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Jersey employment law: What are the risks of dismissing an employee with less than 52 weeks' continuous service?

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Employees in Jersey have the benefit of statutory protection from being unfairly dismissed after 52 weeks' continuous service, much sooner than their UK counterparts. Employers are then obliged to follow a fair and reasonable process and have a 'potentially fair reason', in accordance with the statute, for dismissal before terminating the contract of employment.

There can be a temptation by employers to expedite, or entirely disregard, any form of process prior to dismissing an employee with less than one year's service, ostensibly comforted by the lack of statutory unfair dismissal protection afforded to the employee. However, this can leave employers exposed to other types of claims against them and insufficient contemporaneous decision making documentation in order to defend a claim.

Below are some important considerations an employer should be mindful of before dismissing an employee.

Breach of contract

Claims for breach of contract do not require any minimum service.

Breach of contract claims can include:

- a failure to provide, or pay in lieu of, notice on termination of employment;
- a failure to provide, or pay in lieu of, contractual benefits (which can include a bonus) on termination of employment; and
- a failure to follow a contractual disciplinary or redundancy policy.

In these circumstances an employee can claim damages for breach of contract, which may not simply be limited to the unpaid wages during what would have been the period of notice.

The Employment Tribunal is restricted in its jurisdiction to hear a breach of contract claim to the value of £10,000 and if an employee is seeking more than that the claim must be brought before the Petty Debts Court, or if over £30,000 it must be brought before the Royal Court (this only apples to breach of contract not statutory claims such as unfair dismissal or discrimination). As such, the employer is also exposed to the employees legal costs if the employee is successful (albeit these remain fixed in the Petty Debts Court).

Automatic Unfair dismissal (where one year's service is not required)

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In certain circumstances a dismissal will be considered automatically unfair, with no requirement for minimum service. If a dismissal is found to be for one of the automatic unfair reasons it will always be unfair, irrespective of the reasoning of the employer or the reasonableness of any process.

A dismissal will be automatically unfair if:

- the dismissal is because of trade union activity such as membership, either joining or leaving a trade union, or participating in official industrial action;
- the dismissal is because an employee asserts a statutory right or raises proceedings against the employer to enforce a statutory right;
- the dismissal is because an employee asserts their right to the minimum wage or raises proceedings to require the employer to pay the minimum wage;
- an employee is selected for redundancy because of any of the above three circumstances and is subsequently dismissed;
- the dismissal is because an employee asserts the right to be represented at a disciplinary or grievance hearing or duly represents a fellow employee;
- the dismissal is on the grounds of an act of discrimination *(explored further below)*; and
- the dismissal is because of pregnancy or family reasons.

Discrimination

As listed above, a dismissal for a discriminatory reason will be automatically unfair and the dismissed employee will be entitled to bring a claim without any service requirements.

Employers are likely to be more aware of their responsibilities under the discrimination law, than was once the case. However, it will not always be obvious when a dismissal could be considered as being discriminatory. In Jersey the protected characteristics relating to discrimination, are:

- race (including colour, nationality, national origins (including bring of Jersey origin) and ethnic origins);
- sex;
- sexual orientation;
- gender reassignment;
- pregnancy and maternity;
- age; and
- disability

Those familiar with the equivalent UK legislation might note the omission of religious and philosophical beliefs and marriage and civil partnership, which are not characteristics protected under Jersey's discrimination law.

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It is important to give these characteristics consideration and asses the factual circumstances surrounding any potential dismissal.

Conclusion

It can be all too tempting to completely bypass company or best-practice processes to dismiss someone with less than 52 weeks' service, particularly if the 52 week anniversary is approaching. However, employers should consider the possibility of the above claims as a minimum, which can be costly from both a reputational and economic perspective.

Even where none of these claims appear relevant, it is always preferable to follow a process (even an abbreviated one) for an employee with less than 52 weeks' service as it will provide important contemporaneous decision making documentation if an unexpected claim were to arise.

Please contact your usual Collas Crill contact or Jamie Guyan for any advice and guidance in relation to this article.

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