# Conquering UK Employment Law – Termination

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# INTRODUCTION

Not only must business owners be experts in sales and management, finance and computing and tax and marketing; if they employ staff they also need to be familiar with the increasingly complex world of employment law.

It is entirely right and proper that employees are afforded protections at work, and that we have moved on from the 'master and slave' origins of the employment relationship, however even with the best of intentions, falling foul of the law is surprisingly easy nowadays for the unsuspecting employer given its complexity and the rate at which it changes. The addition of European originated input to our employment legislation in recent years has further increased the potential pitfalls for the unsuspecting small (or large!) employer.

This series of 'Conquering Employment Law' books is designed to aid small businesses in particular who may not have the luxury of their own in house HR team, or access to high street lawyers. They can be rather expensive when you only want to find out what the minimum wage is or what to do if an employee announces that she is pregnant!

It is true that there is a wealth of information available now online, and it is an extremely useful starting point, but it can still be difficult digging down through the enormous amount of data out there to the exact advice that you need for your situation *right now*. Knowing where to look is half the battle and it is difficult to know if you can trust the various websites to be giving you up to date and legally correct information.

The author has spent over thirty years working in the field of employment law, and has advised and represented both companies and individuals over a huge range of employment law issues during this time. She qualified as a lawyer in 2013 and in addition to writing on the subject, runs an employment law consultancy advising both SMEs and individuals across a wide range of industries.

This second book in the series is on Termination of Employment, which can be a minefield for small firms and difficult to get right for an employer without at least a knowledge of the basics.

# 1 TERMINATION OF EMPLOYMENT – THE LEGAL BACKGROUND

While there are a number of ways in which termination of an employment contract might take place, such as resignation, dismissal by the employer, the ending of a fixed term contract, etc. this book is aimed largely at assisting the small to medium sized employer with carrying out dismissals fairly and, whilst examining terminations in general, we going to place our focus largely on employer led dismissals and the concept of unfair dismissal (and how to avoid it!) in the employment tribunals.

Let's get started then with a little background before delving in to the minutiae. The law underpinning dismissal is part of a much wider set of rights and obligations which we need to place into the larger context of employment in general.

It might be useful to understand how we derive our legal rules in this country as it helps explain how employment law works.

A country's legal systems are either 'codified' or 'uncodified', which means very simply that the legal rules and principles setting out how the country is to be governed are either set out in one document or they are not. In a codified system, the law is set out in a document such as the constitution in the US. In an uncodified system, the rules and laws are not set out in one easily definable place but are derived from a variety of sources such as statute and case law. Here in the UK we are unusual in that we have an 'uncodified' legal system in common with only a few other countries (such as Israel and New Zealand for example), the majority having written constitutions to which one can turn to find out what the laws of the land are.

So if we have an uncodified system, how do we find out what our laws and rules are?

Our law in this country is derived from three primary sources; statutes, (or laws enacted by parliament), European law (at least as things stand at present!) and case law – the judgments of hearings in the higher courts which set precedents to be followed, also known as the common law.

We'll see later on that while statute often sets out the law from a macro perspective if you like, it is the courts whose role it is to actually interpret what that statute means at a micro level. We'll also see that in order to understand your obligations as an employer and know how to behave in order to comply, you need to be familiar not just with the statutes, but with common law principles as well. And that's before we even begin to consider the European influence which has had a substantial impact on employment laws in this country.

So back to employment, when engaging an individual under a contract of employment in the UK, whilst enjoying a plethora of rights from day one, (such as the right to the minimum wage, the right not to be discriminated against, and to equal pay to name but a few), your employee will, after two years' service attain the right not to be unfairly dismissed.

(This period used to be one year prior to April 2012 and it has gone up and down with successive governments according to their persuasions over the years, and it currently stands at two years' service.)

The right not to be dismissed unfairly is enshrined in the Employment Rights Act 1996 (which we will refer to as the ERA from hereon in) and it has remained pretty much unchanged since that date, with only a few notable amendments over the years (such as retirement being removed as a fair reason for dismissal following the abolition of the default retirement age in 2011).

***The UK's Uncodified Systems of Law***

***Statute***
***Case Law***
***Europe***

So what does unfair dismissal actually mean in practice and how can we be sure that we're acting within the law?

The ERA sets out a two-stage test to determine whether a dismissal is fair or not.

1. **Reason.** Firstly, the employer must show what the reason for dismissal is. Many employers are not aware of this, but there are in fact only five reasons under UK law which pass the test of being 'potentially fair' and if your reason does not fall within one of these then you may have a problem!

The potentially 'fair' reasons for dismissal which are as follows;

- Conduct
- Capability
- Redundancy
- Contravention of a statute
- SOSR which stands for 'some other substantial reason'.

So back to our two stage test for fairness – to pass the first part the reason must be one of the five potentially fair reasons above. You will notice that I use the word *potentially* repeatedly here in conjunction with fairness – just because a reason is given and it is one of the fair reasons listed unfortunately does not mean that a dismissal is fair and will stand!

2. This is where the second stage of the test comes in. Once a potentially fair reason is established, the question of whether the actual dismissal itself is *fair* or *unfair* must be considered.

   How to determine whether it is or not is also set out in the ERA which states that fairness;

   *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

   *(b) shall be determined in accordance with equity and the substantial merits of the case.*

Wow! This is rather wordy and long winded so what does it mean in practice?

In practice, the courts have interpreted this part of the test as meaning that dismissals must be **a. procedurally fair** and **b. substantively fair**. While these terms will be heard frequently in employment tribunals on a daily basis up and down the land, in fact the ERA doesn't actually mention procedure or substance at all, only reasonableness. But that is how reasonableness is judged.

**Procedurally** fair has a specific meaning and is different depending upon the type of dismissal being carried out, whether that is for redundancy or conduct for example. We'll consider exactly what this means in later chapters.

**Substantive** fairness looks largely at the reason given, was it fair for the employer to treat the reason given as the reason for dismissal. So, for example if the employee is dismissed for conduct because they were late twice by 5 minutes over a six-month period would the employer have acted reasonably in treating that as a fair reason for dismissal? More than likely not. And indeed, was the reason given the true reason for dismissal? Often it isn't. Employers have been known to take the 'easier' option of making someone redundant when in fact they were poor performers but the employer couldn't face the difficulty, awkwardness and time involved in a capability or conduct dismissal.

And, looking at the second part of the extract from the ERA above, when judging reasonableness, the courts will also take into account the size of the employer and the type of resources it has available to it when considering how reasonably it behaved. A small employer with maybe 5 staff and a part timer in the office doing HR along with all their other admin duties, will be judged less rigorously than a multinational corporation with lawyers and a large Human Resources department to advise.

So all parts must be present for the dismissal to be fair; the reason must be one of the five potentially fair ones, and the dismissal must be both procedurally and substantively fair.

To illustrate how we would apply this, let's take a scenario. An employee is seen taking money out of the till at the shop where they work. They are dismissed on the spot and sent home.

Objectively the reason appears to be one of the fair ones, conduct (theft) and the substantive reason appears to be sound, dismissal because they appeared to steal from their employer. So far so good but the dismissal is likely to be declared unfair on procedural grounds because there was no fair procedure – the employee was dismissed on the spot when there should have been a hearing, a chance for the employee to state their case and have the right of appeal as per Acas guidelines (we'll come on to those later). There may be many reasons why the employee took the money and without giving them the chance to put their side of the story, the employer cannot be said to have carried out a fair dismissal. The employee's compensation might be limited if theft was found to have taken place but win they most likely would.

***Summing Up***

***Is the reason one of the 5 fair reasons?***
***Was the dismissal fair substantively?***
***Was the dismissal fair procedurally?***

So we can see that statute in the form of the ERA sets out the law and the test which employers must pass when determining the fairness of their dismissal. There is no further guidance given within the body of the statute on what 'fairness' actually means, and so we have to turn to case law and other authorities (such as the Acas Codes) to find further detail in terms of what makes a dismissal procedurally or substantively fair. We will look at these in the following chapters. You can see now why it can be such a headache for employers to do the right thing when it is often so difficult to find out what the right thing is!

*The Acas Codes of Practice also provide guidance for employers and employees when interpreting statutes and as Acas states, while failure to follow a Code doesn't make a person or organisation liable to proceedings, an employment tribunal will in certain situations take them into account when considering relevant cases and it may affect compensation.*

# 2 TYPES OF TERMINATION – WHAT'S IN A NAME?

Let's look in a little more detail here at what constitutes a termination – despite seemingly a relatively straightforward concept, it is surprisingly not always entirely clear.

Termination is not necessarily always the same as dismissal; a resignation will result in the termination of employment but it is not a dismissal, and while we will look at resignation, we won't do so in any depth apart from where there may be contentious issues to deal with of which you need to be aware. Let's start with dismissals.

**1. Dismissal**

Dismissal usually, (although not always) takes place at the hand of the employer and there are generally only three ways in which a dismissal can arise. We will look at the more unusual types of termination later in the chapter.

Turning to statute again for guidance, the ERA provides for three types of dismissal; termination by the employer with or without notice, expiry of a limited (or fixed) term contract and constructive dismissal.

**a. Termination by the employer**

As we saw above, there are five potentially fair reasons for an employer to terminate a contract of employment as set out in the ERA and we will now consider each in turn.

1. Conduct. Bar listing the heading as a potentially fair reason, the ERA gives no further guidance on what this means. It is not a particularly difficult concept however and if we switch it round and look at it as *misconduct* it is easier to understand. We will consider how we judge the fairness of a conduct dismissal in Chapter 3 (as opposed to what constitutes a conduct dismissal) as there are specific guidelines derived from case law. Some examples of fair conduct dismissals are featured in the box below, but typically any form of misconduct, carried out by the employee at will (and not as a result of perhaps not being up to the job) will, if serious enough as a one off, or if repeated without improvement, result in a fair dismissal.

Misconduct further subdivides into *misconduct* and *gross misconduct*. Misconduct is the type of less serious misdemeanour (for example lateness), for which you would use the disciplinary procedure. If your employee is late once or twice you would usually start with a quiet word. If it keeps happening you might then issue a verbal warning, if repeatedly no improvement then a first written, then a final written warning and then if it continued you would dismiss with notice.

Gross Misconduct is conduct so serious that it entitles the employer to terminate the employment immediately (and for immediately don't read that as 'on the spot' – you can never (or rarely) dismiss *on the spot*, there must always be a hearing and proper procedure followed) and without notice. Such serious misconduct is known as a 'repudiatory breach', a term taken from contract law (remember that the employment contract is nevertheless a contract even though it operates under special rules) which means that the breach is so serious that it entitles the injured party, here the employer, to treat the contract as at an end. A repudiatory breach does not automatically terminate the contract, but it gives the injured party the option of either accepting the repudiation and terminating the contract as a result or instead 'affirming' the contract, i.e. taking no action and so the contract remains in force.

**Some examples of fair conduct dismissals**

Repeated lateness
Falsifying documents
Insubordinate behaviour
Failure to obey reasonable instructions
Theft
Violence
Being under the influence of alcohol or drugs
Poor attitude

2. Capability. The second potentially fair reason for dismissal is capability. Under the ERA the employer has to demonstrate that a dismissal in this category relates to the *capability* (assessed by reference to skill, aptitude, health or any other physical or mental quality), or *qualifications* (meaning any degree, diploma or other academic, technical or professional qualification relevant to the employee's position) of the employee for performing work of the kind which he was employed by the employer to do. Goodness! A lot to digest.

We can see then that there are two heads under this section, *capability* and *qualifications*. There is little case law relating to qualifications, presumably either because it is rarely the subject of contention or because it is rarely a reason for dismissal. Possibly because issues often come to a head shortly after the start of employment if it becomes apparent that the employee does not have the qualifications that they claimed at interview. Similarly, employees may, for whatever reason, fail to obtain qualifications they agreed to seek once they joined the employer, or they lose qualifications they once held (the driving licence is a common one here) or perhaps an issue arises because the employer needs new and different qualifications which the employee doesn't have and for whatever reason can't get. Apart from the first example which could potentially be seen as a conduct issue (i.e. obtaining the job by deception), in all other cases a dismissal under this heading will rarely be seen as fair unless the employer has investigated the availability of suitable alternative employment first.

Turning to capability next, this encompasses a couple of scenarios. The first is where the employee, try as he might is simply not up to, or *no longer* up to the job. (The situation also arises where the employee is up to the job but is not trying, the difference between the two being that the former is incompetent and the latter is just lazy which hopefully made you question whether the latter scenario is more a conduct dismissal than a capability one!) And the second type of capability consideration is where illness renders the employee incapable of performing his job. Employers must be mindful when considering dismissals in this latter category of the overlap with discrimination law under the Equality Act 2010, as a dismissal which is potentially fair under this heading may at the same time also be discriminatory. More on that later.

3. Redundancy. Dismissal for redundancy essentially arises where the dismissal is 'wholly or mainly attributable' to one of three scenarios;

i. **Where the business closes altogether, or**
ii. **Where the workplace in which the employee is employed closes even where the business itself carries on elsewhere, or**
iii. **Where the requirement for an employee to do the kind of work which they were employed to do has ceased or diminished**

As we can see from the definition, it arises where the business either shuts down altogether which is fairly finite and rarely leads to disputes; where the factory or office or location where the employee works closes but not the whole business, (this can be trickier and brings issues such as mobility clauses into play) or thirdly where the employer just needs less staff following for example a reorganisation, loss of a contract, changes in technology etc. This last area is the one where the majority of the case law sits as it can cause issues of interpretation. And I don't think that I'm being unfair to employers when I say that redundancy can be seen as a tempting solution to 'losing' problem employees.

So those are the only three areas where a redundancy can arise – any other scenario may be a dismissal for some other substantial reason but won't qualify as a redundancy.

There are a number of reasons why a company might need to declare a redundancy, it might reorganise and find that it needs less staff under the new set up, technological changes might mean that it needs less staff (and maybe more computers) to carry out the same work. It might be responding to commercial pressures, less sales, more competition, or it might be relocating to cheaper, different premises for a variety of reasons.

While the three headings seem straightforward we will see in the next chapter that sometimes the definition of redundancy can be more problematic than it first appears.

4. Contravention of a statute. This arises where the employee could not continue in the position which they held without either the employee or employer contravening a *'duty or restriction imposed by or under an enactment'*.

   Examples include where to continue to employ someone would breach immigration rules, or where the employee loses their licence and they are employed to drive, or where they need to hold a specific qualification to legally carry out that role, such as a lawyer with a practising certificate, or a doctor. It is important to note that for the dismissal to be fair, continued employment must actually breach a statute, not where the employer mistakenly believes that it might.

5. SOSR – this stands for Some Other Substantial Reason. While at first it may seem to be something of a 'catch all' reason, covering areas which do not fall neatly into one of the other four above, it has tended to be quite narrowly applied by the courts and in *relatively* limited circumstances. Employment law cases are invariably heavily fact specific so please do not take the examples which follow as carte blanche situations where you could happily dismiss an employee! However for illustrative purposes only, the types of dismissals which have been accepted under this heading have been as follows.

   - wife fairly dismissed when her husband started working for a competitor of her employer
   - employee dismissed for refusing to accept a substantial and negative variation to their terms of employment where there was a **substantial** business reason for so doing
   - irreparable personality clashes
   - pressure from third parties i.e. a client
   - breakdown in trust and confidence
   - s 106 of the ERA also provides that in two specific replacement situations, a dismissal will be for SOSR. Those are the dismissal of an employee who is replacing another employee on maternity leave when they return, and the dismissal of an employee who is replacing another employee who has been suspended on their return.

It can include reasons such as where there is a conflict of interest or where a client refuses to work with an employee and there is no alternative work.

**b. Expiry of a limited term contract**

This is a relatively (and I use the term advisedly) straightforward topic. The ERA states that an employee is dismissed if '*he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract*'.

Limited term contracts, (more commonly known as fixed term contracts), tend to expire on either a given date (for example a six-month contract), or on completion of a specific task (when the house is built), or on the occurring of an event (when the maternity leaver returns to work). Such expiry is counted as a dismissal and there are now regulations in force governing fixed term contracts known as the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Employees dismissed on the expiry of their fixed term contract may be entitled to redundancy pay depending on the reason for the non-renewal. After two years' service employees on fixed term contracts enjoy the same protections as those on ordinary contracts, and whilst writing you should note that employees who are continuously employed on a series of fixed term contracts for four years are deemed to be automatically permanently employed unless the employer can objectively justify the continued use of a fixed term contract. Do not be tempted to assume therefore that someone can just be dismissed simply because their fixed term contract has come to an end, logical though that may seem to the uninitiated! You still need to consult, consider alternatives and also consider whether they might be redundant and entitled to redundancy pay.

**c. Constructive Dismissal**

This is the third method of termination as set out in the ERA. I explain to clients that constructive dismissal is effectively the opposite of Gross Misconduct. It arises where the employer breaches the contract so fundamentally (a repudiatory breach again) that it entitles the employee to resign immediately and without notice.

It follows therefore that the breach must be serious – the words of the legendary Lord Denning in a famous (in the employment law world at least!) case called *Western Excavating v Sharp* heard in 1978 are set out in the box below and that case defined the concept of constructive dismissal.

In the particular case, Mr Sharp asked for time off work and it was refused. He went anyway and was dismissed as a result. On appeal the dismissal was overturned and he was given a sanction of 5 days unpaid suspension instead. Mr Sharp found this difficult to cope with financially and asked for his holiday pay in advance. This was refused and so he resigned and then claimed constructive dismissal. He was unsuccessful as it was held that the company had not committed a fundamental breach of contract which went to the root of the contract.

**Lord Denning in Western Excavating v Sharp**

**"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."**

In order for the dismissal to constitute a fundamental breach, it must be a. serious enough and b. the employee must resign 'in response to the breach'. As it refers to conduct which entitles the employee to resign immediately without notice, if they delay too long in resigning they risk having affirmed the contract and thereby losing their right to claim.

It *is* possible however for the employee to resign with notice and still claim constructive dismissal as long as they are entitled (due to the seriousness of the breach) to treat themselves as constructively dismissed, but they must actually resign in response to the breach.

The employer's breach can be a one off event if serious enough, or it can be what is known as the 'last straw' approach, where the employer has committed a number of breaches, each of which alone would not necessarily amount to a repudiatory breach, but when taken together amount to a 'course of conduct' which adds up to a repudiatory breach.

It is not always clear cut with regard to what amounts to a repudiatory breach and cases are fact sensitive as ever but examples of successful claims have included;

A reduction in pay
A job relocation without an express mobility clause
Breach of the duty of trust and confidence
Discrimination
Excessive workload
Unilateral variation in working hours

The sorts of breaches which amount to the 'last straw' type of constructive dismissal are where the employer has, over a period of time evidenced an intention not to be bound by the contract.

Future (or anticipatory) breaches can also give rise to a claim, where the employer advises the employee that he intends to take an action and the employee resigns as a result.

In a constructive dismissal claim the burden of proof is on the employee and not the employer, (unlike in an unfair dismissal claim where the employer must establish that the dismissal was fair). The employee firstly therefore has to establish that there has been a breach, then that it was a sufficiently serious one and finally that they resigned as a result of it.

It is possible for an employee to be constructively dismissed and for it still to be a fair dismissal. An example of this would be where the employer had seriously breached the employee's contract but because it had good reason to do so it renders the dismissal fair. The circumstances in which this works are rare so don't get excited about this!

**2. Terminations which are not dismissals.**

a. Resignation. The most obvious non-dismissal termination of employment arises where the employee resigns. Not too contentious by and large but some points to be aware of.

Resignations must be 'clear and unequivocal' in order for an employer to be able to rely on them. So for example an employee saying 'I've had it with this place' before going home for the weekend would not necessarily entitle the employer to conclude that they had resigned whereas an employee saying 'I am handing in my notice as of now and leaving today' would be good enough. Clearly the best advice is for employers to ask for resignations in writing (and a properly drafted contract of employment will stipulate that notice must be given in writing) so that the employee's intention is clear. Make sure that their letter of resignation contains the leaving date too unless it says 'with immediate effect' and is dated.

A further potential problem area is resignations made 'in the heat of the moment'. The courts have typically given the benefit of the doubt to employees who have resigned in such circumstances. While, as stated above, if a resignation is clear and unambiguous an employer is entitled to assume that the employee has resigned, where that clear resignation is made at the top of the employee's voice following an altercation with the supervisor, or when asked to work overtime at the weekend he says 'you can stick your job' the courts will expect the employer to wait a while before concluding that they have in fact resigned! This doesn't apply to all resignations however, only where the employer 'knew or reasonably ought to have known' that the employee was acting in the heat of the moment and might not actually have meant to resign in the cold light of day.

If, following such a heat of the moment resignation, the employee makes it clear within a reasonably short period of time that he didn't mean to resign, then the employer is obliged to have him back as was the case in *Sovereign House Security Services v Savage.* Mr Savage was effectively accused of stealing money and told that he would be suspended. As a result he told his supervisor that he wouldn't be in the next day. When he came back to work his employer refused to have him back on the basis of his alleged resignation and he subsequently claimed unfair dismissal and was successful.

In terms of what constitutes a 'reasonable time' to allow the employee to change their mind, case law suggests that up to a day or two is the maximum that should be allowed, any longer than that and an employee who didn't intend to resign really should have had enough time to retract.

A resignation can also turn into a dismissal where the employee, who is working his notice having resigned, is then dismissed before the expiry of the notice period by the employer.

b. Implied Resignation

There are cases where employees simply don't turn up and despite the employer writing to them, no communication ensues. I am frequently asked by clients what to do in such circumstances and the advice is that as long as we have waited a decent period of time and reasonably attempted to contact the employee by both writing and telephoning to ensure that they haven't had an accident, there comes a point where, by their conduct, there is no other reasonable conclusion to draw but that the employee has resigned and isn't coming back.

c. Mutual or Consensual Termination

This is an unusual and rather rare scenario. Where it arises, both parties agree that the employment will end, there is no dismissal and the employee will not be able to use any statutory rights to his advantage. It differs from a resignation which is a unilateral act on the part of the employee whereas with a mutual termination, both parties are in agreement with it. Cases are rare largely because there is often a driving force from either the employee or the employer where the employee is faced with agreeing to go or facing disciplinary sanctions. Courts will look at the facts to determine whether it was in fact a dismissal, or a constructive dismissal, (a 'resign or you're fired' type of affair!) or whether in fact both parties were entirely happy with the arrangement. Commonly now with the advent of Settlement Agreements (formerly Compromise Agreements) parties agree to mutually conclude the employment relationship on terms which are wrapped up in the agreement which preclude the matter ending up in court.

d. Frustration of the contract

This arises where, because of an external event, unforeseen by the parties, usually with no fault on either side, it is no longer possible for the contract to be performed. The contract is automatically terminated, and there is accordingly no dismissal. The best examples of this are death of the employee (or possibly the employer), imprisonment and long term absence. Long term absence must be treated with caution in this context however as the courts can be reluctant to make a finding of frustration in an employment context. Furthermore, the event must be unforeseen and most employment contracts have sickness schemes or long term PHI or disability schemes which clearly indicate that some form of long term illness was contemplated! It can also be difficult to determine whether or not the employee may come back; in one case an absence of 2 years was held not to have frustrated the contract as the employee's job did not require a permanent replacement. It is difficult to determine at what point in time the employer can legitimately conclude that the employee won't be able to come back. There is also an overlap here with disability discrimination and employers must make sure that there are no 'reasonable adjustments' which could be made enabling the employee to remain in work before concluding that the contract is frustrated. Proceed with caution is the order of the day here.

**3. Wrongful Dismissal**

This term is often bandied about when people talk about claiming against their employer and it is often used interchangeably with unfair dismissal. However it is not the same as unfair dismissal and has a specific legal meaning. It is a common law concept and simply means a dismissal which is in breach of contract. If the contract is breached, the employee will have a claim for damages which is limited to notice pay (usually including applicable contractual benefits) and for the length of time it would have taken for the employer to have followed a contractual procedure if one was not followed.

There is an overlap with unfair dismissal, usually a wrongful dismissal will also be an unfair dismissal but not always – for example an employee fairly dismissed for let's say excessive absence where the employer followed all the correct procedures in dismissing an employee but then failed to pay their notice pay would be a fair dismissal but also a wrongful dismissal and notice pay would be awarded.

Historically employees would sue for wrongful dismissal in the civil courts, but employment tribunals now have jurisdiction to hear wrongful dismissal claims to a maximum award of £25,000. Clearly a senior employee whose notice pay exceeds this amount would doubtless be better off in the civil courts unless he had an unfair dismissal or discrimination claim of a higher value.

There are advantages to claiming in the civil courts, there is no qualification period unlike the 2 year period for employment tribunal claims, and while claimants must apply within 3 months of their dismissal in the tribunal, they have 6 years in the civil courts.

**TAKE NOTE**

**If you breach a contract then you are no longer able to rely on its terms. So if you fail to pay an outgoing employee their notice pay, or if you pay them in lieu of notice when you have no contractual right to do so, then you are in breach of contract and any restrictive covenants or clauses regarding confidentiality upon which you may want to rely will no longer be binding on your employee.**

# 3 A FAIR DISMISSAL – SUBSTANTIVE AND PROCEDURAL FAIRNESS

We are concentrating our focus on terminations by the employer, or dismissals. We will not consider constructive dismissal further as we have covered that earlier and in any event it is difficult to be proactive in a constructive dismissal situation – the first the employer tends to know about it is that the employee has resigned and is making a claim! If you are lucky they may have taken advice and will raise a grievance first which will at least give you a chance to put things right if you have inadvertently made an error. Which is of course the point of the grievance system….

So let's focus instead on situations we can do something about which is dismissals. The process and how you handle a dismissal is paramount and can make the difference between a fair and an unfair dismissal.

Heading back to our statutory definition of dismissal, if you recall back in Chapter 1 we discussed the fact that for a dismissal to be fair it needs to be;

a. one of the five potentially fair reasons
b. substantively fair, and
c. procedurally fair.

We now know what the five fair reasons are so let's turn our mind to substantive and procedural fairness. We'll start by considering the role of Acas as not only do you need to know what part they play in the employment landscape, they are also an invaluable resource for employers.

**Acas.** Acas provides us with a wealth of information on dismissing fairly from both a procedural and substantive point of view.

The Acas Code of Practice on Discipline and Grievance is the gold standard. It is a statutory document and tribunals **must** take it into account when deciding if an employer has dismissed fairly. I therefore recommend that you download a copy and read it! If employers unreasonably fail to follow it, compensatory awards can be increased by up to 25%. Similarly if employees also unreasonably fail to follow the code (i.e. in not appealing against disciplinary sanctions, or failing to raise grievances) then their award can be reduced accordingly. It is therefore important that you are aware of its provisions and that you follow them. They are largely common sense and if you are acting fairly and reasonably, are the sorts of things that you would likely want to do anyway.

The Code applies to all dismissals apart from those due to redundancy or the expiry of fixed term contracts. It does not appear to apply to dismissals for SOSR reasons although there has been conflicting case law on this – my advice to clients, if in doubt follow the Code!

(Acas have also produced a 'Guide' on discipline and grievance at work which, while not having the same statutory status, is nevertheless extremely helpful in assisting employers with the minutiae of handling disciplinary and grievance matters).

The steps an employer must follow according to the Code are set out in the box below and these should be followed **every** time an employer is considering disciplinary action up to and including dismissal.

**The ACAS Code on Disciplinary and Grievance Procedures Key Points In Brief**

1. Act promptly.
2. Establish the facts (investigate, ideally assign a different manager to the one holding the disciplinary hearing).
3. Inform the employee of the issue (do so in writing before the hearing setting out information which needs to be discussed, and giving the employee time to digest and prepare, offer the right of representation, a union representative or a colleague).
4. Hold a hearing. Ensure again that the employee knows of their right to be accompanied. Set out the issues to the employee, allow them to ask questions to clarify and to state their case.
5. Make a decision re action. If action is needed issue either a verbal, first or final written warning depending on the severity.
6. Be consistent.
7. Offer the right of appeal.
8. Confirm all in a letter to the employee advising what needs to be done to improve, and what the sanction is if there is a failure to improve.

With the Acas Code in mind, let's consider now substantive fairness. Employers' decisions are subject to an objective test called the '*reasonable responses*' test. And we have Iceland Frozen Foods to thank for it as it was a case involving Iceland and an employee called Mr. Jones which gave rise to the test.

Briefly Mr Jones was a supervisor and after the night shift he left without locking the premises or putting on the alarm. Part of the reason for the dismissal was that his employer was also of the view that on the night in question, Mr Jones had permitted his team to effectively work on a 'go slow' basis thereby earning more overtime. The first tribunal found that it was an unfair dismissal and that on the facts they felt it wasn't serious enough to dismiss for gross misconduct. The employer appealed and it was at this point that the test was set which was that it was not the tribunal's view that mattered, but whether the employer's decision to dismiss fell within the 'band of reasonable responses' that a reasonable employer in that business faced with that set of circumstances might have adopted. The test is not what would the tribunal have done, or even was this employer right to have done it, but was the employer's decision within that band.

So if, in the tribunal's opinion, no reasonable employer would have dismissed in those circumstances, then the dismissal will be substantively unfair. If on the other hand however, it cannot be said that no other reasonable employer would have taken that decision, then it will stand as fair. This can often seem very *unfair to* the employee, particularly if the decision is right at the bottom end of the band of reasonable responses, i.e. not many employers would be that harsh but it is possible that some would and so the decision is still within that potential band . Tribunals have been known to find that they consider a decision to dismiss to be harsh and that they would not have taken that action themselves, but they can't go as far as to say that *no reasonable employer* would have done so and so the dismissal stands as fair. There is no doubt that it is indeed a tough test and a high bar.

It is established law that tribunals are not allowed to 'substitute their own view' for that of the employer i.e., they can't say we wouldn't have done that, they are only permitted to look at what the employer did and ask if it was a decision that another reasonable employer would have taken in those circumstances.

Of course any tribunal's view as to what a 'reasonable' employer would do is to an extent subjective anyway and both employers and employees are at the mercy of the court's take on the facts on that day, influenced by the witnesses in front of them and in my opinion these factors make a huge difference. But we have to start somewhere. So that is the first question. Band of reasonable responses.

We now need to consider each of the five reasons for dismissal individually as each have their own further tests of reasonableness. I told you that it was complicated!

1. Conduct.

   In a dismissal for conduct reasons, the employer must firstly establish what the conduct is and must then show that that conduct was in fact the reason for the dismissal.

   Furthermore in conduct dismissals, the employers must satisfy what is known as the *Burchell test.*

   Here we have BHS to thank. The case, *BHS v Burchell* which was heard in 1972, involved an employee of BHS who was suspected along with some other employees of abusing the staff purchasing procedure. Arising out of the case, where it was not clear cut whether or not the employee had done what was alleged, the Employment Appeal Tribunal concluded that in such a case, a dismissal will not be fair unless;

a. The employer believed the employee to be guilty of misconduct
b. The employer had reasonable grounds for holding that belief
c. The employer had carried out as much investigation as was reasonable in order to support that belief

Any investigation is also subject to the range of reasonable responses test.

In a case brought against Sainsbury's in 2003 (*Sainsbury's v Hitt*), it was held that the range of reasonable responses test applies equally to investigations as well as the reason for dismissal. In the case, an employee was dismissed for stealing razor blades because they were found in his locker and he had the opportunity to steal them. The employee argued that others had keys to his locker, that the razor blades had been planted and that those other employees should have been interviewed as part of the investigation process. It was held however that it was not for the tribunal to say what investigation *should* have been carried out, only to determine whether the investigation that Sainsbury's *did* carry out was itself within the band of reasonable responses.

Having established that conduct was the reason for the dismissal, established what that conduct was, and passed the Burchell test, the employer must also show that overall he acted reasonably in all the circumstances in treating the reason as a fair reason to dismiss.

Factors to be considered under this heading, many found in the ACAS Guide are typically;

a. Consistency. Have other employees who did the same as this employee been treated in the same way?
b. What is the employee's length of service? The courts are (rightly) sympathetic to a more lenient approach being taken with regard to longer serving employees with previously clean records
c. The employee's disciplinary record, have there been previous warnings? Is this the final straw following a final written warning for conduct?
d. Mitigating factors, was the employee provoked, does he have home or personal circumstances which need to be taken into account? Is there any illness or disability?
e. The employee's approach to the matter, have they admitted it, are they sorry?
f. The likelihood of it happening again?
g. The effect of their behaviour on others in the organisation and the importance of setting a precedent.
h. Are there any suitable alternative sanctions instead of dismissal?

Even if the answers to the above questions make no difference to the decision, you should still consider them and make a note for the file of your deliberations, a. to treat the employee fairly and b. to show to a tribunal should the need arise.

2. Capability/Qualifications

We will consider capability only here under this heading as the qualifications aspect is relatively straightforward and has been covered above. If an employee is dismissed for failing to have the right qualifications, then this will typically arise in the early part of their employment. The only question an employer should ask when considering dismissing an employee for lack of qualifications purposes, is whether there is any suitable alternative employment which can be offered to the employee as an alternative to dismissal.

Capability then can be subdivided into two further headings, that of performance and ill health. Performance first. So we are looking here at an employee who for whatever reason is not performing to the standard required. Clients often raise problem performing employees with me, and I am always slightly bemused as to how these situations arise. It is not difficult to understand with short service employees as they are an unknown quantity until tried and tested, and with a decent probationary period, employees who are not going to cut the mustard can be weeded out.

It is more difficult to understand with longer serving employees! Unless the job requirements have changed such as requiring use of new technology etc. it is hard to grasp why the employee is *suddenly* no longer performing. And very often it is the case that the employee has *always* been performing fairly badly but the employer hasn't managed the situation ('they are just outside their probationary period', or 'they have just gained two years' service' are common refrains!) and has suddenly woken up to that fact. Of course it happens, managers are human and under a lot of stress and often it seems easier not to face this sort of issue. But it can create problems longer term when you decide that the time has come to deal with it.

Be careful not to mix up capability and conduct although it is true that they are often interlinked. Is the employee performing badly because despite their best efforts they just aren't up to it, or are they just too lazy or disinclined to try any harder? The former is capability, the latter conduct.

Assuming that conduct related performance issues are dealt with as conduct to be improved, then pure capability issues need to be dealt with as improvement issues. If your Disciplinary and Grievance Procedure is well drafted then it will make reference to capability as well as conduct.

Where an employee is underperforming, tribunals will expect you to have tried hard to assist the employee to improve and will expect you to have turned your mind to the following questions;

a. Has the employee been told what they are doing wrong and what they need to do to perform correctly?
b. Has the employee been trained as thoroughly as possible and where possible by the employer?
c. Was the employee given a chance to improve?
d. Did the employee know what the consequences would be of failure to improve?
e. Are there any other factors which might be affecting the employee's performance, such as external, problems at work or health?
f. As a last resort has the employer considered any other vacancies before dismissal?

**Drafting Tip**

**Include an extendable probationary clause in your contract of employment with a short notice period for the duration in order that non-performing employees can be dealt with easily.**

**And ensure that your Disciplinary and Grievance Procedure makes provision for handling capability issues.**

Again, with capability dismissals the tribunal must not form its own view as to whether the employee is capable. All the employer needs to show is that he has a reasonably held belief that the employee is not capable, that he has warned and waited and done all he reasonably can to assist the employee to improve. Tribunals will expect to see evidence of warnings and a one-off act of poor performance is unlikely to lead to a fair dismissal unless it had catastrophic effects. And remember the alternative employment before dismissing.

Moving on to ill health dismissals. There is well established case law on how to handle ill health situations where the employee has been off for some time, and there is a question regarding when, or indeed if, they can return.

In a case heard as far back as 1977, it was held that *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position".*

An employer will therefore not be considered to have handled the situation fairly unless they have made investigations into the employee's medical situation, and discussed it with the employee. Seems fairly obvious?

In obtaining medical advice the employer needs to act in accordance with the Access to Medical Reports Act 1988 which provides that the employee must give their permission before you may write to their doctor and they have the right to see any medical report before it comes to you. In practice employees rarely ask for this but they have to be given the chance.

If the prognosis is not good for an imminent return, or at least inconclusive, then the employer needs to determine how long, if at all, he should keep the job open for.

The matter was discussed in a case called *BS v Dundee City Council*

They held that the following factors may be relevant when taking that decision;

a. The size of the organisation
b. Whether the employee has run out of sick pay (never a good idea to dismiss in advance of that)
c. How much it costs to replace the employee with temporary cover while he is away
d. If there are any costs incurred by the employer in keeping the employee on the books such as admin or payroll costs

The overlap with disability discrimination needs to be factored in here as well.

An employer is under a duty not to discriminate because of a disability and also to make what are known as 'reasonable adjustments' to the workplace in order to facilitate a disabled employee's ability to work. An ill health dismissal may therefore be unfair and an employer left open to a claim of discrimination if they fail to make adjustments which would have enabled the employee to return and this includes the failure to offer alternative employment.

Before finally deciding to dismiss therefore an employer needs to consider whether the job can be done differently or if there are any suitable alternative vacancies, is there lighter work available, or work which doesn't have a physical component, or maybe some work from home might be possible?

As a case example I have just finished advising a client on an ill health dismissal and all of the above factors came in to play. The employee was suffering with depression and stress and went off sick a year ago. He exhausted his sick pay and was also rather lax in communicating with the company which didn't help their tolerance of the situation. He only ever contacted us when we had told him that if we didn't hear by x date we would have no alternative but to reach our own view, and at the last minute he always sent a letter and the sick notes. The medical evidence was inconclusive but by his own admission and that of his wife, he felt it was unlikely that he could come back. My client is a very small firm, shelling out expensive agency fees to temporarily replace the individual and his sick pay had long run out. The employee had been off for a year and there was no reasonable expectation that a return was imminent. On that basis a decision to dismiss was taken.

Each case in this area will turn solely on its own facts and so the more reasonable and patient you can be, seeking medical advice and consulting with the employee the better, if you are later called to account in court as a result of a dismissal.

3. Redundancy.

While it is not governed by the statutory Acas Code, redundancy has its own rules on procedural and substantive fairness and in fact Acas have written a number of guides to aid the employer.

We saw earlier that substantively there are three ways in which a redundancy might be declared, one is where the business closes down, the second is where the place in which the employee works closes down even where the overall business continues to operate, and the third is where there is a ceased or diminished requirement for the work of the particular kind that the employee is required to do.

Procedurally the rules are different to those of a conduct dismissal although still with the overarching test of reasonableness. The test, that of *Polkey* reasonableness, was set out in a case in 1987 called *Polkey v AE Dayton Services* and is as follows;

That an employer will not dismiss fairly for redundancy unless he;

1. Warn and consults employees.

   There is a statutory duty on employers who propose to dismiss as redundant 20 or more employees at one establishment over a 90-day period or less, to consult with representatives of any independent trade union, or elected employee representatives. Consultation must begin 'in good time' and where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect.

   For less than 100 redundancies, the consultation period is 30 days. Employers must also notify the Secretary of State for Business Innovation and Skills at least 45 days before the first dismissal where the employer proposes to dismiss 100 or more employees within a 90-day period. Where there are less than 100 redundancies but more than 20, proposed, the notification period is 30 days. If there is no independent union then the employer **must** consult with elected representatives of the employees. The elected representatives could be representatives already set up for other purposes (such as elected works councils). Consultation with the representatives must be undertaken with a view to reaching agreement and must not simply be a matter of form. If there are no elected representatives then an election amongst the workforce affected must take place and this can be a complex process.

   It is most important that employers involved in large scale redundancies follow the procedure and the timescales as set down as the penalties for failing to do so can be severe. A tribunal can award up to 90 days' pay (what is known as a Protective Award) in respect of *each* employee where there has been a breach of the information and consultation duty. This can run into thousands. The only possible defence to the strict duty is where consultation would have been 'utterly futile' and these situations are rare. An employer can also be fined if he fails to notify the Secretary of State.

   Where there is a smaller number than those set out above, i.e. less than 20 employees, there is no prescribed period for consultation, and therefore employers should leave enough time for a reasonable process of consultation to take place. In a case called *Chronos Richardson v Watson*, the EAT stated "in our judgment it falls short of an adequate and reasonable standard of consultation for an employee to be told on a Monday that he is selected for redundancy dismissal intended to take place on Friday"!

So we can deduce that a week is too short and that the statutory minimum for 20 staff is 30 days. So an educated guess is somewhere between 2 weeks and a month! I always recommend to clients when they are considering more than one redundancy, to hold one or two group meetings with those affected, followed by 2 individual meetings at least a week apart, and then the giving of notice which usually takes 3–4 weeks plus depending on how long the relevant notice period is.

In terms of what must be consulted about, in larger scale redundancies this is prescribed in the Trade Union and Labour Relations (Consolidation) Act 1992 which states that employers must consult over;

a. avoiding the dismissals.
b. reducing the number of employees to be dismissed.
c. mitigating the consequences of the dismissals.

For less than 20 redundancies, in terms of the subject matter of individual consultation, while again there are no details set out, it would be wise to follow the statutory guidance set out in TULCRA above.

Consultation must not just be a matter of form; it is important that due consideration is given to what the employee says at the consultation meetings before any decision is made.

2. Adopts a fair basis for selection.

The second part of the Polkey reasonableness test is that the employer must adopt a fair basis for selecting staff for redundancy. Clearly if the whole factory is closing down or if there is only one person doing the job which needs to go, then selection is not an issue. If however you have five drivers and only need two for example, then clearly some basis for choosing between employees needs to be established.

Selection can be broken down into two areas, firstly creating a 'pool' of employees from which you will select, and secondly adopting a fair selection process for choosing between the employees in that pool. It is important that the right people are put into the pool and factors such as the type of work which is ceasing or diminishing and how many employees regularly do that work or are capable of doing that work should be considered. Also relevant is whether the employees' jobs are interchangeable and if yes, do they interchange often? Are there other departments in the same place doing similar work who should be included in this pool or is it discrete and can the pool be widened to include lesser skilled employees?

It is important to be able to demonstrate that as the employer you have 'genuinely applied your mind' to the creation of your pool. The courts tend not to look too closely at the make-up of the pool if you can demonstrate that you have thought about it and that there is a sensible and well thought out basis for its creation. As ever, keep good notes.

In terms of selection criteria once you have the pool, it is important that the factors you choose are objective and can be measured. For example having the criterion 'attitude' would be difficult to measure as it could be subjectively applied depending on which manager's opinion you canvassed, whereas absence days or performance targets are much more easily quantifiable.

Acas suggests the following as objective factors;

- Absence and Attendance
- Disciplinary records
- Performance
- Skills, experience and qualifications

Once you have chosen the criteria you can apply a weighting factor between them to place the right amount of importance on each factor. For example it might be more important that someone regularly achieves targets than that they have a 100% attendance record and this can be reflected.

One final point to make on selection criteria; be aware of inadvertently introducing a discriminatory bias. For example avoid counting absence which has arisen as a result of disability and include employees who are on long term absence or maternity or paternity leave in the discussions.

Note that part timers and those on fixed term contracts are protected under the law and it would be automatically unfair to select someone for redundancy on the basis of their part time or fixed term status alone unless it can be objectively justified (and I can't think of many good examples of this!).

It should hopefully go without saying that selecting someone because they are pregnant or on maternity leave or over retirement age (there is no longer any such thing as 'retirement age) is directly discriminatory! You may think that that is obvious (and if not then you're reading the right book!) but one client facing a redundancy exercise only a few years ago cheerfully told me that we could lose x and y first because one was on maternity leave and the other was 68!

3. Considers suitable alternative employment.

The third part of the Polkey test involves making sure that any alternative employment is considered before anyone is dismissed.

It goes without saying that if there are vacancies then they must be offered to candidates facing redundancy before outsiders, and those on maternity and paternity leave enjoy special protection in the law in that vacancies must be offered to them ahead of anyone else, even if they are not the best candidate, as long as they are suitable for the job.

Employees are permitted a statutory trial period of four weeks to determine whether the alternative offer is suitable. It can be extended but only for the purposes of retraining the employee. At the end of this the employee must decide whether they are to accept the alternative employment in which case they continue in the new role, or whether they consider that the new role is not suitable and reject the offer. The employer at that stage has to decide whether their rejection was reasonable or not. If not then they lose their right to a redundancy payment.

4. Breach of statutory restriction.

Dismissals for this reason are rarely contentious as long as suitable alternative work (and/or an amendment to their current job if such an option is available to circumvent the statutory restriction) is offered if possible.

However the employer is still under a duty to act reasonably overall and that means taking into account all the facts of the case. An employer should also consult with the employee and hold a meeting to discuss the matter before deciding to dismiss.

The employer would therefore need to consider the extent or length of the statutory restriction and how much it affects the employee's ability to do their job.

For example if an employee who is employed to drive loses their licence and needs the licence to drive it seems fairly clear cut doesn't it. However if the driver has 20 years' service and the ban is for a month, then dismissal might not be reasonable. It might be that the employer considers what options are available which might include giving the employee alternative work if some is available, or letting them take holiday or unpaid leave etc. In a case heard in 1972 the employee was a salesman and needed to drive to do his job. He lost his licence but engaged a chauffeur to ferry him to and fro. His employer dismissed him under this part of the ERA and he made a claim of unfair dismissal. The dismissal was found to be unfair as his employer had not given him time to determine whether or not this plan would work.

5. SOSR

As discussed above, it is not clear whether or not the Acas Code applies to SOSR dismissal – in my view there is no reason NOT to apply the code as it is not particularly onerous, its principles are rooted in fairness and it can only stand an employer in good stead with the court if they are seen to have acted reasonably which remains part of the overall test.

Further, case law suggests that the *Burchell* test discussed above should apply to SOSR dismissals, although again, there is no good reason in my view not to do so.

# 4 UNFAIR DISMISSAL – WHEN IT GOES WRONG

We have looked at the various types of terminations and ways in which an employer can dismiss fairly. But what happens if it goes wrong and you are on the receiving end of a notification from ACAS that a tribunal claim may be lodged against you. (I'll explain why this comes from ACAS in a minute.)

**Entitlement to claim**

First let's look at who can claim.

Only employees (and therefore not 'workers' or the self-employed) can make a claim of unfair dismissal and to do so they need 2 years' service as at the date of termination. This used to be one year until April 2012 when the period increased to 2. There are three categories to get your head around here, employees, workers and the self-employed. The self-employed are relatively straightforward (think plumbers) and employees working under a contract of employment are a familiar concept.

But I have doubtless confused you with the term 'worker', (which would be perfectly understandable as most people wouldn't have a clue what the difference is and it is a difficult concept). A worker is defined in the ERA as someone who works under a contract of employment **or any other contract**, whereby the individual undertakes to perform personally any work for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. Which basically means anyone who does work which has to be done by *them* (and not a substitute, imagine the plumber not turning up but sending his mate, generally speaking that would be acceptable) and where they are not engaged by the employer in a business context such as a painter or an accountant. Confused? Yes, so are a lot of people, the distinction between a worker and an employee is hard to grasp. Casual workers are usually workers, they don't have employment contracts but do have the protection of worker rights (minimum wage, holidays, rest breaks etc.). So, back to employment claims.

*There is a little-known exception to the 2-year period of qualifying service required under the ERA. If an employee is dismissed without notice (in circumstances where the employer was not entitled to dismiss without notice) after 51 weeks' employment but less than 2 years, then the statutory minimum notice period of a week is added to the employee's period of service to enable them to make a claim.*

An employee is defined in the ERA as someone who works or worked under a contract of employment.

The employee must work in (or if not based there, have a substantial connection to) England, Scotland or Wales (Northern Ireland have their own rules).

There are certain circumstances in which the 2-year qualifying period does not apply.

a. If an employee is dismissed where they would qualify for paid suspension on medical grounds then the qualifying period is only one month.
b. If an employee is dismissed because of a reason relating to their 'political opinions or affiliation', or a reason connected to their membership of the reserve forces, then no qualifying period is needed – the dismissal is not automatically unfair and will be judged against the usual test but no qualifying period is needed. So think carefully before dismissing that newly recruited vocal political activist in the office! Make sure that any dismissal relates solely to performance or other factors.
c. The last of these exceptions is automatically unfair dismissals. If you dismiss your employee for one of these reasons then they will be able to bring a claim without the requisite 2 year period AND the test of reasonableness is irrelevant; the dismissal will be found to be automatically unfair if an employee can show the tribunal that they were dismissed for one of these reasons.

There are 26 automatically unfair reasons for dismissal and while I won't list them all here, I will list a few of the more important ones to give you a flavour. They include reasons such as dismissals because of part time status, fixed term status, in connection with union recognition, flexible working requests, whistleblowing, asserting a statutory right, health and safety and family reasons. The last one itself subdivides into reasons of time off for dependants, pregnancy, maternity, paternity, childbirth, adoption, parental leave, shared parental leave.

You will note the flavour of these reasons and they are of course patently unfair, if you dismiss someone because they pregnant then you deserve the weight of the law against you!

There will also be an unfair dismissal if an employee is selected for redundancy for one of the automatically unfair reasons.

There are various exceptions to the right to claim unfair dismissal, including members of the armed forces (but not the reserve forces) and the police (with some exceptions), share fisherman and those with diplomatic immunity are not able to claim. Those taking part in strike action (again with some exceptions, are not permitted to claim (you can see why employment law is complicated!). Anyone operating under an illegal contract is not permitted to claim nor is a claim valid which is made out of time or which has been validly settled. We'll look at valid settlements in Chapter 5.

**How a claim is made**

Assuming therefore that an employee has the right to bring a claim, (much watered down now by the increase in qualifying service to 2 years), what do they have to do?

It has become much harder in recent times for employees to make a claim for three reasons; the first we have seen above is the increase in qualifying service from one year to two back in 2012, the second is the introduction of employment tribunal fees and the third is the Acas Early Conciliation scheme. The Acas scheme isn't necessarily a bad thing but it does add another hoop for employees to jump through.

Fees first. Prior to July 2013, employees wanting to make a claim could simply download the employment tribunal form (ET1), complete it and send it off to the employment tribunal without further ado and at no cost to themselves. It was therefore much easier to lodge a vexatious claim simply for the purpose of intimidating their hapless employer into stumping up to settle the matter. Typically, employers experience a sense of panic and a sinking feeling when a claim lands on their desk, and unless extremely certain of their position, and/or armed with the resources to fund legal advice, most just want the matter to go away and will often pay for the privilege.

Things changed in July 2013. Fees were introduced for making an employment tribunal claim. There are two levels of fees, lower fees for smaller claims called Type A claims which include a failure to pay statutory redundancy pay, or unlawful deductions from wages. Type B claims include weightier claims such as unfair dismissal, discrimination, equal pay and whistleblowing.

The fees are payable at two stages, one when the claim is lodged (the issue fee) and one before the hearing (not surprisingly known as the hearing fee). The issue fee (at the time of writing) for Type A claims is £160 and Type B claims £250. The hearing fees are £230 for Type A and £950 for Type B. So the total fee for Type A is **£390** and for Type B **£1200** if you want your case to reach the hearing.

These are not insignificant and in practice it is believed that fees have deterred many applicants from lodging claims. Statistics apparently show that there has been a reduction of a staggering 70% in claims brought since fees were introduced. While doubtless many vexatious claims now never see the light of day, it is likely that claims with merit are also not being brought because of the cost and effort involved. It is a certainly a favourable time to be an employer from this point of view.

There is a fee remission scheme if claimants are unable to pay, but it is somewhat complicated with a disposable income and a capital test, and the limits are low.

Tribunals are not permitted to accept claims unless they are accompanied by a fee or by a remission application submitted no later than 7 days from the application date.

If the employee wins their case they may apply to the tribunal for the employer to refund their fees and this largely happens, but it is not an automatic process.

And thirdly, from April 2014 Acas Early Conciliation was introduced.

Employees wishing to make a claim to an employment tribunal must now in virtually all circumstances contact Acas as a first step under the Early Conciliation scheme. Early conciliation can be a rather complicated process especially when trying to calculate by how much it extends time (more on that shortly) and what the critical dates are, but in essence the system is straightforward. Applicants may fill out a form or telephone Acas who will discuss the details of their claim with them and will then discuss with both parties whether or not they are willing to enter into discussions regarding settling the matter. If either party declines or if at the end of the timeframe allowed a successful resolution has not been reached, then Acas will issue what is known as an Early Conciliation Certificate (EC) and this certificate contains a number which applicants will need if they wish to formally lodge an employment tribunal application. Without this number claims cannot be submitted.

Let's look at timescales as EC is relevant here. An application to an employment tribunal must be made within 3 months of the effective date of termination (known as the EDT). The tribunals do have discretion to extend time but in unfair dismissal cases this is only where it was 'not reasonably practicable' to present the claim in time and then it must have been presented within such further period 'as the tribunal considers reasonable'.

In discrimination cases the tribunal has the discretion to extend time by such period as it consider to be 'just and equitable'. While these tests are arguably quite wide, and there seems to be a broad spectrum for the tribunal, in practice they have typically been relatively narrowly applied although increasingly decisions seem to err on the side of the employee. Where a solicitor is at fault and their failure is the reason that the claim is not lodged in time, the tribunals tend not to extend time given that there is a cause of action for the hapless employee against the solicitor. Ignorance is no excuse unless the employee has been misled regarding timescales, for example where the employee is told by her employer that she can't lodge a tribunal claim until after the internal appeal hearing and the appeal hearing is longer than 3 months from the date of dismissal.

So claims must be made within 3 months of the EDT or in cases of discrimination within 3 months of the last act complained of. Some claims have longer time limits; for example claims for a statutory redundancy payment, equal pay claims and dismissals arising from taking part in official industrial action have a limit of 6 months.

Once the employee contacts Acas (referred to as Day A) the clock on the time limit is effectively stopped starting with effect from the day after the contact is made, up to the day when the EC certificate is received (referred to as Day B). The EC period could be as long as one month plus 14 days (Acas can extend time by up to 14 days if settlement is not reached within the month where they feel that there is a reasonable prospect of settlement) which is the maximum period of extension, or as short as a day if the parties don't want to conciliate and the EC certificate is issued immediately. How long the extension lasts depends on the date within the 3 month limitation period that the employee contacts Acas. This is where it gets a bit complicated! If the employee's original time limit for lodging a claim falls between Day A and one month after Day B, the new time limit will be one month after Day B. If however the original time limit falls more than one month after Day B, then time will be extended by a period equivalent to the early conciliation period. The length of the early conciliation period is calculated from the day after Day A up to and including Day B.

The first you will know about a potential claim is receiving a call from an Acas Conciliation Officer who will advise you that they have received an Early Conciliation approach from your ex (or current) employee and they will inform you about the potential claim and ask if you would like to enter into discussions to settle the matter. Acas will act as a neutral go between but they won't offer advice to either side, they will simply go back and forwards between the two sides to see if a settlement is possible. The Conciliator has a relatively narrow remit. The Conciliator cannot know what the outcome of a tribunal hearing would be if it went ahead, cannot advise either side whether to accept or make any proposals for resolution, cannot take sides, represent either party or help prepare either a case for tribunal or a defence to a claim, and cannot take a view on the merits of a claim or advise whether a claim should be made.

Unless you are sure that the claim against you is entirely without merit, it is always worth considering settling the matter as time spent preparing for a tribunal can be costly and even if you do it yourself, don't underestimate how much effort is involved. And if you use solicitors, costs up to and including representation on the day can be upwards of £10,000 and you will *still* use up a significant amount of management time. A cost benefit analysis is usually worth undertaking to see if a nuisance value low offer is worth making. The benefit of Acas is that their services are free, they are entirely impartial and once an agreement is drawn up it is binding. Unlike with a Settlement Agreement (which we'll look at in the next chapter), there is no requirement that a claimant takes legal advice before signing a COT3 and so to an extent claimants are at a disadvantage unless represented through the Acas process.

**COT3**

**A COT3 is the name given to settlements which are legally-binding contracts between the parties to settle actual or potential complaints to the Employment Tribunal. They get their name from the name of the form used which is Acas form COT3.**

If the matter can't be settled, the claimant will be given an EC number and they will at that point decide whether to then lodge an application to the tribunal. If they do, this will be on form ET1 which contains the claimant's details including terms of employment, the employer's details, the claim that they are making and what remedy they are seeking.

**Handling a claim**

Further to the contact by ACAS, if you have not agreed to settle the matter, you will be aware that a claim has been made against you when form ET3 arrives in the post. This is the Respondent's form (you are now a Respondent!) and you will need to complete it. You will also be given a copy of the Claimant's ET1 and it is a similar exercise in reverse, you need to provide your details and confirm or otherwise the details the Claimant gave, and then provide your response to the claim that they are making. It is an important document and while you will later have the chance to provide witness statements, what you put on the ET3 forms the basis of your defence and so it is important that it is correct and contains all of the information that you are relying on.

You are given 28 days to respond and you will also be provided with a hearing date and a list of 'directions', instructions to follow. The various tribunals tend to do things a little differently; sometimes the directions come with the ET3, sometimes later, sometimes there is a 'preliminary hearing' or a 'case management' meeting where the parties come together to discuss either any preliminary issues or the directions, particularly if there is a complicated claim such as whistleblowing or discrimination, or these can be done over the phone.

The directions usually include the following;

a. a date by which the Claimant must set out in detail what financial loss they are claiming and send it to the Respondent
b. a date by which the parties must send each other a list of documents on which they intend to rely (this can run into hundreds or more depending on the complexity of the case and only documents on the list can be referred to at the hearing)
c. a date by which the parties must exchange documents
d. a date by which the Respondent must make a bundle of agreed documents and make enough copies of the bundle for the parties and the tribunal (no mean feat)
e. a date by which witness statements must be exchanged between the parties (again no mean feat particularly if you have a number of witnesses and only that which is contained in the documents can be referred to in court so it is most important that they are accurate and they take a while to get right)

Sometimes other directions can be sought and these vary from tribunal to tribunal, some ask for chronologies, skeleton arguments, cast lists of individuals etc. and some just request the basics above.

It is MOST important that you comply with directions and diarise them as soon as they are received. Tribunals look most unfavourably on parties not complying with them.

Once the directions are complied with it is time for the hearing, which can last for up to a day if the matter is straightforward and up to a week for more complex matters or those with a large number of witnesses. The parties can represent themselves or can use solicitors, barristers, consultants etc. Originally the tribunals were intended to be informal settings where the parties were encouraged to represent themselves and it was very much less common for legally trained individuals to preside. In fact when I was a Personnel Director back in the nineties, we always represented ourselves at tribunal and I am pleased to say that we never lost a case, and there were quite a few cases…! But now it is more usual to see both parties represented by lawyers or barristers.

If it is a straightforward unfair dismissal claim then these are usually heard by a Judge sitting alone who will be legally qualified. In the old days all hearings had a panel of three members, a legally qualified chair and two lay members, one with an employer's hat on and one from a trade union background. Nowadays only more complex cases are heard in front of a panel.

In an unfair dismissal claim the employee must show that they have been dismissed and the employer must then show what the reason for dismissal was, and that it was one of the five potentially fair reasons. The tribunal must then decide whether the employer acted reasonably in treating that reason as sufficient such as to justify dismissal and whether the employer acted reasonably in all the circumstances.

In an unfair dismissal claim the employer usually goes first, their witnesses give evidence, they are cross examined by the other side and then the panel ask questions. Then the Claimant gives evidence and the same format is followed. Both parties make closing statements and then the Judge retires to make the decision.

Once the hearing is over, the decision can either be made and delivered to the parties on the day or the tribunal can 'reserve judgment' which means that the decision will be written up and delivered at a later point. Usually when this occurs decisions are received by the parties within 6 weeks or so however as I write I am still waiting for a decision for a Claimant I represented at a hearing which took place 7 months ago! Sometimes it just takes a while.

**Remedies.**

If the tribunal rules that the dismissal was fair then you all go home and you have only lost the costs of preparing your case, your time and any legal fees. And a sense of satisfaction!

If however the tribunal rules that the dismissal was unfair then they will ask for submissions from both parties on remedy. This can either be on the day or at a later remedies hearing.

What are the available remedies? If the Claimant so requests, the tribunal can make an order for compensation, reinstatement (the Claimant gets their old job back on exactly the same terms with continuity of service preserved as if they had never left) or re-engagement (the Claimant comes back to work but in a different role). They will usually have indicated what they are seeking on their ET1 and you will be able to argue against reinstatement or reengagement if you have good grounds to demonstrate that such orders are not practical. In practice most Claimants simply want compensation.

So if compensation is ordered, what will you have to pay if you lose? Tribunal awards are made up of a Basic Award which is calculated in the same way as a statutory redundancy payment, based on the statutory figure for a week's pay (currently £479 per week) or the Claimant's actual gross weekly pay if less. This is calculated taking into account the Claimant's age and length of service which are capped at 64 and 20 years' service respectively. The maximum is £14370. If the Claimant has received a statutory redundancy payment this will be offset against the Basic Award.

The second award is the Compensatory Award which is based on the Claimant's actual loss taking into account loss of wages to the date of the hearing and future loss of wages. Wages includes bonus, commissions, expenses, pension and other benefits. The Claimant is under a duty to 'mitigate their loss' i.e. to try and find alternative work and will be expected to prove to the tribunal that they have made efforts in that regard. Average awards are low, the median award in the last set of tribunal numbers published showed the Compensatory Award to be in the order of £7,000. However they can be a lot higher if your ex employee is near to retirement age and is not expected to find another job easily. There is a cap on the Compensatory Award of the lower of a year's gross pay or the current statutory limit which is £78,962.

The Compensatory Award can be reduced (as can the Basic Award) by contributory fault on the part of the employee. The Compensatory Award can also be reduced (by what is known as a 'Polkey' reduction) if the unfairness of the dismissal was largely procedural and those procedural errors made little difference to the eventual outcome if the employee would have been dismissed anyway.

The award can also be reduced if the Claimant has earned any income or state benefits during the period to the hearing and beyond as it is only actual loss incurred which is relevant.

The Compensatory Award can be increased or reduced by up to 25% or if the employer or employee did not follow the Acas Code of Practice on Discipline and Grievance.

The compensation cap is removed for dismissals relating to health and safety activities, whistleblowing, or where there has been unlawful discrimination.

The tribunal can also award a figure (typically low and in the order of £500) for loss of employment rights and finally the tribunal can make a costs order to the effect that the Respondent pays the Claimant's tribunal fees if the Claimant makes an application for an order. These are usually repayable by the Respondent if the Claimant is successful.

With regard to costs, there are no general costs orders in the employment tribunals as there are in civil courts and so each party pays their own costs. However the tribunal can make cost orders against a party (although apart from tribunal fees this is still the exception rather than the rule) in some circumstances including where claims are vexatious, have little prospect of success, or for unreasonable conduct or incurring wasted costs.

# 5 SETTLING CLAIMS

Contractual and common law claims can be settled via a normal 'waiver of claims' (for consideration of course), however agreements to waive statutory claims such as unfair dismissal or discrimination will be void unless they are carried out in one of only 3 prescribed methods.

The first of these is via an Acas agreement – we discussed the COT3 earlier. The second is via a properly constituted Settlement Agreement which we will discuss shortly and the third is where agreement is reached to submit to an Acas led arbitration which can be used for straightforward unfair dismissal claims and flexible working claims. Once parties submit to arbitration the decision of the arbitrator is binding on the parties. This occurs more commonly in collective employment related disputes where for example, a trade union might be in dispute with an employer over the annual pay rise. The union could agree with the employer to ask Acas to appoint an independent arbitrator from their panel of arbitrators to hear the two sides' cases and then make an independent and impartial decision which will be binding on the parties. It can also be used to settle individual disputes where for example, an individual and an employer might decide to go to arbitration to avoid the stress and expense of an Employment Tribunal. I am not aware of exact figures for individual ACAS arbitrations but there were 22 trade dispute arbitrations requested in 2015/16 and I would guess that the individual number was pretty low.

On then to the final method which is the Settlement Agreement (SA), formerly known as a Compromise Agreement. Concluding the employment relationship via an SA is becoming increasingly common and I am currently advising on more settlement discussions with clients, (both corporate and individual) than ever before.

There are numerous benefits to using the SA for both parties. For the employer it means that once agreement is reached, the matter is over and done with and the employee, who may otherwise have a valid claim, cannot bring any claims against the company which have been compromised by the agreement (other than pension related or personal injury which are typically excluded). For the employee, they receive a sum of money usually on termination or shortly thereafter which is upfront, and they do not have to take their chances at tribunal with the associated cost, uncertainty and tribunal fees to be incurred. They have however (usually) lost their job in the process however an SA *can* be used to resolve a workplace dispute for example over holiday pay or other terms and conditions while the employee remains in employment.

Not all claims can be settled via an SA, currently future personal injury claims and claims with regard to accrued pension rights cannot be compromised, and due to a lack of established case law in the area, it is not clear whether general future claims can be compromised. In terms of statutory claims, while most can be settled, there are a number of specific claims which cannot, some examples of which are for failure to inform and consult with appropriate representatives on collective redundancies, claims for failure to inform and consult or failure to pay the compensation that is equivalent to the protective award under TUPE, and claims under the Agency Workers Regulations.

In order that an SA is legally binding, it must comply with the following conditions as set out under the Enterprise and Regulatory Reform Act 2013 under which the concept of the SA was formed;

a. The agreement must be in writing
b. It must relate to a particular complaint or proceedings
c. The employee must have received legal advice from a relevant independent adviser (who must be identified in the agreement) on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue any rights before an employment tribunal
d. The independent adviser must have a current contract of insurance, or professional indemnity insurance, covering the risk of a claim against them by the employee in respect of the advice
e. The agreement must state that the conditions regulating settlement agreements under the relevant statutory provisions have been satisfied

It is usually the employer, or the employer's advisor who draws up the agreement and the employee then takes it to a solicitor to obtain advice. Solicitors are only required to advise on what the terms of the agreement mean, and also what effect signing it will have on the employee's ability to make any subsequent claims. Solicitors are not required to advise on whether the sums on offer represent a good deal or not, however they frequently do. When setting the terms for an offer therefore I advise clients to start low on the basis that you are likely to be negotiated upwards and leave yourself some wiggle room.

So how do you manage to manoeuvre yourself to be in a position to offer a settlement agreement to an employee and to keep it confidential should they not wish to accept it?

Prior to an addition to the ERA in July 2013, employers could have 'without prejudice' conversations with employees but these only remained confidential where there was an existing dispute between the parties. But sometimes this is not the case, either there is no dispute or one of the parties is unaware that there is a dispute and we have all known occasions where an employee just isn't working out, (the 'it's not you it's me' sort of conversation!), or where they are performing just well enough so that disciplining them is difficult, or there may be a relationship or 'face not fitting' problem, or you may, as the employer, just not want to go through the pain and timescale of a full disciplinary procedure. This is where pre-termination negotiations and an SA can come in very useful.

Acas have produced a couple of documents which are very useful in assisting employers with the process. The Guide to Settlement Agreements is a detailed 88-page document which offers useful advice, gives examples of the sorts of scenarios where SAs might be useful and provides templates, both of letters to use when explaining the scenario to employees and also a model SA itself. The Guide explains that it sets out good practice but has no formal status in employment tribunal proceedings.

Acas have also published a statutory Code of Practice on Settlement Agreements. Failure to follow the Code does not, in itself, make a person or organisation liable to proceedings, nor will it lead to an adjustment in any compensation award made by an employment tribunal. However, unlike with the Guide, employment tribunals will take the Code into account when considering relevant cases. The Code explains that discussions that take place in order to reach a settlement agreement in relation to an existing employment dispute can be, and often are, undertaken on a 'without prejudice' basis. This means that any statements made during a 'without prejudice' meeting or discussion cannot be used in a court or tribunal as evidence. However, as we have discussed, the without prejudice rule only exists where there is already an existing dispute between the parties, if there isn't then it won't apply.

The government addressed this issue by adding section 111A of the ERA to allow the use of confidential discussions to assist with pre-termination discussions. Section 111A, which runs alongside the 'without prejudice' principle, provides that even where there is no existing dispute, the parties may still offer and discuss a settlement agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim. Section 111A doesn't apply to all situations however, it is largely unfair dismissal. Claims that relate to an automatically unfair reason for dismissal such as whistleblowing, union membership or asserting a statutory right are not covered by the confidentiality provisions set out in section 111A. Neither are claims made on grounds other than unfair dismissal, such as claims of discrimination, harassment, victimisation or other behaviour prohibited by the Equality Act. The protection will also be lost if there is any 'improper behaviour' on the part of the employer with regard to the pre-termination discussions such as harassment, bullying, undue pressure, victimisation, discrimination, telling the employee that they must accept the agreement or they will be dismissed etc.

Whilst not a legal requirement, the Acas Guide suggests that employees should be allowed a companion at a meeting to discuss an SA. It may also be discriminatory (i.e. a failure to make a 'reasonable adjustment') not to allow a companion if for reasons of disability one is necessary. It is also important to stress to the employee that entering into the SA is entirely voluntary and that there will be no negative fall out if the employee does not wish to.

The Code states that employees should ideally be given 10 calendar days to consider the terms of the SA and to take legal advice before having to make a decision. Failing to do so might constitute improper behaviour.

Although not a requirement, it is usual for employers to meet the cost when the employee goes to the solicitor for advice. In the early days this was typically £250 plus VAT, now it is more commonly around £500 plus VAT and in my experience when the employee's solicitor calls to discuss amendments (or should I say increases) to the terms of the agreement, it is usually an increase in their fee which is requested first!

I find in practice that clients often have difficulty in starting these pre termination discussions, they can of course by their very nature be awkward, but I must say that in many years of advising on them, I have never known one be rejected – in the end there is usually a compromise to be sought.

I find that it is easier and more reassuring for the employer to start the process by a meeting with the employee and to go in armed with everything that they need. This usually means a 'without prejudice and referring to S111A' letter advising on the reason for meeting and setting out the situation, and also a draft Settlement Agreement setting out the terms which the employee can take directly to the solicitor. The letter acts as a crib sheet for the employer regarding what needs to be said as often the stress of the situation can make one go blank.

It is much easier to plan beforehand and have it ready than to inadvertently say something which you might not mean.

I usually also draft an 'open' letter setting out the non SA route, whether it be redundancy terms without the benefit of the enhanced package, or a letter referring to performance which needs to be addressed should agreement not be reached. It is most important that the open letter is designed to set the alternative scene as opposed to sounding like a threat if the employee doesn't sign. It needs to be carefully worded for this purpose. For example if the employee may be about to undergo a redundancy consultation process but that could take some time and involve pools for selections etc. it may be that you offer an open letter which is the one that you would send at the start of the process, but the without prejudice letter and SA offer an enhanced package for agreeing to go without the formal part of the redundancy process.

Once the first 'awkward' conversation has taken place, the process often runs relatively smoothly, with some negotiation with the employee's solicitor generally being par for the course. A reference is usually requested as part of the agreement and appended to it.

Employers often ask if the employee should be required to come into work while the 10 day period elapses. While it is not prescribed that they should be allowed to remain off work (with pay), it often eases the process if they are not in the office and perhaps giving them the choice is the most sensible route.

# 6 CONCLUSION AND HOW TO AVOID MAKING MISTAKES...

There is some general advice which I can offer, gleaned from over 30 years of advising clients, generally running small firms and the issues tend to be largely the same.

Following this advice won't guarantee that you will avoid claims; employees will often try their hand, but it will help to keep you on the right path and put you in a stronger position should things go wrong and you end up in a tribunal defending your actions.

1. Treat employees fairly and consistently – it is common sense but often overlooked.
2. Give employees the benefit of the doubt, at least at first, and assuming of course that the misdemeanor isn't of grave seriousness.
3. Try and resolve issues during the employee's probationary period, it saves so much unnecessary angst later on and typically a poor employee will become evident during this period. And even if not during the probationary period, at least act before the first two years are up. Please!
4. Keep on top of things – a familiar refrain from clients when asked how often the employee has done whatever they are being accused of (off sick, or had performance issues) is 'oh lots of times' but that for whatever reason they weren't dealt with at the time. Know what standards you expect, communicate them and then deal with any and all issues as they arise, with all employees. Make a note in the file as you go along, even if it is only an informal word – it is so much easier to deal with and helps to build a picture. It also means that the employee can't accuse you of being inconsistent by allowing lateness and poor performance on some occasions and not on others.
5. Deal with issues head on rather than pussyfooting around – the thought of bringing up an issue with an employee, particularly a difficult one can be daunting I admit, and it can lead to an atmosphere in the office, but better that employees know where they stand and that matters are not left to fester. Not dealing with issues with one employee can lead to problems with others in the team who feel that the employee is being given special treatment – it will also be harder to discipline others for similar behaviour/performance if some are allowed to get away with it. And the tribunals look for consistency when assessing fairness. All issues can be dealt with kindly, firmly and objectively, it doesn't necessarily have to be awkward. Make notes if you are nervous regarding how to begin and scared of forgetting key points.

6. Keep good records of meetings, discussions, performances, timekeeping, absences etc.
7. If you have a Disciplinary and Grievance procedure, know what is in it and follow it. Refresh your mind on your contracts of employment too, it is likely that the local solicitor drew them up for you or your predecessor years ago and the admin person in the office churns one out each time someone starts. You may have no idea what they say and I'll bet your supervisors don't – see if they need a revamp or at least be familiar with their terms.
8. If you have an appraisal system, do make sure that it reflects reality. You have no idea how often clients ask how they can dismiss a poor performer and when I ask what their last appraisal said, I am invariably told that it was virtually glowing!
9. Train your staff and your managers. I can't place enough emphasis on this. It is no good if you and your HR person and/or your lawyer up the road are aware of the law on equal opportunities, health and safety etc. (although it is certainly a start!), if your managers, supervisors and staff aren't. Let's take discrimination as an example – you are vicariously liable for the actions of your staff UNLESS you have taken 'all reasonable steps' to avoid it happening. This means having an equal opportunities policy, training ALL staff in it, training managers in it and ensuring that any issues arising under it are swiftly dealt with. Training needn't be onerous, an hour with managers on annual basis will suffice. And ten minutes at induction with each new member of staff.

In conclusion, terminating an employee's contract of employment fairly can be daunting and for the inexperienced employer, it seems as if there are so many legal hurdles to be negotiated first.

However, if an employer follows the guidelines above, treats the employee with respect and doesn't discriminate, acts in accordance with the contract, carries out any investigation thoroughly and fairly, gives the employee a chance where possible and where appropriate, then he won't have gone far wrong.