Unfair dismissal

All employees who have worked for an employer for two years or more have the right not to be unfairly dismissed. This means that an employer can only dismiss an employee in certain circumstances and for certain reasons. These reasons are:

1. Conduct – misconduct or gross misconduct;
2. Capability – performance related or sickness related;
3. Redundancy – where there is a need for fewer employees to carry out the work or where the organisation closes;
4. Illegality – where to continue to employ the individual would be illegal, e.g. for immigration purposes; or
5. Some other substantial reason – where there is a sufficiently compelling reason to dismiss an employee fairly but none of the above categories apply. Very often this covers such situations as loss of trust and confidence or termination of a fixed term contract in certain circumstances.

In addition, an employer must:

1. Ensure that dismissal is within a range of reasonable responses which a reasonable employer may have come to – this does not mean that all employers must reach the same conclusion; and
2. Follow a fair procedure – this will incorporate the employer's internal policy, as well as ensuring that general employment processes are followed, for example the ACAS code on disciplinary procedures.

Dismissal on certain grounds is deemed automatically unfair whether or not the employee has been employed for two years or more. These include dismissals on the grounds of pregnancy or childbirth, health and safety activities, whistleblowing, asserting a statutory right (under the Employment Rights Act 1996) and exercising various time off rights.

An employee has three months to bring a claim for unfair dismissal which runs from the date of termination.

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Unforeseen circumstances in contracts

How do contracts deal with the impact of an “Act of God”? The legal term is “*force majeure*” and it is used in contracts to protect the parties in the event that some or all of a contract cannot be performed due to circumstances that are outside the control of the parties and so which, consequently, could not be reasonably avoided.

Inclement weather is often a frequent cause of force majeure. For example, if a school is closed due to snow, the contractor may be prevented from delivering its goods or services because the school is closed, but may still want to be paid and may even claim for additional alleged losses that it has suffered. Force majeure could also include pandemic situations such as swine flu or a foot and mouth outbreak. With the exception of construction contracts, force majeure is usually not specifically provided for in many routine contractual arrangements.

If a force majeure situation arises, your first port of call, of course, will be the terms of the contract between the parties. However, if the contract is silent on the point, or if there is no written contract, you will have to look at the commercial deal structure that underpins the arrangement. If the agreement is volume based, such as a catering contract, where the contractor is paid per meal delivered, then if no meals are delivered then usually no payment will be due. However, if the contract is a fixed service contract, perhaps a cleaning contract where the contractor is paid a flat rate against a fixed specification, then it is more likely that a school will not be entitled to withhold fees for days when the cleaning was not performed.

You should always, however, resist any claim by a contractor that you should reimburse them for losses over and above the contract price unless the loss claimed is a loss arising out of some special or unusual circumstance which you were aware of at the time you entered into the contract and the contractor cannot avoid that loss. An example might be where your landscaping contractor puts you on notice that to do your job he has to hire specialised equipment; but even then before agreeing to pay out, you should check firstly that the contractor is liable for the full amount claimed (and not just a lost deposit, for example) and secondly, that the contractor is able to provide a receipt to show he has actually paid the sum and that his loss therefore is real.

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Liability for Independent Contractors

Where a school enters into a contract with an independent contractor (which might be a person, a firm or a company) to provide a service, the school could, in certain circumstances, be liable for the negligent acts of that independent contractor, even if the school was itself not negligent.

A school can be liable if it employs an independent contractor to perform a function which the school has a duty to perform, such as a national curriculum based activity like a swimming lesson or a sports lesson. It does not matter whether the contractor provides the function on school premises or at an alternative venue.

This is brand new law which has arisen from a judgment by the Supreme Court in a case brought against an Essex school. As successive court cases will develop and clarify the law, it is not possible to say with any certainty what activities delegated to an independent contractor a school will be liable, but the law as it currently stands does not include contractors to whom no control over the child has been delegated – for example, bus drivers, or theatres/museums etc. where children might be taken by school staff during school hours (as the school staff retain control over the children in those circumstances).

It is, therefore, extremely important to ensure that any contracts entered into by a school with an independent contractor includes specific requirements to carry insurance which will indemnify the school in the event of negligence on the part of the contractor. All insurance policies should be checked, with assistance from your insurers if necessary, to check sufficient cover is provided.

You should also make checks of the contractor before entering into the contract. These checks go beyond the usual DRB checking and include taking up references and ensuring membership of any relevant statutory bodies e.g. the National Swimming Association.

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Thinking of cancelling a contract?

If you are considering terminating your relationship with a supplier, check the terms of the contract before anything else. Consider:

1. When can you give notice to do this? Some contracts will contain the ability to break on a terms' notice, some may provide for a years' notice. A term means a full term. If you serve notice at the beginning of the spring term, then the term that will constitute notice will be the summer term. Therefore your new supplier will be engaged as from the end of the summer holiday.
2. Once you have served notice and it has been accepted, start to plan your exit strategy. Have you found a replacement supplier?
3. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) may apply, if staff that you currently have will transfer from the outgoing supplier to the new supplier, or to you if the contract is brought back in-house. Check the contract with regards to redundancy liabilities. Are they covered, and who pays for them?

When contracting with a new provider, remember:

1. Keep the contract term short.
2. Clarify the break options.
3. Ask the provider to explain whether, and how, he can increase costs. Whilst you may enter into a contract at a defined cost, that cost may change over the life of the contract. That may not be unreasonable in the circumstances, seek clarity as to how and when this will occur.
4. Costs can be referred to as "reviewable" or "as advised from time to time." These are at the behest of the supplier, not the school. Therefore you should ask for these to be defined.
5. To ask is there a management fee? This can be expressed as such, or hidden in the pricing structure.
6. If the pricing of some contracts is dependent on a volume measurement (e.g. school meals) check whether if the volume of meals falls below a set quota, whether the costs can increase. Seek confirmation whether this is the case in your contract, and if so what are the conditions.

In terminating your arrangement with one supplier and engaging with another, it may be possible to negotiate with the outgoing supplier an earlier termination date. This can benefit all the parties involved.

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The mixed blessing of social media

Social media lets us to stay in contact with close friends and distant relatives, tell everyone what we think about the latest “Strictly” and share our opinion instantly about anything that we think is important, with a potentially worldwide audience. However over the past few years, every school has experienced the downside. Abusive emails or Facebook posts from parents which target individual teachers; organised Twitter or Facebook campaigns aimed at an entire school or governing body; or a barrage of individual emails from a parent who is upset about how they think that the school has treated them or their child.

If you or the school are at the receiving end of unpleasant posts e mails or tweets there are some things that you can do before you ask for legal advice.

1. Do not rely on second hand information about what is being written or posted. Get hold of and keep a hard copy.
2. Once you have got that hard copy, think about what to do. Some parents do not understand that everyone can read their tweets or posts, and may agree to remove them. You can ask Facebook to remove posts which breach their policy. If the parent is complaining about the school on eg Facebook suggest that if they have problems with the school, then the complaints procedure is a better way of dealing with them.
3. The criminal law applies to tweets, posts and e mails. If you think that the post amounts to criminal behaviour, because it’s a credible threat of violence or damage, or amounts to harassment then report it to the police.
4. Tweets or posts sometimes attract press attention. If that happens make sure that the school has a clear communications strategy that makes it clear who can speak to the press on behalf of the school, and what is going to be said.
5. Offensive tweets, e mails and posts can also be breaches of civil law, for example if they are defamatory or amount to harassment. If you are being affected as an individual speak to your union and your employer, and if necessary take legal advice on how you can be protected.

There will always be a low level of unpleasantness on social media that we now have to learn to tolerate both as organisations and as individuals. However, serious threats or harassment that interfere with the running of the school do not have to be tolerated.

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Discrimination in employment

The Equality Act 2010 provides protection for individuals against discrimination in the workplace on certain grounds. Those grounds are known as “protect characteristics” and are: sex, race, disability, age, religion or belief, sexual orientation, marriage and civil partnership, pregnancy and gender reassignment.

It is, therefore, unlawful to treat someone at work less favourably than his or her peers because they have a protected characteristic: for example, because they are older or because they are woman.

It is also unlawful to cause an employee offence or to cause them to be humiliated in the workplace because of one of these protected characteristics: for example, sending a birthday card which jokes about a person’s age may be considered to be harassment if it is offensive and causes offence to that individual.

It is important to remember that the Equality Act 2010 applies not only employees but also to agency workers, job applicants and other self-employed individuals.
Where an individual brings a claim for discrimination in the Employment Tribunal it can be costly and time consuming to fight.

Where a person is successful in their discrimination claim they will be awarded costs for hurt feelings, however, where additional claims are included e.g. unfair dismissal or whistleblowing, any damages will be increased.

As well as awarding damages to a person who has experienced discrimination, the Employment Tribunal can make a statement setting out the rights of the person bringing the claim and responsibilities of the employer.

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