

Termination of Employment

It is only as recently as 1998 that Guernsey introduced statutory law governing the termination of the relationship of employer and employee. This article deals with the basic rules which apply to the termination of employment.

The key piece of legislation is The Employment Protection (Guernsey) Law 1998, as amended (the "EP Law"), which sets out minimum notice periods, circumstances where employment can be terminated, how claims are to be brought and the requirements in connection with compromise agreements. The EP Law has now introduced a limited form of employment protection into Guernsey law. We have not gone as far here as the U.K., and do not have here any equivalent to the legislation which they have there in relation to statutory maternity rights, statutory maternity pay, statutory sick pay, rights to redundancy payments nor in connection with age, disability or race discrimination.

Questions of the circumstances in which the employment relationship can be terminated, and the period of notice which needs to be given, are governed by both the contract between the employer and the employee and the EP Law.

The Contract of Employment

There will always be a contract of employment between an employer and an employee although it need not be in writing. An employee who works fifteen or more hours per week for an employer is entitled to written conditions of employment by virtue of the Conditions of Employment (Guernsey) Law 1985, as amended. Even where written conditions have not been issued there will be a verbal contract (i.e. an agreement) between an employer and an employee.

Notice

Most employment relationships are terminated by the giving by one of the parties to the other of notice of termination. The period of notice required is governed by the contract of employment, however such period cannot be less than the minimum periods set out in the EP Law.

A written contract will normally specify the requisite period of notice. If there is no written contract, then whatever the parties have agreed verbally will (provided that it is equal to or more than the period specified by the EP Law) apply. If they have not come to any agreement at all, then it is normally implied that the employment contract can be terminated by the giving of "reasonable notice". The vagueness of this expression indicates the importance to both parties to the employment relationship in there being a written agreement. The term "reasonable notice" is normally, although by no means invariably, taken to be the same length as the period of payment (e.g. monthly or weekly). It also has regard to the differences of worker status and the nature of the work performed.

Payment in Lieu of Notice

Some employers take the view that an employee under notice (whether notice was given by the employer or the employee) is unlikely to be a hard or willing worker and prefer to immediately terminate the employment by giving the employee payment in lieu of notice. This is an option available to an employer regardless of whether the contract of employment contained a 'payment in lieu of notice' clause.

The employee cannot normally complain about being given payment in lieu of notice, even if the immediate termination of the employment by the employer might constitute a technical breach of contract (in that the employer will not have given the requisite notice of termination). The employee is fully compensated by receiving the pay which he or she would have received had he or she worked during the notice period. A payment in lieu of

notice clause would not prevent an employee bringing a claim for unfair dismissal and, if successful, being awarded further money in respect of that unfair dismissal claim. It is not obligatory for an employer to give pay in lieu of notice. If an employer requires an employee to work during his or her notice period and the employee refuses then the employer need not pay the employee for the period which is not worked.

If an employee leaves without giving the required period of notice then there is normally a breach of the contract of employment for which the employer may have a right to sue the employee. However, it is rarely worthwhile for the employer to take such action since, unless the employer can prove financial loss which has been suffered as a result of the employee having left without notice, the employer is only entitled to "nominal damages". In a case in the Guernsey Petty Debts Court, the Magistrate decided that an employer whose employee had left without notice was, in circumstances where the employer could not prove any loss as a result of the employee leaving, entitled only to "nominal damages", which he assessed for this purpose as being £100.

Where employment is terminated by the employer without the requisite period of notice, and the employer refuses to pay the amount of the salary or wages which the employee would have received had the correct period of notice been given, then the remedy of the employee is to institute Court proceedings. If the amount claimed is £2,500 or less then the action will normally be brought in the Petty Debts Court; otherwise it will be brought in the Royal Court. The procedure in the Petty Debts Court is far simpler and a dispute will usually come to trial far more quickly than in the Royal Court. No legal costs are recoverable from the loser in Petty Debt proceedings. Some legal costs are recoverable from the loser in Royal Court proceedings, but the complexity of the procedure, the limited amount of costs recoverable when compared to the actual legal costs which will be incurred and the length of time which it takes for a dispute to come to trial mean that if a claim is above the £2,500 Petty Debt Court limit it is often more advisable for a claimant to waive the balance of his or her claim over and above £2,500 to bring the matter within the jurisdiction of the Petty Debts Court

Immediate Termination of Employment

An employer can dismiss an employee without notice if the employee commits an act of "gross misconduct". A particular example of gross misconduct would be where the employee had stolen from the employer. However, what constitutes "gross misconduct" will depend on the nature of the employment and the terms of the employment contract. For example, a bank might include in its form of employment contract a stipulation that any unjustified breach of confidentiality on the part of the employee would constitute gross misconduct and give the employer the right to terminate his or her employment summarily.

However even where an employee is dismissed for gross misconduct and employer must ensure that the dismissal itself is handled fairly (see below).

Where an employee terminates his or her employment without giving notice, he or she may be able to claim to have been "constructively dismissed" (and therefore to be entitled to the pay which he or she would have received if notice had been given) if the conduct of the employer has been such that the employee is entitled to terminate the employment without notice. As with the concept of "gross misconduct", as to when an employee is entitled to exercise this right is rather vague. However, amongst the types of breach of contract by an employer that might support an allegation of constructive dismissal are:

1. A failure to pay wages or unilateral decision to cut pay;
2. A demotion or other change in status;
3. A change of job content not permitted or envisaged by the contract;
4. Undermining a senior employee's position;
5. A unilateral change of hours;
6. A failure to ensure the employee's safety; and/or
7. A failure to follow a contractually binding disciplinary procedure.

Minimum Periods of Notice

The EP Law specifies minimum periods of notice which must be given by an employer to an employee, or by an employee to an employer, to terminate the contract of the employee. These periods are as follows:

1. Where the employee has been continuously employed for more than one month but less than two years, one week's notice;
2. Where the employee has been continuously employed for a period of two years or more but less than five years, two weeks' notice; and
3. Where the employee has been continuously employed for a period of five years or more, four weeks' notice.

It should be stressed that these periods are minima. Where an employment contract specifies that a longer period of notice is necessary, it is that period which will be applicable.

The compulsory notice requirements in the EP Law do not apply to an employment contract (a) made in contemplation of the performance of a specific task which is not expected to last more than three months or (b) for a fixed term of three months or less, unless (in either of these cases) the employee has been continuously employed by the employer for more than three months.

The EP Law does not effect the right of an employer to dismiss an employee without notice on the grounds of the employee's gross misconduct.

Written Statement of Reasons for Dismissal

The EP Law provides that an employee whose employment is terminated and who has been continuously employed by the employer for one year or more is entitled to be provided with a written statement giving the reasons for the dismissal. The right to such notice is not automatic but only arises on the employee requesting such a notice. Once such a request has been made, the written statement must be given within seven days. No request as to the reason for dismissal is necessary in the cases of a female employee who is dismissed whilst she is pregnant, or after she has given birth, during a period of maternity leave.

Unfair Dismissal

The EP Law gives an employee who has been continuously employed by an employer for one year or more the right not to be unfairly dismissed. The requirement for one year's continuous employment does not apply in the following cases:

1. If the reason (or, if there was more than one reason, the principal reason) for the dismissal was that the employee was pregnant, or was a reason connected with her pregnancy, except where the employee was (or would have become) because of her pregnancy, incapable of adequately doing the work for which she was employed or where she would not have been able to carry on working after the date of termination without either she or the employer contravening a duty or restriction imposed by law; for example a health and safety obligation of the employer.
2. In certain health and safety cases. For example if the reason (or principal reason) for the dismissal was that the employee left, proposed to leave or refused to return to his place of work in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert.
3. If the reason (or principal reason) for the dismissal was that the employee brought proceedings against the employer to enforce a relevant statutory right or alleged that such a right had been infringed. A "relevant statutory right" for these purposes is a right conferred by the EP Law, the Conditions of Employment (Guernsey) Law, 1985 or the Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993.
4. If the reason (or the principal reason) for the dismissal was trade union membership or activities or non trade union membership.

The right not to be unfairly dismissed does not apply to employees who ordinarily work outside Guernsey. Further the right not to be unfairly dismissed may be excluded in the case of a fixed term contract of one year or more by agreement between the employer and the employee in writing made before the date on which the contract expires.

If a complaint of unfair dismissal is made by an employee, it is for the employer to show the reason for the dismissal and that that reason was good substantive reason. A reason for dismissal will be treated as a good substantive reason if it was:

- a) related to the capability or qualifications of the employee to perform work of the kind which he was employed by

the employer to do;

b) related to the conduct of the employee;

c) that the employee was redundant;

d) that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under the law of Guernsey; or

e) some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

Even if the employer is able to show that the reason (or the principal reason) for the dismissal was one of these good substantive reasons the tribunal must assess whether the dismissal was fair or unfair. The decision of the tribunal will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason for dismissing the employee. This question must be determined "in accordance with equity and substantial merits of the case". In addition to deciding whether the reason was fair or unfair the tribunal will also require procedural fairness in the dismissal. This means that a dismissal can be unfair because of an unfair procedure being followed even though there was a good reason in principle for the dismissal. Whilst there is no obligation on an employer to have a formal written disciplinary procedure this requirement for procedural fairness makes it extremely advisable to have such a procedure and to comply with it in the process of dismissing an employee.

Where a dismissal is of:

a) a replacement for a pregnant employee; or

b) a replacement for an employee whose suspension on medical grounds comes to an end;

this dismissal is treated as being a dismissal for a "substantial reason" and would normally be treated as a fair dismissal, subject to the general test of fairness which must be applied by the tribunal as referred to above. Conversely, a dismissal is automatically treated as unfair if the reason (or the principal reason) for the dismissal is one of the reasons to which reference has already been made (dismissal on grounds of pregnancy, in health and safety cases or on the grounds of assertion of a relevant statutory right or in relation to trades union activity or membership) which will result in the usual requirement for one year's employment not applying.

Dismissal Procedure

The EP Law does not set out what does and does not constitute a fair procedure for the dismissal of an employee. The States of Guernsey's Commerce & Employment department (the "Department") has produced guidance in the form of a code of practice called "Disciplinary Practice and Procedures in Employment". Failure by an employer to observe the provisions of this code of practice does not of itself render the employer liable to proceedings but in any unfair dismissal proceedings the tribunal shall have regard to the code.

The employer should have adequate disciplinary rules and procedures which will vary according to the employer's circumstances and such procedures should be explained to employees. When a disciplinary matter arises the employer should establish the facts promptly. In serious cases as suspension with pay may be appropriate, not as a penalty but as a means of removing an individual from a potentially difficult situation while an investigation is carried out. Prior to making a decision or imposing a penalty the employee should be interviewed and given a chance to state his case and should be advised of any rights under the procedure, including the usual rights to call witnesses and be accompanied to any disciplinary proceedings. The employee should also be advised of his right of appeal and any such appeal should be conducted by someone other than the people who conducted the initial hearing.

Records should be kept detailing any breach of disciplinary rules, the actions taken and the reasons for it, if an appeal was lodged and subsequent developments. These records should be kept secure and confidential.

(The requirements surrounding a disciplinary procedure which does not result in dismissal is beyond the scope of this note).

The Tribunal

Formerly complaints against an employer under the EP Law were heard by a single adjudicator. The adjudicator has now been replaced by a tribunal of three members who hear and determine the complaint.

Where an employee has a complaint of unfair dismissal or of failure to provide a written statement giving reasons for dismissal or has suffered detriment because he is a shop worker who has refused to work on a Sunday, the complaint must be made to the secretary of the tribunal care of the Department. The claim must be commenced by the employee within three months of the effective date of the termination of employment. A tribunal will be appointed to hear the complaint unless it can be settled by conciliation.

The tribunal shall not hear a complaint unless the conciliation process has been complied with. Upon a complaint being made the Department will use its best endeavours to settle the complaint by giving such advice as it thinks necessary or expedient or by conciliation. If the Department believes that the complaint cannot be settled in this way or if it has not been settled within six weeks (unless negotiations are in progress with a view to settlement) then the complaint will be passed back to the tribunal. Communications to the Department in the conciliation process are confidential and cannot be admitted in the tribunal hearing without the consent of the person who so communicated it.

Further the tribunal must refuse to hear a complaint if a compromise agreement (see below) has been signed where the independent adviser acting was a Guernsey advocate or a UK qualified solicitor or barrister.

The intention is that at the tribunal hearing the parties should not use lawyers in connection with proceedings before the tribunal so that, although there is nothing to prevent one or both of the parties having lawyers representing them, no legal costs are recoverable by the successful party to the tribunal hearing. However it is not uncommon for either or both parties to be represented by a lawyer.

There is a right of appeal from a decision of the tribunal to the Royal Court and, in addition, the tribunal may, itself, refer a question of law arising in the course of a hearing to the Royal Court for a decision.

Where a tribunal finds a complaint is well founded it must make an order that the employer pay to the employee:

1. In the case of a complaint of failure to give a written statement of reasons for dismissal, half a month's pay, or (where the complainant was paid on a weekly basis) two weeks' pay; or
2. In the case of a complaint of unfair dismissal, a sum equal to six months' pay or (where the complainant was paid on a weekly basis) twenty six weeks' pay.

These amounts can be changed from time to time by the States by Ordinance.

Once there has been a finding of failure to give a written statement of reasons for dismissal, the tribunal has no discretion as to the amount of the award. However if there has been a finding of unfair dismissal the tribunal may reduce the award from the statutory maximum if the tribunal finds that:

- (a) the complainant has unreasonably refused an offer by the employer which would have had the effect of re-instating the complainant in all respects as if he or she had not been dismissed, or
 - (b) for any other reason the tribunal considers that it would just and equitable to reduce the amount of the award; then
- the tribunal shall reduce the award of compensation to such extent as it considers just and equitable.

An award made by the tribunal can be enforced against the employer in the same way as a judgement obtained before Court. An tribunal's award is a preferred debt (in other words, if the employer is insolvent, the employee will be preferred for payment above other ordinary creditors of the employer) subject to the maximum amount preferred not exceeding £3,000. This maximum can be changed by the States by Ordinance.

Contractual Claims and Claims under the EP Law

It should be stressed that any entitlement to an award in respect of unfair dismissal is in addition to any entitlement under a contract of employment (or a claim out of the breach of that contract). If, for example, an employee is entitled to three month's notice of the termination of his or her employment under the terms of the relevant employment contract, and the employer dismisses the employee with immediate effect, in circumstances where the dismissal is "unfair", the employee will be able not only to obtain an award of six month's pay from a tribunal appointed under the EP Law but also (subject to a reduction to take into account any amount actually earned by the

employee during the three month notice period) to three month's pay in lieu of notice. As previously stated, if the employer refuses to pay salary or wages in lieu of notice, the employee's remedy is by way of Court proceedings. This could mean that, in order to get everything to which he or she is entitled, the employee may have to bring two sets of proceedings: one before a Court and the other before an tribunal appointed under the EP Law.

Compromise Agreement

Compromise agreements were introduced into Guernsey law in 2006. Generally it is not possible for employers and employees to agree between themselves that the provisions of the EP Law and the unfair dismissal regime are excluded from their relationship. Therefore any provision attempting to do so is void in so far as it tries to exclude or limit the unfair dismissal provisions of the EP Law or prevent an employee from bringing a claim for unfair dismissal. The aim is to protect employees from making decisions that they later regret. However an agreement not to take bring proceedings before the tribunal can be exempted from this general rule if certain conditions are met. An agreement which meets the conditions is a "compromise agreement" as the employee's right to bring actions are compromised.

The conditions relating to compromise agreements are that:

- (a) the agreement must be in writing;
- (b) the agreement must relate to particular proceedings;
- (c) the employee has received advice from an independent adviser as to the effect of the proposed agreement and in particular its effect on his ability to pursue his rights before the tribunal. (A person is an "independent adviser" if he or she is a Guernsey advocate, a solicitor or barrister qualified in the United Kingdom or a member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union);
- (d) there is in force, when the adviser gives the advice, a contract of insurance or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
- (e) the agreement identifies the adviser; and
- (f) the agreement states that he conditions regulating compromise agreements under the EP Law are satisfied.

In addition to compromise agreements there is also a second type of agreement where a prescribed form of agreement is signed by the employer and employee, countersigned by an officer of the Department, stating that they have settled the complaint.

Under the EP Law the tribunal may review a prescribed form agreement which has been signed before an office of the Department but the tribunal may not review a true compromise agreement. Thus if the parties wish to bring a dispute to a resolute end then the agreement should take the form of a true compromise agreement.

Contractual claims (as opposed to claims under the EP Law) can be settled by entering into a termination agreement. It is common for a termination agreement and a compromise agreement to be combined into one document, being a "severance agreement". The conditions relating to compromise agreements must still be fulfilled in relation to the severance agreement for the compromise of the employee's rights under the EP Law to be effective.

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This paper is intended as a general review and aide memoire. It does not create a retainer or lawyer-client relationship and does not provide comprehensive or specific legal advice concerning the matters contained within it. This paper should not be relied upon as giving or providing advice on any individual case.