



5 REASONS WHY EMPLOYERS LOSE UNFAIR DISMISSAL CLAIMS AND TEN WAYS TO AVOID A DISMISSAL BEING HELD TO BE UNFAIR BY A TRIBUNAL

If you are a Business Owner, Director, HR Director/Manager then this short Guide may help you winning an Unfair Dismissal claim against you.

1. Procedures are not Followed

A huge number of Unfair Dismissal cases are lost, by employers, because procedures were not followed.

Employers risk losing cases where their own procedures or the procedures in the Code of Practice on Grievance and Disciplinary Procedures were not followed or where no procedures at all were applied.

In cases before Rights Commissioners or the Employment Appeals Tribunal (“EAT”) these cases nearly always revolve around procedures. It is often a case of Procedures Procedures and more Procedures.

2. What Happens When Procedures are not Followed?

When procedures are not followed then the EAT/Rights Commissioners will normally hold that a dismissal was unfair.

The Courts have held that fair procedures are a Constitutional Right for employees. If those Rights are not respected then employers run the risk of a Tribunal holding the Dismissal to be an Unfair Dismissal regardless of the circumstances.

3. What Happens if you are “Justified” in Dismissing for Wrongdoing but Procedures Where Not Followed.

The employees claim may still be held to be an Unfair Dismissal.

The issue of justification will then go to the level of compensation which the employee will receive, if any. But once a dismissal is held to be unfair invariably the employee, except in very unusual circumstances, will receive some compensation. Many cases before the EAT show that while an employee may have contributed, to a significant extent, to the dismissal they still receive compensation.



4. Is There a Difference Between a Simple Dismissal and Dismissal for Gross Misconduct?

The simple answer to this is “yes”.

In a case where an employee is dismissed for cause this allows an employer to go back and show the history of the employee, taking account of previous warnings or disciplinary penalties imposed and being able to show that the dismissal resulted from ongoing problems with the employee over a period of time.

In the case of a dismissal for gross misconduct then it is only the incident which led to the dismissal which can be looked at by a Court or Tribunal. This means that previous disciplinary warnings or previous disciplinary sanctions are irrelevant and cannot be referred to. If they are they will simply be discounted. The only difference, from an employer’s perspective between a dismissal and a dismissal for gross misconduct is that no minimum notice need be paid in the case of a dismissal for gross misconduct.

It is far easier for an employer to dismiss for a stated matter and pay the Minimum Notice that to dismiss for Gross Misconduct. Minimum Notice claims are usually relatively small.

5. If you Decide to Dismiss and Follow Proper Procedures can the Court Hold that you Were Wrong to Dismiss the Employee?

If procedures are followed then the EAT/Rights Commissioners cannot put their opinion of the dismissal ahead of yours unless your decision was “irrational” or “unreasonable”. The fact that a division of the EAT or a Rights Commissioner may believe that in similar circumstances they would have applied a lesser penalty does not mean that the dismissal will be held to be an Unfair Dismissal. Neither the EAT nor a Rights Commissioner can impose their opinion for yours except in very limited circumstances. If proper and fair procedures are followed it is very hard, if not impossible, for an employee to win an Unfair Dismissal case.

The Ten Procedures Which Should be Followed as a Minimum

1. Set everything out in writing.
2. Notify the employee of what the disciplinary matter is.
3. Advise the employee of the right for representation such as a Union or work colleague.



4. Furnish copies of the disciplinary procedure or the code of practice which will apply to the process.
5. Furnish copies of all notes of interviews with witness or evidence you intend putting to the employee in advance of meeting them.
6. Give the employee a right to respond, call witnesses, cross examine or challenge any matter.
7. Make sure the person hearing the disciplinary matter is independent of any investigation.
8. Give copies of all interview notes with the employee to them and give them a right to make corrections.
9. Regardless of the outcome whether it is a dismissal, final written warning, or even a lesser penalty make sure you give the employee a right of appeal.
10. Repeat matters 1-8 for any appeal.

Conclusion

If you follow these steps you are 90% of the way to stopping any dismissal being declared unfair.

This is a short practical note only. It does not purport to be nor intend to be legal advice. Before acting or refraining from anything contained in this Guide independent legal advice should always be obtained.

The firm of Richard Grogan & Associates would be pleased to act for you in any claim that you may have against you.

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