

Cultural Misalignment:

When can you act if an employee is difficult, culturally misaligned or a mischief-maker — but not objectively underperforming?

David McCarroll, Partner
RDJ LLP

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How to View the Legal Risk

Don't think of Legal Risk as a Black & White Judgement being made on your Actions



Think of Legal Risk as a Navigation exercise:
Different rights, obligations & Potential Claims

Key Considerations?

- **When is this arising?**
 - How long is the Employee with us? In probation? After many years service?
 - Is it following a change of manager or a merger? More substantial if longer term
- **What has happened to date?**
 - Are there complaints about the employee?
 - Are there complaints submitted by the employee?
- **How are we responding?**
 - Want to avoid penalisation, victimisation
 - Don't want a lack of clarity to leave us wide open to other claims
 - Can we articulate a substantial ground justifying our action
- **Where is this occurring and what is our appetite to risk?**
 - Seniority of employee; area of operations; sensitivity to any issues raised?

Key Considerations?

When are we addressing this matter?

- **Within one Year - During Probation**
- **Within one Year – Outside of Probation Process**
- **Concept of a Dismissal on Notice**

Within Probation (& within 12 months)

- When to Act: Act within probation as issue becomes apparent.
- Transparent and Predictable Working Conditions Regulations 2022:-
- Probation **cannot exceed 6 months** in private sector (12 months for public servants)
- Can **on an exceptional basis** be longer than 6 months provided they **do not exceed 12 months**;
- It must be **in the interest of the employee to extend**
- But you are **not required to extend a probation** and you can make your decision during a probation period as to their continued employment
- Of course, less than 12 months service minimises the level of risk considerably

Within Probation

- Need to document the basis as to why they are failing probation.
- How is it they not meeting expectations
- Can we point to anything raised at the outset about our working culture / our values etc – in job description, in induction, during initial period
- Use the probation materials, the manager feedback, give examples
- Make clear the possibility of a termination of employment on grounds of a failure of probation
- Articulate reason for the dismissal in the outcome material and dismissal letter
- Stay away from descriptions that imply a conduct / misconduct concern, which will trigger natural justice rights and fair process expectations

Within One Year: But not within Probationary Process

- Often either overlooked or passed first probation milestone
- Still within a year (so UD Act potentially less of an issue)
- But not able to safely say that we are still in a probation period
- Might even be having to overcome a probation review that was passed
- Can we act?

Concept of an Immediate Dismissal On Notice

- Must have contractual provision that allows for notice to be served to terminate employment
- Usually also cite contractual right to discharge payment of notice in lieu
- Notice is served in writing on the employee and notice in lieu paid up
- Brings contract to an immediate end, within the terms of the contract
- In the past, such letters said almost nothing else.
- However, better to try and articulate the matter as a performance issue in terms of the manner in which the role is being undertaken
- Stay away from descriptions that imply a conduct / misconduct concern, which could trigger natural justice rights and fair process expectations

Support for Immediate Dismissal On Notice

Over-C Technology Limited (2021 Court of Appeal Case)

Court overturned an injunction granted to an executive on probation whose employment had been terminated on the basis of poor performance during his probationary period; outlined 2 principles :

Firstly: that an employer can terminate employment for any reason, or no reason, provided adequate notice is given. This applies whether or not the dismissal occurs during the probationary period.

Secondly: that the principles of natural justice apply to cases involving dismissal for misconduct but not to termination on other grounds.

Immediate Dismissal On Notice (After 12 months)

- Concept remains one that can be relied upon and undertaken
- Without misconduct element being upheld, the Courts are not likely to impose fair procedural rights in terms of any injunction
- **But Very Significant Level of Risk!**
- Without a proper process to address the issues, employer is **exposed under statutory rights claims (eg the Unfair Dismissals Act)**
- Still often utilised for very senior employees
- Furnish Notice letter, pay notice in lieu, and introduce a draft of proposed terms, stress the tax benefits and desire to reach agreement
- Can be attractive if the overriding objective is removal (even at the cost of an UD claim)
- Can be effective where there is already a clear sense that the employee will do a deal.

Key Considerations?

- What has happened to date?
 - Are there complaints **about** the employee?
 - Are there complaints submitted **by** the employee?

Complaints About the Employee

In Buttimer v Oak Fuel Supermarket Ltd [2023] IEHC 126 Mr Justice Dignam stated:-

An employer is free to terminate an employee's employment for no reason during probation, and even where it relates to poor performance, the employer is not obliged to observe fair procedure, but where the termination is for misconduct, fair procedures must be observed.

Court found dismissal was due to allegations of misconduct and not for "performance-related issues" as contended by the employer.

Therefore, should have been afforded fair procedural rights

Complaints By Employee: Safety, Health & Welfare at Work Act, 2005

- **Provides for certain protections against dismissal and penalisation, where :-**
 - acting in compliance with SHWAA
 - performing any duty or exercising a right under SHWAA
 - making a complaint or representation to his or her safety representative or employer or the HSA, as regards any matter relating to safety, health or welfare at work,
- “**Day one**” rights
- Can take a claim to the WRC, typically awards are low but they are full public hearings
- “**But For**” test: but for the complaint the act of penalisation wouldn’t have happened.

Complaints By Employee: Safety, Health & Welfare at Work Act, 2005

- Safety, Health & Welfare at Work Act, 2005 (SHWAA)

- **Penalisation is very broadly defined term:-**

- includes act or omission of an employer (or a person acting on their behalf)
 - Matters that affects to their detriment, an employee's T&Cs
 - Includes a suspension, lay-off or dismissal or a threat of such
 - demotion or loss of opportunity for promotion,
 - transfer of duties, change of location of place of work, reduction in wages or change in working hours,
 - imposition of any discipline, reprimand or other penalty (including a financial penalty), and
 - coercion or intimidation.

Complaints By Employee: Other Potential Penalisation claims

- Large volume of Employment Rights statutes
- Most modern statutes prohibit the penalisation or threatened penalisation of an employee for exercising or proposing to exercise their statutory rights, eg:-
 - S26 of the Organisation of Working Time Act
 - S36 of the National Minimum Wage Act
 - S15 of the Protection of Employees (Part Time Work) Act
 - S13 of the Protection of Employees (Fixed Term Work) Act
 - S 16 Carer's Leave Act
 - S12 Sick Leave Act
 - S 26 Work Life Balance & Misc Provisions Act
 - Even s26 Chemicals Act

Complaints By Employee: Employment Equality Act, 1998 (EEA)

- Nine grounds of discrimination
- Prohibits less favourable treatment (direct or indirect discrimination)
- Also prohibits “victimisation”, where employee has in good faith:-
 - Sought redress under the Act
 - Lawfully opposed a breach of the EEA
 - Given evidence in respect of proceedings under the EEA
- “Day one” rights
 - Once Prima Facie Case shown, the burden of proof shifts to the employer.
 - Must show less favourable treatment was entirely unrelated to the protected ground
 - Can take a claim to the WRC, generally public hearings

Anuaj Patwardhan V Black Shamrock Ltd (ADJ-00039205)

- Complainant was a HR & Operations Manager and was dismissed within 2 months
- Dismissal letter said - not the appropriate fit in terms of role suitability and overall performance
- Claimed she was told “*her culture was not a good fit for the company*” and on challenging that was again told that “*she was not a good culture fit*”
- Complainant alleged her dismissal was due to her Indian origin
- Employer detailed documented evidence of probation meeting and issues raised
- Also evidence that others had threatened to resign because of Complainant’s actions
- Investigation at the time uncovered additional shortcomings and competency issues
- Accepted reference was made to culture but their evidence was that this alluded to their work culture
- AO found that no prima facia case of discrimination had been reached.

Complaints By Employee: Unfair Dismissals Act, 1977 (UD)

- Employers are required to have substantial grounds to justify a dismissal
- Certain matters are deemed *automatically unfair* (eg trade union activity, religious or political opinions, the race or colour of the employee, a pregnancy related dismissal, protected disclosures)
- UD Act does not generally apply to dismissal of employees with **less than one years' service**
- **Automatically unfair dismissal** don't require the service requirement ("**Day One**" right)
- So if facts trigger a potential automatic unfair dismissal grounds, even though they don't have 12 months service – Employer need to be able to provide evidence to deny any such motivation

Synergy Security Solutions Ltd v Dudek (UDD1853)

- Complainant was dismissed after ten weeks and claimed it was automatically unfair
- Alleged that her pregnancy was the real reason
- Respondent company stated that the reason for the dismissal was that the complainant was not an appropriate fit with the organisation
- Claimed that she had not reacted positively to the instructions and coaching provided
- Evidence of two employees who had coached the employee and told HR Director she was not a fit
- Claimed none of the personnel involved in the decision to dismiss had any knowledge, prior to her dismissal, that she was pregnant
- Case dismissed as not being one of automatic unfair dismissal
- Not for the WRC in that case to consider the fair procedures element, as the case falls away for not being deemed an automatically unfair dismissal

Complaints By Employee: Protected Disclosure Act, 2014

Created certain protections & remedies:

- against “**penalisation**”
- suffered by “**workers**”
- who made “**protected disclosures**”

A **protected disclosure** is the disclosure of

- “***relevant information***”
- which in the ***reasonable belief*** of the worker
- tends to show a “***relevant wrongdoing***”
- which came to the “***attention of the worker***” in the course of their employment

Complaints By Employee: Protected Disclosure Act, 2014

Unfair Dismissal claim to the WRC/Labour Court

- Dismissal as a result of making a protected disclosure **“automatically”** unfair
- **Compensation** for financial losses up to 5 years’ remuneration
- **Interim application under Schedule 1 of the 2014 Act**
 - Made to Circuit Court - akin to a form of low threshold injunction
 - Discloser can seek order from the Court preventing/reversing their termination, keeping them on full pay until any claim under the UD Act is heard.
 - Under the 2022 Act, interim relief from the Circuit Court can now be sought for the much wider list of acts and omissions that are defined as penalisation
- **Cause of action in tort**
 - where a person has suffered detriment because they or another made a protected disclosure.

Moorehall Disability Services v Nowak (Labour Court 2006 Decision PD/20/12)

- Complainant working as a care worker within a house where adults with disabilities lived
- **Dismissed after four months:** claimed it was an act of **penalisation for raising protected disclosures**
- Employer said it was a probationary dismissal related to his inability to engage effectively with the residents
- Court addressed all of the disclosures allegedly raised and found them, on the evidence, not to amount to protected disclosures
- That was based on the evidence given by its staff as to what actually arose regarding each issue
- In addition, evidence given of the inability to engage, with one witnesses stating for example:-
- *She noticed a change when the Complainant was on duty. Residents stayed in their rooms and no longer congregated in the kitchen. There seemed to be a heavy heart in the place. Handovers with the Complainant were sparse as he had an urgency to leave.*

Key Considerations?

- **How are we responding?**
 - We've seen how we must avoid triggering a penalisation, victimisation claim
 - We want to have some documented clarity on why we acted
 - Must not be left wide open to other claims inferring another motive
 - Can we articulate a substantial ground justifying our action?
- **Pushes us into finally considering.....**
- **What about when we have to act after 12 months service?**

Unfair Dismissals Act, 1977 (UD)

- Generally require 12 months service (save for automatically unfair dismissals)
- **Presumption of Unfairness:** employers are required to have substantial grounds to justify the dismissal
- Certain matters deemed **not to be unfair** if resulting wholly or mainly due to
 - Capability, competence, qualifications, conduct, redundancy
- Otherwise, you need to show “**other substantial grounds justifying the dismissal**”
- Not just **other grounds** but they need to be **substantial**
- “Not being a good fit” is not a substantial ground

Unfair Dismissals Act, 1977 (UD)

- If we are over the 12 months, we've now added two levels of consideration
 - 1) We can't act, unless we have established either:-
 - one of the fair dismissals (likely performance, or conduct in terms of repeated failure to follow a reasonable instruction)
 - Or, some other substantial grounds
 - 2) We must conduct ourselves reasonably
 - s.6(7) permits the decision-maker to have regard to "**the reasonableness or otherwise of the conduct ... of the employer**" in relation to the dismissal"

So, when can we act.....

- Act early
 - Within Probation, ideally
 - Within 12 months, ideally
 - Risks are then more measured
 - But be conscious of being able to support your basis for dismissal
 - Must be able to rebut other claims made
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- If 12 months have past
 - We need to build, piece by piece a fair process
 - We need to rely on a fair dismissal ground
 - Or other substantial grounds

www.rdj.ie
info@rdj.ie

twitter.com/RDJ_LLJ
[linkedin.com/company/rdj-llp](https://www.linkedin.com/company/rdj-llp)

**Thank you for your time.
Any questions?**

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