

GUIDANCE NOTE

REASONS FOR TERMINATION

BACKGROUND

The Employment Rights Act (ERA) Section 29 (2) & (3) sets out that an employer shall have the right to dismiss, as follows:

(2) An employer shall have the right to dismiss an employee for a reason which falls within this subsection if it

- a) Relates to the capability of the employee to perform work of that kind which he was employed by the employer to do;*
- b) Relates to the conduct of the employee;*
- c) Is it that the employee was redundant, but subject to section 31; or*
- d) Is it that the employee could not continue to work in the position which he held without contravention, whether in his part or on that of his employer, of a duty imposed by law.*

(3) In subsection (2)(a), "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

When an employee leaves an organization, the employer must supply the employee with two (2) documents:

1. NIS Lay-off /Termination Certificate
2. Certificate of Employment Record

The reason for termination must be stated on the NIS Lay-off/Termination Certificate. Additionally, the Employment Rights Act compels employers to inform employees, in writing, of the reason for termination once the employee requests such.

What can be problematic for employers, however, is what to state as the reason for terminating an employee.

CONSIDERATIONS

The following is a list of reasons for terminating employees along with their definitions. Employers can utilize these terms in the completion employment documentation for exiting employees.

Resignation

This term should be assigned to an exiting employee who communicates to management that they no longer will be working with the organization subject to the specified notice period. It is the onus of management to ensure that the following are included in any resignation letter submitted:

- Date of Submission
- Notice Period
- Last Day of Work

Redundancy

This occurs where there is a separation of employees due to the closure of the company, or removal of the employee's position from within the company. Employers often have redundancies in instances of organizational restructuring, poor economic performance or natural disaster. Employers should be able to adequately provide information, if requested, which validates their case for redundancies.

Employers are also reminded of Section 31 (4) of the ERA which states:

“Where 10 % or more of a workforce is being reduced, the employer must consult with the employees or recognized trade union and write to the Chief Labour Officer (CLO) no later than 6 weeks before the affected employees are dismissed.”

Medical Incapacity

If the employee is unable to carry out his/her duties due to illness and/or injury, there can come a point where an employer can fairly terminate employment. However, the onus is on the employer to justify the dismissal. This can be done by seeking the opinion of a medical practitioner on the employee's ability to perform the duties of their post.

Employers are reminded of Section 30 (1) of the ERA:

“A dismissal of an employee contravenes the right conferred on him by section 27 where

(a) the dismissal took place while the employee was absent from work for a period of not more than one year, although he was certified by a medical practitioner to be incapable of work throughout the entire period of the absence as a result of an occupation disease or a work-related accident;

(b) the dismissal took place while the employee was absent from work for not more than either

(i) a period of 12 consecutive months; or

(ii) periods amounting to 12 months in any one period of 24 consecutive months

Although he was certified by a medical practitioner to be incapable of work throughout the period, or as the case may be, the periods, of the absence as a result of sickness, not being sickness within paragraph (a).

Misconduct

The ability to dismiss an employee for conduct is clearly established in Section 29 (5) of the ERA. Misconduct is defined as and can be categorised as Minor or Gross. Defining gross misconduct is difficult; a good yardstick is whether the conduct fatally undermines the relationship of trust and confidence that exists between the employer and employee.

Misconduct should be addressed according to the employer's Code of Discipline which should include examples of the types of conduct that would normally warrant summary dismissal. Employers should make it clear that any list is not exhaustive.

Employers are reminded of:

“Notwithstanding subsection (1), an employer is not entitled to dismiss an employee for any reason related to

- (a) the capability of the employee to perform any work; or*
- (b) the conduct of the employee,*

without informing the employee of the accusation against him and giving him an opportunity to state his case, subject to the Standard Disciplinary Procedure and the Modified Disciplinary Procedures set out in Parts B and C respectively of the Fourth schedule”

Poor Performance

The inability of an employee to adequately perform his/her duties is a justifiable reason for dismissal. The immediately aforementioned section of the ERA can be used as the legislative basis for the dismissal of an employee based on poor performance. Employers, however, should have a clearly established policy for addressing non-performance which incorporates progressive discipline with termination as the last step.

Statutory Restriction

An employer may rightfully dismiss an employee where continued employment of the individual could breach a statutory duty or restriction. Examples of this include:

- breach of immigration rules
- loss of driving license, where it is central to the employee's duties
- failure to obtain certain qualifications
- where the employee has received a criminal conviction.

Some Other Substantial Reason (SOSR)

There are some reasons for dismissal which, while not expressly stated in the ERA are covered under the concept of SOSR. Fairness of a dismissal is addressed under the provisions of Section 29(1) which states:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*
- a. The reason, or, if more than one, the principal reason for the dismissal; and*
 - b. That it is either a reason falling within subsection (2) or **some other substantial reason** of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

The most commonly used and most notable examples are below:

- **Break down in trust and confidence:** Businesses sometimes maintain that they must dismiss an employee because of a breakdown in trust and confidence. The above information has been provided to establish that should the employee deem he has been unfairly dismissed, he would have no basis to ground any claim under the provisions of the ERA.

- **Expiry of a fixed term contract:** Where a contract clearly outlines specific start and end date, an employee shall have no legal grounds to contest a dismissal which occurs on the stipulated end date.
- **Refusal to Accept Changes to Terms and Conditions:** An employment contract can only be varied in accordance with its terms or with the parties' agreement. If an employee refuses to accept a change to their terms and conditions and your business dismisses them for that reason, the reason may constitute SOSR.

For a unilateral change to amount to SOSR, your business must be able to demonstrate that the changes were not imposed arbitrarily, but were for a "sound business reason". There is no need to prove that the re-organization was crucial to the survival of the business. However, you must provide evidence to demonstrate the business reasons for the change and show that they were not trivial.

- **Conflict of Interests:** Your business may be able to dismiss an employee for SOSR if they are in a situation that creates a potential conflict with your business' interests. You must be able to provide evidence demonstrating that the employee posed a risk to your business interests. Your business will need to show that:
 - The employee had access to commercial information;
 - The employee had close connections with a competitor; and
 - You feared the employee may leak confidential information.
- **Personality clashes:** Personality clashes or irreconcilable differences between colleagues can amount to SOSR. However, to do so, the conflict would have to be causing substantial disruption to your business. An employment tribunal will expect you

to take reasonable steps to solve the problem without resorting to dismissal, for example:

- ✓ Re-deploying one of the workers
- ✓ Changing work patterns
- ✓ Attempting to mediate.

CONCLUSION

Employers are expected to follow all procedural rules and to adhere to any legislation which speaks directly and/or indirectly to any of the terms mentioned above. Where a dismissal is sanctioned by an employer the onus will be on the said employer to prove that he/she was reasonably and procedurally fair in his/her decision making. Thus, it is imperative that employers maintain accurate records on all disciplinary matters arising in an organization.

The terms listed above are grounded in law, however employers should ensure that they follow the procedures associated with each dismissal as outlined by law and/or their internal policies. Non-compliance with outlined procedures can result in the dismissal being seen as unfair.