

WRONGFUL DISMISSAL

Basis of Wrongful Dismissal

There are two bases upon which an employee can complain about dismissal. Wrongful dismissal or termination is a claim for breach of the employment contract. Generally, there will be no claim for wrongful dismissal if an employment contract has been terminated in accordance with its terms. There may, however, be a claim for unfair dismissal. See our separate note on Unfair Dismissal.

A claim of wrongful dismissal involves showing that the employee was dismissed in breach of contract and has suffered financial loss as a consequence. Normally, employment contracts can be terminated by giving notice for any reason whatsoever. The notice period for valid termination of an employment contract will be the higher of whatever is specified in the employment contract or the statutory minimum period of notice.

If a written employment contract provides for the period of notice, this will apply. If a written employment contract does not mention a period of notice, one is likely to be implied. In the unusual event that the contract is clearly for a fixed period and termination by notice is not intended, it may not be possible for an employer to terminate the contract before it expires, without causing a breach of contract. For example, certain high level executives may be able to negotiate contracts with this level of security. They may therefore be entitled to damages for wrongful dismissal if their employment contract is terminated in breach of its terms.

Where an employment contract does not provide for specific notice, a reasonable period of notice is required which may be, but may not necessarily be, the minimum notice period set out in legislation. For example, a Court may imply a period of notice of several months in the case of an employee who is skilled and highly paid and in a position of seniority. A notice period of three months to one year could be implied, notwithstanding that the statutory periods of notice might be considerably less.

Dismissal on the Spot

Lawful dismissal without notice may occur either under the contract or under common law contract principles, where the employee is guilty of gross misconduct, gross negligence or gross incompetence. There would have to be some circumstance where the employee has acted in such a way as to completely undermine the trust and confidence between himself and the employer. This would generally be a breach by the employee of a "fundamental obligation" on the employee's part which would thereby entitle the employer to terminate the contract and dismiss lawfully.

If the employer acts in such a way as to breach a fundamental term e.g. failure to pay salary, the employee may have the option either to continue with the contract and claim for damages or alternatively to resign and claim for the employer's fundamental breach of contract.

Procedure

Until recently, wrongful dismissal claims were dealt with only through the Civil Courts. However, claims less than £25,000 can now be dealt with in the Employment Tribunal or the County Courts. Claims over this amount, must be dealt with in the County Court or High Court. There is a period of six years in which to bring a wrongful dismissal claim.

Unlike in Ireland, an employee can in principle bring an unfair dismissal and a wrongful dismissal at the same time. It is now possible to bring certain wrongful dismissal claims before the Employment Tribunal. If they are both in the Tribunal they will be held at the same time and a simultaneous decision will be given. Where a wrongful dismissal claim is made before the High Court it is usual for the employer to request that Tribunal proceedings be stayed (i.e. put on hold) until the outcome of the wrongful dismissal case. An employee cannot recover twice for the same loss.

In a wrongful dismissal claim, the damages will be equal to the amount of wages and salary which would have been earned but for the premature termination of contract.

Compensation and Awards

An employee may be entitled under the contract or custom to additional amounts such as commission, bonuses and gratuities. The Court will look at the circumstances to ascertain what should be paid. This may include the contract, past performance and actual practice in the past. The Court may look at past payments and apply the average amount payable over the relevant period.

The net value of "benefits in kind" during the notice period, will generally be added. Another possible element of damages is the loss of opportunity to take a successful claim for unfair dismissal. It may be possible to claim damages for failure to follow a contractual disciplinary procedure.

An employee is under a duty to mitigate his losses so must look for alternative employment and not unreasonably refuse employment.

It is possible in theory to obtain injunctive relief (i.e. a mandatory Court order) in a wrongful dismissal claim. It would be unusual. It is possible for an employee to apply for an injunction to restrain the employer from acting as intended. Generally, courts are reluctant to compel an employer to retain an employee. However, this may not be relevant where it can be shown that the relationship of trust is intact and damages will be inadequate. This has happened in the case of large organisations, local authorities or prominent public office holders. Generally, however the majority of employees are not likely to obtain an injunction requiring the employer to re-employ them.

Employee's Resignation in Breach of Contract

The employee may himself resign in breach of contract by failing to give adequate notice to the employer. There may be a required period of notice set out in the contract or the statutory period may apply. The employer could in theory bring an action in damages

although this would be very rare. The employer will not generally be able to obtain an injunction requiring the employee to stay. Instead, the employee may be required to go on "garden leave" where he is relieved of his duties and paid a salary at the normal rate for the notice period. In return he is restrained from taking up employment anywhere else for that period.

Where an employee is given pay in lieu of notice, there will generally be no claim for wrongful dismissal because the payment in lieu will mean the employee has suffered no loss. The employer has an absolute right to pay in lieu of notice and correspondingly the employee does not have a right to demand to work out his period of notice.

Restrictive Covenants

An employee's contract of employment may contain restrictive covenants. If this is the case, he must comply with them in the event of termination. Restrictive covenants must be reasonably tailored to protection of the employer's legitimate interest. An anti-competitive purpose alone is not sufficient. For example the protection of confidential information or trade secrets may justify a restriction.

A restrictive covenant may restrain an employee from working for a competitor within a specified time, usually six months to a year, within a specified area. It may prohibit solicitation of clients or potential clients for a period after employment and solicitation of employers. If the employer wrongfully terminates an employment contract, there may be questions over his ability to enforce these clauses.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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