Employment law – the fundamentals a retailer should know – Part 3

In the final of a three-part feature, **Stuart Jackson** continues his exploration of employment law with a look over the complex issues of dismissal.

The last two instalments have taken us through contracts of employment and discipline procedures explaining both that which is obligatory of the employer under law while also exploring their practical impact on the workplace.

In this final chapter, we are taking a look at what can happen if contracts or discipline procedures are handled badly – a claim by an employee for unfair or automatically unfair dismissal can result.

Unfair dismissal occurs when an employee challenges the working environment, conditions or reasons for dismissal. Automatically unfair dismissal can occur where the employer has breached a point of employment procedure or when the basis for dismissal falls into one of a pre-defined list of "automatically unfair" reasons (listed later in this article).

A source of some uncertainty is that while employment law states that employees must have one year or more service in order to claim for unfair dismissal, there is no qualifying service period for claims pertaining to reasons classed as "automatically unfair".

Fair dismissal

Dismissal is normally fair only if the employer can show

that it was for a justifiable reason. It could, for instance, be an issue related to the employee's conduct, capability or qualifications for the job.

During a fair dismissal process that involves a worker with one year or more service, it is essential to follow the statutory procedure, which requires an employer to investigate, evaluate and then conduct a formal hearing (see last issue).

Those with less than one year's service are not able to claim for unfair dismissal and consequently, the complex dismissal procedures outlined last month do not have to be followed.

Since so much of recent EU-driven employment law remains untested in a courtroom, however, it is advisable to follow the full procedures irrelevant of an employee's length of service. Such dedication demonstrates good employment practice, offers experience to management and eliminates any possibility of being caught out by sudden changes to legislation or interpretation.

As there is no qualifying period for "automatically unfair" claims I can envisage a scenario where an employee with less than one year's service is casually dismissed for misconduct and then claims, for example, that an automatically unfair reason such as racial discrimination was the real basis for their dismissal.

The employer now has to answer this new case and having casually dismissed the employee for a reason that did not permit a claim against them, now find themselves without the records or witnesses that would substantiate the original reason and prove that this and not racial discrimination was the basis for dismissal.

If the employer had conducted the full procedure in all cases, irrelevant of length of service, such good practice would have protected them from this new claim. The stronger the employer is in its systems, the less any unscrupulous employee is likely to challenge a reason for dismissal unfairly.

Automatically unfair dismissal

To begin with, let us grasp the concept that "automatically" unfair dismissal has nothing to do with the reasonableness of an employer's action. It sets out to achieve two goals. The first is to protect an employee's (with one year of service or more) rights to due process, irrelevant of the nature of their misconduct. Should the statutory disciplinary procedure outlined last month not be adhered to, the employee's dismissal will be treated as "automatically unfair".

The second outlines pre-determined reasons that are always unacceptable for dismissal regardless of age or length of service.

- Pregnancy, parental, paternity and adoption leave or time off for dependants
- Acting as an employee representative
- Part-time and fixed-term contracts
- Discrimination on the grounds of age, sex, race, disability, sexual orientation and religion
- The Working Time Regulations, annual leave and the National Minimum Wage
- Their right to be

accompanied or seeking to accompany a worker at hearings.

- Actions pertaining to health and safety at work
- Leaving the workplace due to or protecting himself or herself from danger or expected danger.

If any of the above reasons are proven to be the grounds under which an employee was sacked a tribunal will automatically rule in the worker's favour, irrelevant of any other factors involved. The list I have supplied is summarised. For full details visit www.acas.org.uk/index.aspx?articleid=1115

Unfair dismissal

Employees have the right not to be unfairly dismissed. In most circumstances they must have at least one year's continuous service before they can make a complaint to an employment tribunal. However, as stated earlier, there is no length of service requirement in relation to "automatically unfair" grounds.

The qualifying requirement is also reduced to just one month for workers claiming to have been dismissed for certain medical reasons.

Employees must make any complaint within three months of the date of termination of employment. Unsurprisingly, there is yet another provision that permits a tribunal to waive the three-month deadline in unqualified exceptional circumstances. Another case where an employer can never fully and securely "move on" after a dismissal occurs.

Constructive dismissal

This is an intriguing component of employment law that permits a worker to resign and file a claim based on the unreasonable conduct of their employer. The argument is that the worker was forced out of the job and effectively dismissed.

It is generally accepted that a tribunal will only rule in this way should an employer's action have been such that it can be regarded as a significant breach of the employment contract. For example, arbitrarily demoting an employee to a lower rank or poorer paid position.

Employment tribunals

In all tribunal cases the onus is always on the employer to prove they acted correctly and with due cause rather than on the employee to prove the reverse. This makes it imperative to follow procedures, be sure of the reasons for dismissal and to keep accurate and comprehensive records, which can be produced at a hearing.

Although there are time limits on employment tribunal claims, employees have an alternative option to pursue a claim for breach of contract in a county court or the High Court. The time limit for this action is six years from the termination of employment in England and five years in Scotland.

Summary

It is important for retailers to recognise the danger brought by changes to employment law in recent years. The UK has become an increasingly litigious nation and the prospect of a retailer facing a claim that could lead to a substantial compensation payout should make us all handle employment matters vigilantly.

Due to the complexity of employment law, many of the points contained herein are summarised to give general guidance only and professional legal advice must always be sought before taking any action. HFB

If you have any questions for Talking Shop or would like further information on Stuart Jackson's consultancy service, contact him on 0131 315 0303 or email stuart@forceofnature.co.uk or visit www.forceofnature.co.uk