



EMPLOYMENT LAW

## WHITE PAPER – DISMISSAL FOR HR CONFERENCE 2023

**How do you navigate the complexities of short notice dismissals for new employees who fail to meet expectations, including protected conversations?**

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# The starting point

Employees with under two years' service do not **currently** have ordinary unfair dismissal rights, rights to a redundancy payment or to written reasons for dismissal.

But they have their contractual rights (i.e. to notice) and “Day 1” rights which may be relevant i.e. discrimination and automatic unfair dismissal

# Remember to do this on Day 1...

- Make sure you diarise the following:
  - The end date of the probationary period - to take advantage of any shorter notice period that applies
  - The two-year anniversary of employment – and ensure that any notice is given **more than** one week before that date and expires before that date

# What will I cover today?

1. Dismissal of a new employee in “vanilla” situations
2. Dismissal of a new employee where there are potentially aggravating factors present
3. Navigating a “protected conversation” with a new employee about a proposed exit

*Dismissal of a new employee where there are no obvious potentially aggravating factors present*

# Identify and communicate the reason

- It is prudent to identify and communicate a reason for dismissal to deflect allegations that the dismissal is discriminatory or automatically unfair.
- But **be honest** as concealing the true reason may:
  - breach trust and confidence and risk a constructive wrongful dismissal claim
  - be enough to shift the burden of proof in a discrimination claim

# Dismiss in accordance with the contract

- Identify notice obligation
  - Check contract for pre/post probationary notice periods
  - Note statutory minimum notice period
- Abide by the notice provisions – options:
  - Dismiss on notice and ask them to work (or put on garden leave)
  - Dismiss immediately and PILON (if contract permits)
  - Dismiss immediately and pay damages in breach of contract which could be less than the notice pay (but will lose benefit of post-termination restrictions)
  - Dismiss without notice for gross misconduct
- Discharge all other obligations (e.g. outstanding salary, contractual bonus, accrued holiday)

# Benefits of following an Acas Code-compliant process

Necessary if there is a contractual obligation to do so

Putting all of your cards on the table helps to underline that you have nothing to hide

Provides an opportunity to flush out any unknown aggravating factors

Insures against the risk of an uplift to compensation for failure to comply – note only applies to day 1 rights and only employees (not partners)

Many people when they feel they have been treated fairly and had a chance to have their say, don't even think about taking things further

# Advantages of not following an Acas Code-compliant process

Avoids absorption of management time and energy and rubbing salt into the wounds of the employee which may prompt employee to “go legal”

It minimises interaction - the more interaction you have the more chance there is someone says something stupid!

Adopting the ACAS process confuses the message that the only entitlements these employees have are under their contract

It can undermine employees' sense of agency - when employees feel they have agency, they accept it – the Bernie Howard patter

The more you treat someone as a legal risk, the more likely they are to become one

*Dismissal of a new employee where there are obvious risks of “aggravating factors” being present, e.g.*

*1. Employee likely to say purported reason for dismissal is a smokescreen for discrimination; or*

*2. The reason is very close to a discriminatory or other unlawful reason*

# Ostensible reason is a sham to hide an unlawful reason

- What can employers do to manage this risk?
  - Codes of conduct and training
  - Follow a fair process prior to dismissal
  - Ensure decision-making is transparent
  - Dismissing officers must do what is necessary to satisfy themselves that the reason for dismissal is *bona fide*

# Ostensible reason is inseparable from an unlawful reason

- What can employers do to manage this risk?
  - Codes of conduct, training and follow a fair process
  - Watch out for risk areas:
    - **Blind adherence to practice or policies:** may be indirectly discriminatory
    - **Disability:** investigate link between disability and the reason for dismissal, make adjustments and be ready to objectively justify
    - **Whistleblowing:** be clear that the reason for dismissal is genuinely separable from the protected disclosure itself

*Should you have a “protected conversation” with a new employee?*

# Should employers be a bit more generous?

- Some very harsh outcomes for employees
  - Given up stable secure job
  - Moved home or even country
  - Took job in preference to other offers
  - Left with an embarrassing gap on the CV
- Employees treated with kindness may be less likely to “go legal”; but they could take the money and then sue unless required to sign a SA
- Benefits of finality if they enter into a SA may be offset by lawyers demanding more

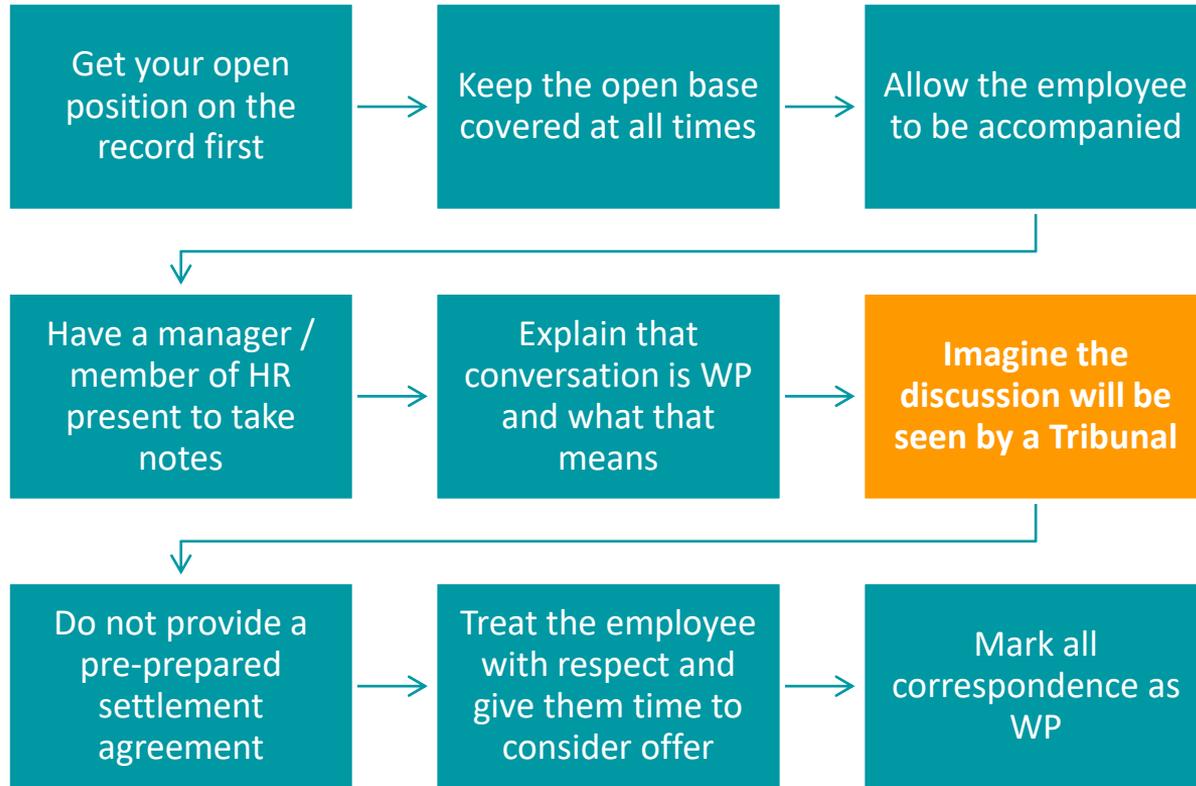
# Section 111A “Protected Conversations”

- Protects pre-termination exit discussions from being disclosed to the ET, even where there is no dispute
- But only applies to ordinary unfair dismissal rights, therefore not relevant to employees who have under two years’ service

# Without prejudice discussions

- Where it applies, the discussion is privileged from disclosure in related claims
- Hurdles:
  1. Is there a dispute?
  2. If yes, is there a genuine attempt to settle that dispute?
  3. If yes, is there an absence of unambiguous impropriety?

# Navigating an “off the record” discussion



# Contact details



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