

CM | MURRAY

The Little Book of
UK Employment Law
for US Employers
Handling dismissals in the UK

“Two countries
separated by a
common language”.
(George Bernard Shaw)



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Welcome

Although there are many similarities between US and UK employment laws, there are also fundamental differences. Adherence to policies and procedures is key to any employment relationship in the UK; inadequate rationale and/or lack of process can result in legal claims and damages awards.

We thought it might help our American friends and colleagues if we provided a Little Book which sets out the key issues to consider when dismissing an employee in the UK in a practical and accessible manner. It features the work of talented illustrator, David Orme.

While we refer to the UK throughout this Little Book for ease, there are in fact different legal systems in the UK. This Little Book concerns English employment law. Very best wishes.

The CM Murray Team.

This book is for general purposes only. Specialist legal advice should be sought for specific circumstances. Information correct as of April 2016.

Employment contracts: anti at will!

In contrast to the US, employees are not employed “at will” in the UK. Employees have two sets of rights: contractual and statutory.

Contractual rights are mainly contained within written contracts. UK law requires that employees receive a written statement of terms within 2 months of starting work.

The contract should contain matters such as the parties' names, the date employment (and continuous employment) began, the rate of pay, hours of work, holiday entitlement, sick pay, pension arrangements, notice period, job title and place of work.

But statutory rights rule

Employees are also entitled, subject to certain conditions, to a number of key minimum benefits which override lesser contractual provisions. These include:

- 28 days' holiday a year
- statutory sick pay for 28 weeks in any 3 year period
- a pension scheme provided by the employer
- not to work more than 48 hours a week (and ability to opt out of that right)
- a statutory redundancy payment and
- minimum statutory notice of termination of one week for every year of service, up to a maximum of 12 weeks' notice.

I don't care where you've been Mr Armstrong – your vacation was not approved



Remember the contract!

Employees are generally entitled to notice of termination of their employment except in cases of gross misconduct; this is usually set out in their contract. Employees must receive at least statutory minimum notice (this overrides any lower notice in their contract).

Other entitlements due may include:

- Accrued pay and benefits
- Outstanding holiday pay
- Business expenses
- Bonus and
- Stock options or shares.

Check the employee's contract and any applicable bonus/share scheme rules before taking any steps to dismiss.

Failure to pay out contractual entitlements may result in legal proceedings. It may also affect the enforceability of post-termination restrictive covenants.



Unfair dismissal

A dismissed employee with at least two years' service has statutory unfair dismissal protections (there are limited circumstances in which this service threshold is not required). This means that when contemplating dismissing an employee, employers should:

1. Have a fair reason to dismiss and
2. Follow a fair procedure

otherwise the dismissal will be unfair.

Failure to satisfy both steps 1 and 2 can result in compensation being payable to the employee.

This is a fundamental difference between UK and US law. Whereas in the US, an employer can dismiss an employee very quickly, in the UK, this process can take weeks or even months to complete.



Fair reason

There are five potentially fair reasons for dismissal, as follows:

- Conduct (e.g. theft, persistent lateness)
- Capability (e.g. underperformance)
- Redundancy
- Where continued employment would breach a statutory requirement (e.g. loss of visa) and
- Some other substantial reason (e.g. reorganisation).

An employer needs to have evidence to support a fair reason before taking the decision to dismiss, otherwise the dismissal will not be fair. It is usually best if an employer picks one reason on which to rely and clearly documents its rationale in writing.

Fair process

An employer should follow the process set out in the ACAS Code of Conduct on Disciplinary and Grievance Procedures in most disciplinary and dismissal matters (excluding redundancy). This process applies even where an employee is only given a written warning. The importance of following due process when operating in the UK cannot be underestimated.

Failure to apply such a process (including providing a right of appeal) could result in a 25% increase in compensation if the employee succeeds at the Employment Tribunal.

In cases of underperformance, unless the error is so fundamental, employees should also be given an opportunity to improve and be helped with development needs before any dismissal takes place.

Follow the ACAS code!

The basic steps in the ACAS Code of Conduct dealing with disciplinary procedures include:

- a) notifying the other party in writing of the employer's complaint/proposed reason for dismissal
- b) undertaking any necessary investigations
- c) holding a meeting to discuss and considering both sides of the matter
- d) allowing witnesses to be called if appropriate
- e) writing to the employee with the decision and providing a further right of appeal

Off with her head!



Not really ACAS procedure... but you're the boss



- f) holding a further meeting to consider the grounds of appeal and
- g) providing the employer's final decision to the employee in writing.

An employee also has a right to request to be accompanied at any disciplinary meeting by a work colleague or a trade union representative, with whom they can confer. The employer should be represented by a person who chairs the meeting and another employee should take notes.

Failure to adhere to the Code can be taken into account by a Tribunal when determining whether a dismissal is unfair and how much compensation to award.



Costly consequences

Employees can usually bring claims in the Employment Tribunal within three months of their employment ending, subject to mandatory early conciliation through ACAS.

Although employees can seek to be reinstated or re-engaged after being dismissed, this is rarely awarded.

The most common remedy is compensation.

Any award is normally made up of a basic and a compensatory award.

The basic award is based on a maximum weekly wage, age and length of service.

The compensatory award is based on the employee's lost earnings flowing from the dismissal, subject in most cases to a maximum limit. This is currently the lower of a year's actual pay or the maximum award which is £78,962 with effect from 6 April 2016 (subject to annual reviews).

It is subject to reductions for pay from any new job which the employee has secured or reasonably could have been expected to secure.

Redundancy

In summary, a redundancy situation occurs under UK law when an employer:

- Closes down their business (or intends to do so) or
- Closes down a particular workplace (or intends to do so) or
- Has a reduced requirement for employees to carry out the particular work for which they have been employed.

The term redundancy is similar to the US term "Reduction in Force". Different rules apply depending on the number of employees that an employer is making redundant.

Certain procedural steps are required in order to make the redundancy fair.

These include:

- Ensuring that the position is genuinely redundant (with adequate documentation to support this)
- Identifying the pool of employees at risk of redundancy (this should include all employees who do similar/ interchangeable jobs)
- Applying objective selection criteria when determining who is redundant e.g performance review scores, skills, relevant experience (reliance on discriminatory criteria will be unlawful)

- Consulting fully with the employee and considering ways to avoid the proposed redundancy
- Looking for suitable alternative roles within the business
- It is recommended practice to provide a right of appeal if the employee is made redundant.

Failure to follow these steps may result in a claim for unfair dismissal and an award of compensation as set out above.

I know what you're thinking:
'Did he fire six employees or
only five?' Well to tell you
the truth, in all the excitement,
I've kinda lost track myself.



Collective consultation

Where an employer is planning large-scale redundancies, it must also undertake collective consultation with union or elected employee representatives.

Consultation must occur before the redundancy dismissals take place:

- 30 days prior consultation where 20-99 redundancies are planned and
- 45 days prior consultation where 100 or more redundancies are planned within a 90 day period.

Failure to consult can result in an award of up to 90 days' pay per redundant employee. A formal notice must also be sent to the UK Government within 30 or 45 days (as appropriate) before dismissals otherwise a conviction and fine may result.



Discrimination

In addition to unfair dismissal rights, similar to the discrimination protections in place in the US, employees are protected from being discriminated against because of:

- Sex
- Marital (including civil partnership) status
- Pregnancy and maternity
- Gender reassignment
- Race
- Religion or belief
- Sexual orientation
- Age (both younger and older employees) or
- Disability.

Whistleblowing

An employee is also protected in certain circumstances if they make a whistleblowing complaint.

Remedies

If an employee is dismissed for a discriminatory reason/whistleblowing, they can claim for lost earnings (there is no cap but they need to mitigate losses) and for injury to feelings (this rarely exceeds £30,000).

Unlike the US, tribunals do not generally award punitive damages awards in employment law cases.

Employing expats

US employees working in the UK may obtain statutory rights even if there is a US choice of law clause in their agreement. Under European law, those US employees cannot be denied the benefit of UK statutory protections for which they are eligible; these should be considered before any steps are taken to terminate an employee's employment.

A US arbitration clause will not, in many UK based employment disputes, be enforceable by the US employer to override the UK courts' jurisdiction. This also applies in other EU countries. This is a complex area and each case needs to be considered carefully.

Always take local advice in the main countries in which the expatriate normally works or will work and also where their employer is based, before hiring, firing or making any other major changes to their working arrangements.

It is also important for employers to draft any expatriate contracts carefully when employing US employees in the UK.

Key points to consider include:

- Structure – is it employment, a secondment or multiple employments etc?
- Law and jurisdiction of the contract (subject to earlier comments)

- The length of the assignment
- Expatriate benefits to be provided and for how long
- Any period of notice and other termination provisions
- Repatriation (and in what circumstances)
- Tax and
- Confidentiality and non-compete provisions.

Options on termination

Employers have several options when deciding how to terminate a UK employee's employment. Employers need to determine what their ultimate goal is before agreeing a final strategy. The approach taken will depend on several factors, including:

- Legal framework
- Attitude to risk
- Cost
- Timing
- Business needs.

It is important to take advice before taking any steps to dismiss an employee in order to put the business in the strongest position going forward.

It may be possible to reach a settlement out of court, either before litigation has started or once proceedings have begun. If settlement is reached, terms should be contained within a settlement agreement. The employee will need to take legal advice from an independent lawyer to make the agreement binding and to waive legal claims.

Employers and employees can also have a so-called 'protected conversation' to agree the terms of an exit. Strict rules apply and advice should be sought.

Top tips for US employers on managing an employee's dismissal

1. **Start** the appropriate process early with the relevant employee(s) to allow necessary consultations to take place.
2. **Follow** policies and procedures where possible to minimize financial risk.
3. **Communicate** with employees about future restructuring/reduction in force plans.
4. **Accept** that there will be a time lag between the decision having been made to dismiss and the actual termination taking place.
5. **Keep** good notes documenting all decisions, corroborating reasons and evidence for decisions taken.
6. **Remember** employees will normally have both contractual and statutory rights.

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Chambers and Partners:

“This ‘hugely innovative’ employment and partnership boutique has recognised strengths in advising clients on City team moves, high-value discrimination claims and senior executive exits. It has a notable presence in the financial services and broadcasting sectors.

The team frequently handles cross-border matters for both individuals and corporates.”

Legal 500:

“CM Murray LLP led by the ‘incredibly effective’ Clare Murray, is frequently instructed to advise international subsidiaries in the UK, and has an excellent reputation for acting for senior executives. Bettina Bender is ‘extremely solution focused’, and David Fisher is ‘the epitome of professionalism’.”

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