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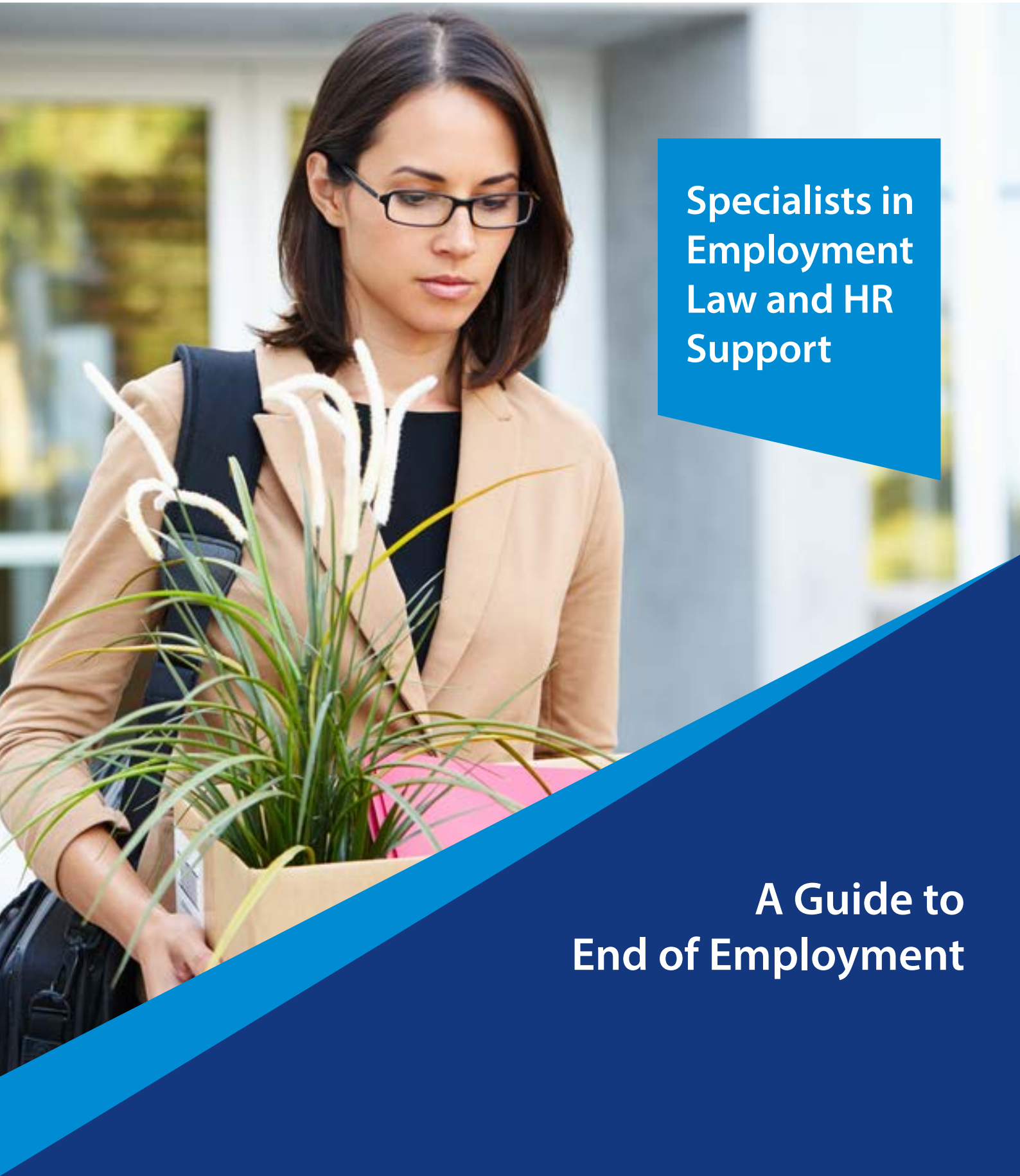

Specialists in Employment Law and HR Support

A Guide to End of Employment

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A Guide to End of Employment

Including valuable information on:

- **Constructive Dismissal**
- **Unfair Dismissal**
- **Redundancy**

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A Guide to End of Employment

Constructive Dismissal

Constructive dismissal is a specific form of unfair dismissal claim. If one of your employees resigns from their job because of your alleged unreasonable behaviour, they might be able to claim that they have been constructively dismissed.

How does an employee prove constructive dismissal?

To succeed with a constructive dismissal claim, your employee needs to show that:

- You committed a fundamental breach of their employment contract
- They had no choice but to resign because of that breach
- They have not done anything that could be seen as accepting the breach – for example, waiting a while before resigning could imply that they had accepted the breach.

If your employee fails to satisfy an employment tribunal on any of the three points above, they won't be able to prove they were constructively dismissed and a tribunal will conclude that they resigned.

What is a fundamental breach of contract?

Trust and confidence is the implied contractual term used most often in constructive dismissal cases – it basically requires an employer to act reasonably towards their staff. Examples of a fundamental breach of contract might include:

- Failure to pay wages or a bonus when due
- Demoting an employee for no apparent reason
- Making unreasonable changes to an employee's duties without their agreement
- Changing an employee's place of work beyond reasonable commuting distance (unless their contract of employment has a clear mobility clause)
- Changing an employee's working hours or making them work overtime without their agreement
- Discriminating against an employee on the basis of their sex, race, age, disability, sexual orientation or religious beliefs
- Suspending an employee without pay
- Failing to deal with an employee's grievance or with disciplinary matters promptly
- Failing to provide an employee with a suitable working environment.

A constructive dismissal claim can be based on just one fundamental breach of contract, or a whole series of less serious incidents, that when considered together may be regarded as a fundamental breach.

How should an employer respond to a claim of fundamental breach of contract or constructive dismissal?

Because of the seriousness of constructive dismissal cases, employees will sometimes resign immediately.

However, if your employee raises a formal grievance – an employment tribunal can reduce any compensation by up to 25% if they do not – you should properly investigate the issues they have raised, hold a formal grievance meeting and try to resolve the matter as fairly as possible.

If you do not deal with a grievance properly, an employment tribunal may decide that you have breached the ACAS Code of Conduct and increase any compensation payable to the claimant by up to 25%.

If your employee has already resigned, you can still try to arrange a grievance meeting with them to try to resolve the issue and offer reinstatement. If your employee unreasonably refuses your offer, this might affect their chances of succeeding with a constructive dismissal claim or reduce any award of compensation.

Alternatively, the matter could be resolved by a negotiated settlement, thereby preventing your employee from bringing any claims against you. The settlement terms would need to be formalised in a settlement agreement.

What legal action can an employee take if they feel they've a case for constructive dismissal?

If your employee has been continuously employed for two years, they could issue a constructive dismissal claim in an employment tribunal. If they resigned because of discrimination, whistleblowing, or because they were exercising a statutory right or for health and safety reasons, there is no qualifying period.

If the constructive claim is successful, the employment tribunal may make an award of damages for any loss of notice and compensation for unfair dismissal. Claims to an employment tribunal must be made within three months of the date of the employee's resignation.

Delphi can advise you on constructive dismissal and grievance procedures. If an employee has made a constructive dismissal claim against you, or you are looking for advice on how to deal with a formal grievance process, we can help.

We specialise in employment law and have many years of experience in this area. We are highly qualified to assist you with whatever workplace issues you might have. **Contact us today on 0113 867 2815.**

Unfair Dismissal

The terms under which a staff member can be dismissed depend on how long that person has worked for you, their employment status and whether they fall within a protected category of employee.

What constitutes unfair dismissal?

An employee may be said to have been dismissed if:

- They are made redundant
- Their fixed term contract ends
- They are forced to resign ('resign or be sacked')
- Their employer prevents them from returning to work following maternity leave
- Their employer incorrectly treats them as if they have resigned
- Their employer prevents them from returning to work after strike action.

Dismissals can be made with or without notice. When there is no notice, this is known as a summary dismissal.

What is an automatically unfair reason for dismissal?

All employees have basic employment rights when they start a new job, including the right not to be dismissed for reasons that are regarded as automatically unfair. These include dismissal related to:

- Pregnancy, childbirth or maternity leave
- Paternity or adoption leave
- Certain health and safety reasons
- Joining a trade union

- Requesting flexible working
- Refusing to give up working time rights such as taking rest breaks
- Enforcing the right to receive Working Tax Credits
- Whistleblowing
- Carrying out jury service
- Reasons connected to discrimination (age, sex, race, disability, religion, sexual orientation).

It is illegal to force your staff to retire unless you can objectively justify your decision and it is possible for claimants to challenge your decision at an employment tribunal.

What is a potentially fair reason for dismissal?

As an employer, you must be able to show that the dismissal is fair because it relates to capability, conduct, redundancy, a legal obligation or another substantial reason.

Dismissal on grounds of capability

Dismissal on grounds of capability is about whether your employee can do their job properly. For instance, they might not have the right skills to cope with a new workplace computer system or perhaps they are unable to carry out their duties to the standard required.

You should explain to the employee the ways in which their work is unsatisfactory and warn that they might be dismissed. Before any decision is made to dismiss, they must be given a reasonable chance to improve – perhaps by being given extra training or supervision, or the offer of an alternative job. An employee might not be able to do their job properly if they are absent with ill health, either through a series of short-term absences or with a single, lengthy, long-term illness.

You should look for ways to support them. Was their illness work-related and if so, what changes could be made to assist them? They should also be given reasonable time to return to work after their illness before any decision is made to dismiss them. If your employee has a disability – which might include long-term illness – you are legally required to support them in the workplace. Dismissal because of a disability could qualify as unlawful discrimination.

Dismissal on grounds of conduct

Conduct is about inappropriate or unacceptable behaviour – for example, if your employee is constantly late for work, rude or fails to follow reasonable instructions from you, their line manager or supervisor.

You must fully investigate the circumstances and provide your employee with appropriate warnings and a chance to correct matters, before any decision is made to dismiss them.

You can dismiss an employee for gross misconduct without any prior warning if they are guilty of violence, theft, fraud or incapacity due to drugs or alcohol. However, you must still follow a fair disciplinary procedure that is consistent with the ACAS Code of Practice – Disciplinary and Grievance Procedures before any dismissal.

It is essential that you tell the employee of the allegations against them, fully investigate and establish the facts, then provide them with a chance to respond and a right of appeal. If you do not follow these procedures, any dismissal is likely to be regarded as unfair.

Dismissal due to redundancy

Redundancy is a potentially fair form of dismissal, although you must carry out a reasonable period of consultation and selection before making any decision to dismiss. If an employee is selected for redundancy for an unfair reason, then an employment tribunal may decide their dismissal was unfair.

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Dismissal due to a legal obligation

You can dismiss an employee if continuing to employ them would break the law, for example, if the person was employed as a lorry driver and loses their driving licence. This is known as a legal obligation to end employment.

Other reasons for dismissal

It may be fair to dismiss an employee for another substantial reason, such as if they are sent to prison, or the factory they are employed in burns down and it is no longer possible to employ anyone.

What does an employer need to show to dismiss an employee?

If you dismiss an employee from their job, you must be able to show that you have:

- A valid and justifiable reason to dismiss them.
- Fully investigated the situation and listened to their side of the story before making any decisions.
- Acted consistently – you cannot dismiss someone for something that you have allowed others to do.
- Behaved fairly and reasonably – for example, by providing them with a right of appeal against dismissal.

You cannot treat part-time workers or fixed-term contract employees less favourably than full-time or permanent employees.

What notice period does an employer need to give an employee being dismissed?

All employees – including those on a probationary period – are entitled to statutory notice of one week if they have worked for you continuously for between one month and two years.
After two years, they're entitled to two weeks' notice. This increases by one week for each year of continuous service, up to a maximum of twelve weeks after twelve years of continuous employment.
You must provide your employees with the minimum legal notice or the period of notice specified in their contract of employment, whichever is longer. If you dismiss for gross misconduct, they may not be entitled to any notice at all.

Providing written reasons for dismissal

If an employee has worked for you for at least two years continuously, they have the right to ask you to set out the reasons for their dismissal in writing. This must be supplied within 14 days of their request. If they are dismissed while on statutory maternity leave, you must provide them with written reasons for dismissal, irrespective of how long they have worked for you.

When is a dismissal unfair?

An employment tribunal will take into account various factors in deciding whether you have acted reasonably in dismissing your employee. If the dismissal procedure you followed was biased or unreasonable, or if they conclude that no reasonable employer would have dismissed for the offence, the dismissal will be unfair.

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What legal claim could an employee make for unfair dismissal?

If an employee has two years' continuous service, they can make a claim of unfair dismissal to an employment tribunal. If they have been dismissed for an automatically unfair reason, there is no qualifying period.

If an employee wins an unfair dismissal claim, an employment tribunal can award damages in two parts:

- Basic award – Based on the employee's length of service and age at the time of dismissal, they may receive one week's pay for each full year of service – capped at £538 per week for up to a maximum of 20 years – or one-and-a-half weeks' pay for each year of service that they were aged 41 or over.
- Compensatory award – This is based on the employee's loss of net wages and benefits from dismissal to the tribunal hearing, minus any earnings from new employment. If the employee hasn't found a new job – or has but it pays less – the tribunal may make an estimate of future loss, usually for a period of six to 12 months. In total, an employment tribunal can award up to 52 weeks' net pay or £88,519 – whichever is the lower.

The employee may also receive compensation for the loss of their statutory employment protection rights – usually between £250 and £700.

Compensation can be reduced if a tribunal decides that there was a fair reason to dismiss but the procedure was flawed, or if the employee contributed to their own dismissal.

Delphi can advise employers on unfair dismissal. If you need advice regarding a disciplinary problem, we can help.

We specialise in employment law and with many years of experience, we are highly qualified to assist you with any unfair dismissal issues you may have. **Contact us today on 0113 867 2815**

Redundancy

Redundancy is a type of dismissal which might be necessary if your business needs to reduce the number of its employees. This might be because the company is closing down or moving away from the location at which the staff were employed – or perhaps you do not need as many people to carry out the kind of work that your staff were doing. Redundancy laws are designed to create a fair process through which you can reduce staff numbers if required.

What are an employer's responsibilities regarding redundancy?

An employer should always consider alternatives to compulsory redundancy, for example:

- Reducing overtime
- Seeking volunteers for redundancy or early retirement.

What consultation do I need to carry out?

You must consult with affected staff to consider whether there are any suitable alternative jobs they could do, which might avoid the need for redundancy.

Consultation should start as soon as is reasonably practical. An initial meeting should be followed by at least one consultation meeting, giving the employee sufficient time to respond. A final consultation meeting will usually be required to address the outcome of any selection procedure. You should consult with employees individually, although they have a right to be accompanied to all such meetings by either a work colleague or union representative.

If you are making fewer than 20 redundancies, there is no standard procedure, but two weeks is generally regarded as the minimum timeframe for a small-scale redundancy consultation. If 20 or more employees are being made redundant from the same location, you must consult with a trade union official or elected staff representative. This is called collective consultation. You must consider how to minimise the number of dismissals and limit the effect for those involved, by offering retraining or looking for alternative jobs. For 20 to 99 employees, the minimum time periods for collective consultations are at least 30 days before any dismissals take effect. If the number is 100 or more, consultation must start at least 45 days before any dismissals.

After the collective consultation is finished, you must consult with affected staff individually. In all instances, consultation must be completed before any employees are given notice of redundancy.

How should the selection process be carried out?

For redundancy to be fair, a selection pool of "at risk" employees should be identified on the basis of people with similar sets of skills or experience. You must ensure that employees are not unfairly included or excluded.

An objective and reasonable set of criteria should be identified to select the candidate(s) for redundancy, based on skills, qualifications, productivity, disciplinary record, etc. You should then carry out an objective scoring exercise, before consulting with the employees on their scores, and providing them with anonymised copies of other employees' scores. You do not have to follow a selection procedure if the company is closing down and everyone is being made redundant, or if you have only one employee doing the job that is no longer required.

What is the procedure for identifying suitable alternative employment?

As an alternative to redundancy, you might offer an employee a different position within the company. Whether the job is appropriate can depend on how similar it is to their current role and issues such as pay, status, hours and location. Employees have the right to a four-week trial period for any alternative job they are offered.

If you have a suitable alternative job available, and you fail to offer it to a member of staff facing redundancy, an employment tribunal may well decide that is unfair dismissal. If your employee unreasonably turns down a suitable alternative job, they might lose their right to a statutory redundancy payment.

Allowing time off for job hunting

If your employee has been employed continuously for two years by the time their notice period ends, they are allowed to take a reasonable amount of time off to look for another job or arrange training to help them find one.

What are the procedures surrounding dismissal?

Once a candidate has been selected for redundancy, you must follow ACAS Guidelines on dismissal, otherwise the process may be unfair. If you are going to make 20 or more redundancies, you must notify the Government's Department for Business Innovation and Skills in writing. If a potential candidate for redundancy is on maternity leave, you must offer them any suitable alternative work that is available, otherwise their dismissal may be automatically unfair.

How much redundancy pay do I need to provide?

If a member of staff who is made redundant has been employed continuously for two years, they are entitled to a tax-free redundancy payment, reflecting their length of service. It is calculated as follows:

- Half a week's pay for each full year worked if they are aged under 22
- One week's pay for each full year worked if they are aged 22 or older
- One and half week's pay for each full year worked if they are aged 41 or older.

Weekly pay is currently capped at £538 and length of service is capped at 20 years, so the maximum statutory redundancy payment an employee can receive is £16,140.

Before their employment ends, an employee selected for redundancy must be given appropriate notice. They should receive their basic pay and entitlements, such as pension contributions, private healthcare insurance, etc. If your employee's contract contains a "payment in lieu of notice" clause, you may make a lump sum payment to them, rather than insisting they work out their notice period.

What legal action could my employee take?

If you have made redundancies and have not followed a fair or correct procedure, your employee(s) may be able to make claims against you at an employment tribunal. For example:

- If unreasonable criteria are used to select candidates for redundancy, or a flawed dismissal process is followed. For instance, an employee with two years' continuous service might have a claim for unfair dismissal. However, an employment tribunal could reduce the level of compensation if you can show that the end result would have been the same had you followed a fair procedure.
- Irrespective of their length of service, if an employee is selected for redundancy on the basis of their race, age, gender, sexual orientation, disability or pregnancy, they might have claims for automatic unfair dismissal and discrimination.
- If 20 or more employees are being made redundant and you fail to collectively consult, the affected employees can bring employment tribunal claims. If successful, this could result in an award of up to 90 days' gross pay each.
- Employment tribunal claims could be made if you fail to pay statutory redundancy pay.
- If you do not honour your employee's contractual entitlements – such as notice pay, pension contributions and private healthcare insurance – they might have a claim for breach of contract.

Delphi can advise on redundancy matters. Redundancy is a very complicated area of law and the information provided here is only intended to provide a brief overview. If you require advice on a redundancy situation, large or small, **Delphi can help.**

We specialise in employment law and with many years of experience, are highly qualified to assist with any redundancy issues. **Contact us today on 0113 867 2815**