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Effective Management Of UK Employee Exits

Law360, New York (October 21, 2009) -- English employees enjoy statutory protections in addition to their contractual rights on termination; in essence the "at will" status does not translate well across the Atlantic.

Dealing with and, better still, avoiding a potential claim in respect of these dismissal protections can make this area seem a minefield for any U.S.-based employer.

This article aims to explain in general terms the protections that apply to employees in England and the choices available to an employer in relation to the possible termination of an employee's employment, along with the relative risk and costs when deciding how to terminate.

In terms of the right approach to take, much will depend on the seniority of the employee in question and also the number of employees you are proposing to terminate.

In cases of more junior staff and where more low level conduct or performance issues are concerned, regular appraisals and warnings on the personal file will assist in providing the employer with the necessary papertrail to proceed to termination in the appropriate cases.

In situations where senior members of staff are involved, the proposed termination can be driven by personality issues, a change in overall management or indeed performance or conduct issues.

Generally most companies prefer not to go down the full extent of the formal route when terminating senior members of staff as this can be seen to be interfering with effective management. Instead there is often a preference to commence settlement negotiations early on to agree terms of departure.

Very broadly, if you are planning multiple redundancies or reductions in force of more than 20, very strict rules apply. In this situation a collective redundancy process should be followed from an employee relations as well as a risk perspective.

Different rules apply to self-employed consultants or people who are classified as workers rather than employees and care must be exercised to have clarity on status.

Another issue to bear in mind is that foreign nationals who are seconded to the UK will usually obtain UK statutory rights despite U.S. or other state choice of law clauses.

The Legal Framework

Unfair Dismissal Claim

An employee with (usually) more than one year's service has unfair dismissal protections. This means an employer has to have a fair reason to dismiss them and then also has to follow a fair procedure.

There are exceptions to the one year minimum service rule in cases of, for example, termination on the grounds of pregnancy or trade union membership.

Fair Reason

There is a statutory list of fair reasons for dismissal, which include the following:

- Conduct (e.g. theft, persistent lateness);
- Capability (e.g. underperformance);
- Redundancy;
- Retirement;
- A Statutory Restriction; and
- Some other Substantial Reason (e.g. reorganisation).

Procedure

There are also strict procedural rules which must be followed by an employer as set out in the ACAS (Advisory, Conciliation and Arbitration Service) Code of Conduct.

For example, if the company wishes to dismiss the employee on grounds of their capability, the disciplinary procedure set out in the Code of Conduct should usually be followed.

This would include a written invitation to a disciplinary meeting setting out the alleged conduct (e.g. their continued underperformance/conduct), offering them the right to be accompanied by a colleague or trade union official, and allowing them to state their case at the disciplinary meeting. The employee must then be given the right to appeal against any disciplinary decision.

Oral or written warnings may be issued but underperformance or misconduct which does not qualify as gross misconduct (e.g. theft) in itself does not warrant instant dismissal without a prior series of warnings.

In individual redundancy cases a similar process should also be followed. This includes equivalent strict requirements on selection and consultation although they do not derive from the ACAS Code.

Unfair Dismissal Claim and Tribunal Award

Dismissing an employee without a fair reason or without following a fair procedure will mean the dismissal is unfair and the employee can bring a claim (provided they have the required length of service).

This claim will be brought in the Employment Tribunal, the English court for statutory employment claims, usually within three months of the date of dismissal. On any successful claim the financial award is made up normally of a basic and a compensatory award.

The basic award is calculated on the basis of the employee's age and length of service and is subject to a current maximum award of £11,400. The compensatory award is currently capped at £66,200 and is intended to compensate the employee for their loss of earnings resulting from the dismissal.

The employee is under a duty to mitigate their losses (i.e. find another job) and the award will reflect how long it will take them to get another job. If the company as the employer makes procedural errors in the dismissal a Tribunal can increase any award by up to 25 percent (subject to the overall maximum).

Employees typically argue that they are likely to be unemployed for somewhere between three and nine months, and they can put forward a longer period in order to seek the maximum award available.

Although employment tribunals very rarely award the maximum compensation amount, in the current economic market dismissed employees may be able to show extensive losses going forward.

Alternative remedies the tribunal could order are reinstatement or re-engagement (with back pay) although these remedies are not usual. The tribunal could award an

additional award to the employee if an employer refuses to reinstate or re-engage following a tribunal order.

Contractual Claim

An employee will also have rights under their contract and this usually includes the right to notice on dismissal.

If a written contract does not exist or does not include a notice period (or is less than the statutory notice) then the following statutory notice periods apply: one week's notice per year of service up to a maximum of 12 weeks' notice after 12 years' service.

There is a statutory requirement in the UK to provide an employee with certain minimum contractual terms within two months of joining an employer and it is fairly common for contracts to be issued including a specified notice period.

A claim for unpaid notice may, depending on the wording of the contract, be a specific entitlement or may be subject to a duty on the employee to mitigate their losses by finding another job.

Discrimination

There are a number of potential grounds of discrimination including sex, pregnancy, marital status, race, nationality, ethnic origin, age, disability, sexual orientation, gender reassignment and religion or belief.

One or a number of these discrimination complaints can sometimes also be raised in addition to any unfair dismissal claim, if an employee alleges the true reason for the dismissal was a discriminatory ground.

Compensation in these types of claims is uncapped but again loss based and subject to a duty to mitigate losses. There is no minimum service threshold.

Whistleblowing

Whistleblowing is a term used for what is legally known as a Public Interest Disclosure, which is made when an employee reports certain allegations of serious malpractice or wrongdoing — called a Protected Disclosure — within the company (for example a crime, breach of health and safety legislation or damage to the environment).

A whistleblowing claim may be raised in addition to any unfair dismissal claim if the employee alleges that the true reason for the dismissal was the fact that he had made the Protected Disclosure.

Again, compensation in these types of claims is uncapped but loss based, and subject to the employee's duty to mitigate his losses. There is no minimum service threshold.

The employee can apply to the court for interim relief within seven days of their dismissal.

If this application is successful, the court could order the employer to continue paying the employee's salary pending a full hearing of the issues.

Large-Scale Reductions

In relation to large-scale work force reductions the so-called collective consultation rules apply. Where the number of employees affected is between 20 and 99 a 30 day consultation period applies.

Where more than 99 redundancies are proposed there is a requirement for a 90 day consultation period in both cases with trade union representatives or elected employee representatives. This consultation period should be completed before the first dismissal takes effect.

The company also has to notify the Secretary of State of the planned redundancies. Where the collective consultation rules are not observed a protective award of up to three months' actual pay can become due to every employee affected.

Depending on the numbers involved, this can become a costly exposure. Individual redundancy consultation meetings should also be held with the affected employees in addition to the collective process being followed.

Tax on Termination

In the appropriate circumstances up to £30,000 of a genuine noncontractual termination or redundancy payment can be paid tax free.

Should a higher ex gratia amount have been negotiated and agreed on termination, the remainder of the monies will normally be taxable and the precise rate of tax and whether national insurance (or social security tax) falls due will depend on factors such as the date of payment.

Additional tax reliefs may apply for individual employees e.g. pension payments and foreign service relief. Specialist payroll/tax advice should be sought in these circumstances.

Options on Termination

An employer has several commercial options when terminating the employment with different levels of legal, tactical and commercial risk.

1) Terminate employment in breach of the unfair dismissal protections

This is a high risk strategy, carrying the maximum financial exposure set out above. However, this means that you can terminate the employee quickly (although you may be involved in an expensive and protracted legal claim if the employee proves unwilling to settle at a later stage).

2) Approach the employee with an offer to part company

An employer and employee can always try to agree terms regarding the employee's departure.

Sometimes this is raised in a conversation in which the company tells the employee things are not working out and the disciplinary procedure will have to be invoked but that this could be avoided if the employee chooses to leave on agreed terms.

An employer can say this conversation is to be treated "without prejudice" or off the record, but there is a risk that the details of the conversation will in fact be disclosable in any subsequent litigation.

The agreed terms will be set out in a so-called compromise agreement which seeks to settle the employee's potential claims against the employer (with certain limited exceptions such as personal injury and accrued pension rights).

In return for the security offered by this compromise agreement the employer commonly pays over a settlement sum which is slightly in excess of the employee's basic legal entitlement (or sometimes more, depending on the commercial risk and rationale).

It is usual to send the employee on paid leave (or garden leave) whilst the terms are being negotiated.

The compromise agreement often includes the typical clauses you would expect in a U.S. severance agreement (regarding confidentiality and noncompetes).

The employee is required to take independent legal advice on the terms of the compromise agreement in order for it to be legally binding and the benefit here is that a deal is reached.

The risk here, however, is that the employee may not agree the proposed terms and still brings a claim against the company which has then left itself open to potentially successful claims as a fair reason and fair procedure would not have been established before the decision is taken to dismiss.

3) Achieve a fair termination by establishing a fair reason and process

This is the safest strategy but is likely to take the longest as you potentially have to follow an extensive set of procedural steps and meetings justifying dismissal before being in a position to terminate fairly (and provided the right factual conditions apply).

Issuing repeated warnings for underperformance (including training and opportunities for improvement) leading to a fair dismissal for underperformance could take six months or so and would involve extensive management time in the process.

The benefit of this approach is that the employer will be in a strong position to defend any potential claim by the employee concerned.

4) Combination of the above

A hybrid option is to commence a proper dismissal process and offer terms of settlement at the end of the process in a without prejudice conversation after a decision to dismiss has been reached.

The benefit in trying to reach an agreed settlement even though the dismissal procedure has been followed is that you aim to achieve certainty that no claim will be brought at what will hopefully be a sensible commercial level.

Conclusion

The approach to be taken when terminating employees in the UK will have to be a balancing act between observing the procedural requirements and weighing up the cost and risk of acting outside of the statutory framework.

As always it is best to take advice early on to allow the employer to take a strategic and effective approach with a clear understanding of the rules and potential exposure.

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