
- Some other substantial reason.

A discussion of each of these categories would justify a separate article in its own right. It is useful to mention them here in passing but you should obtain specific legal advice at an early stage if any dismissal is contemplated.

Secondly, the decision to dismiss must fall within the band of responses which a reasonable employer would adopt. Not all examples of misconduct justify dismissal. Any misconduct which justifies inclusion on the POVA list (Protection of Vulnerable Adults) however, will almost certainly be deemed to be gross misconduct.

Thirdly, the procedure must still be fair in all the circumstances. This means that the ACAS code of conduct and previous case law is still relevant when considering whether the procedure adopted is fair overall.

In other words, following the minimum three steps is not necessarily enough. Each case will be different and, depending upon which of the five recognised categories the case falls into, the procedure will be different.

Once again, specific legal advice should be sought before the procedure is started, not afterwards when it may be too late.

For more details contact **Richard Brown** at the Guildford office on **01483 302000**.

April 2007