

TheBusinessOpinion

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Summers
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Concepts



It may be a dismissal – but is it fair?

FRED ran a small gardening and construction business. He had managed to keep all his workers employed through the recession up until now, but customers were dropping (literally, three deaths in the last six months) and he did not know how much longer he could keep everyone employed for.

James was known to be poor at time-keeping. He had great intentions, but just could not get to where he was supposed to be on time. This caused frustration with customers, not to mention his colleagues, as he was part of a team that often required each person to carry out a function before the others could carry on. James was somewhere at the start of the process, so it was rare that a job was completed on time. Even when he did manage to get to work, he often made mistakes. Every time he was pulled up, he improved for about a week, then slipped back again. Matters were not helped by him losing his driving licence last month which meant others had to pick him up and drop him off. In the morning that meant two men, or more, were late.

There had been 'quiet words' in James's ears and on one occasion he had even been given a verbal warning. When a customer rang to say they could jolly well cancel her work as she was not waiting any longer for the job to be done, Fred had had enough.

'I want to speak to you,' he told James, 'now!'

'Get lost,' said James. 'I'm on my tea break.'

'Right,' said Fred, 'You're fired!'

The employment relationship

The ending of a contract is a dismissal, but it may end for a variety of reasons and in most cases it will not be unfair. So, what makes a dismissal unfair?

The easiest way to perhaps consider this is to first look at the most obvious, and then the subtleties of the employment relationship.

At the most basic level, an employment relationship goes back to the very old concept of master and servant. In times gone by, the balance of power was with the employer who could exert influence and control over the servant. The employment laws were enacted to redress the balance of power, giving the servant certain rights.

Jersey is decades behind UK employment law, and was only updated in 2005 from very basic legislation relating to the right to have a contract and the payment of wages. One leftover from those times that I sometimes see in old contracts, even now, is the need to serve notice on a payday. This had an interesting outcome when I was at JACS many years ago in that an employee who had been 'let go', by reason of redundancy, was given what the company thought was the correct amount of notice. Unfortunately, just after his notice had expired, he died. It transpired that there was a need to serve notice on the pay day which extended his notice by an additional three weeks. This resulted in him still being employed at the time of his death. The poor man was extremely unfortunate in dying, but his widow benefited hugely from the very generous 'death in service' benefit that the company had in place, entitling her to a very significant pay-out.

The other quirk of the old legislation

was that wages could not be paid on licensed premises. Almost every pub in St Helier broke the law every Friday night when wages were divvied out to construction workers.

I digress! The first important tranche of employment law was the right not to be unfairly dismissed. To identify what grounds may constitute unfair, five fair reasons were stated. Any fair dismissal must fall within one. They are:

- Conduct.
- Capability.
- Redundancy.
- Statutory requirement.
- Some other substantial reason (SOSR).

Taking the first, conduct is self-explanatory. It is usually profession or sector-specific, with examples often stated as to what constitutes poor conduct or bad behaviour. There are also degrees of poor conduct, misconduct, or the more serious gross misconduct and each may attract a different penalty.

It might, for instance, be misconduct to have a sneaky cigarette behind the bin shed outside a shop in town, but it would be gross misconduct if you did it behind the bin shed on the fuel farm site.

Capability can relate to the ability or inability to do a job (the employee's competence) but it can also be about attendance. If, for whatever reason, an employee has lots of absence (either individual days or long term) then they may be incapable of fulfilling the requirements of the role. Their absence prevents it.

Redundancy is where work that is being carried out diminishes or ceases, or is expected to diminish or cease.

A statutory requirement may be a right to remain under immigration legislation is required, (but the employee's visa has expired) or a specific driving licence is required (to perhaps drive a HGV) and the employee no longer has the requirement. It would therefore be illegal for the employer to continue employing the employee at all, or for that role.

SOSR – everything else that does not fall neatly into the other categories. Examples of this are changes to terms and conditions which are necessary for business reasons but they have not been accepted by the employee, and sometimes pressure from a third party not to employ (for instance, if a client you have put the employee with refuses to have that employee to do the work).

In the main, it is relatively easy to determine which category should be used, but once that is established, a fair process needs to be followed. That, as they say, is the tricky bit and would take a whole article in itself!

So, let's consider James above. There are shades of possible redundancy, aspects of capability, the loss of a statutory requirement (but that has been resolved by others picking him up, unless of course other duties require him to drive) and the insubordination which is conduct. Would any one of them result in a fair dismissal? As they are all likely to be viewed as minor, it is likely they would merit no more than a written warning.

You can see why it's easy to get the wrong one or try and lump them all together in the hope that something will stick. My mantra is 'if in doubt, take advice and say and do nothing until you do'. Capability and conduct procedures follow two different pathways, so you must be clear as to which one you are using. Sometimes it is both.

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