Protecting your organisation even after an employment contract comes to an end

by Derek McKay

In the final of our three-part series of articles on the Lifecycle of the Employee, Derek McKay, Managing Director of Adare Human Resource Management provides expert advice on how to effectively manage the termination of employment contracts, whether it's voluntary, compulsory or required.

In most instances, the end of an employee/ employer relationship is amicable; people need references after all so tend to see out their contract in a very professional manner. However, there are times that this isn't always the case and, at Adare Human Resource Management, we've worked with organisations who have found themselves in the Workplace Relations Commission (WRC) or Labour Court defending cases that could have been avoided.

How the relationship between an employer and employee comes to an end is very much in the control of the employer as much as the employee but organisations need to be mindful of the potential risks associated with the termination of employment and how to protect themselves.

In general, there are four main ways to terminate employment; ***Resignation, Retirement, Redundancy and Dismissal.***

Resignation

Resigning from a position is the most common form of ending an employment arrangement but is not without its risks. There may be some unresolved issue in the employee's decision-making process such as perceived bullying or harassment that led them to terminate their employment. Despite there being no explicit legal requirement to do so, we always advise organisations to ensure that they have robust grievance procedures in place; it is a good form of protection against claims of constructive dismissal.

Generally speaking, there is a misunderstanding about what constitutes constructive dismissal and how it is assessed. It is the responsibility of the employee to provide the proof that the termination of their employment is one of constructive dismissal under the Unfair Dismissals Act. This is gauged against two specific tests; The Contract Test and The Reasonableness Test.

Initially the employee is required to demonstrate a breach against these tests, which is a high bar, before the burden falls on the employer to defend the case. This is the opposite to an unfair dismissal case where the burden is automatically on the organisation to prove that the dismissal was fair. In this situation, it is automatically considered "unfair" under the legislation, which is where the confusion lies.

Under **The Contract Test**, the employee argues the entitlement to terminate the contract as the employer has breached a fundamental condition of the contract. What this means is that the actions of the employer show or prove to the employee that they no longer intend to be bound by the terms of the contract.

Within the realm of **The Reasonableness Test**, the employee argues that while the employer may have acted in the terms outlined in the employment contract, the conduct or actions of the employer are so unreasonable that it then entitles the employee to treat the contract as being at an end. So, while the actions of the employer may not have actually breached any of the conditions of the contract per se, those actions can still be classified as being so unreasonable that there is justification to the involuntary resignation of the employee.

Dignity at work

Given the increased reporting of cases of harassment and bullying in the workplace, it is essential for employers to have a Dignity at Work Policy. Demonstrating that an organisation has taken appropriate steps to protect an employee is a very effective way of protecting against complaints, particularly constructive dismissals.

Retirement

There is no fixed retirement age set out in legislation in Ireland for private sector employees, however, most organisations will have a

retirement policy in place, which is set out in the terms and conditions of their employment. In our 2018 HR Barometer, three quarters of organisations stated that they did have a set retirement age with the majority setting that age at 65.

However, this isn't the case in the public service, with civil servants having the option of working up to 70 if they so wish.

The issue of retirement has become topical recently with the WRC issuing a specific Code of Practice in early 2018 on longer working, which sets out best practice for managing retirements, as part of the Industrial Relations Act 1990. The code outlines best practice for handling retirements under certain headings including 'Utilising the skills and experience of older workers', 'Objective justification of retirement', 'Standard retirement arrangements' and 'Requests to work'.

The Employment Equality Acts 1998-2015 also references age as one of the nine grounds that defines discrimination against an employee. There have been a number of high-profile cases, such as Valerie Cox v RTE, where the WRC has ruled that the employee was discriminated against because of their age and has proved costly for an organisation; €50,000 in RTE's case.

Our advice to organisations is to ensure all contracts of employment include a clause that states a normal retirement age, that there is an agreed internal process for managing retirements or requests from employees to remain on past the contractual retirement age and that organisations utilise the Code of Practice on Longer Working to guide their decisions.

Redundancy

While the country is now close to full employment there is still quite a bit of organisation restructuring going on and redundancies can form part of this process. For a redundancy to be considered genuine, it should satisfy the appropriate legislation and fall within the definition of redundancy:

- The organisation ceases to operate the business for which the employee was employed to do,
- The work the employee was contracted to do has ceased or the requirement for that work has reduced,
- The organisation has decided to carry on the business with fewer, or no, employees,
- The work the employee was contracted to do is to be performed in a different way and/or the employee is no longer qualified to carry out that work,
- The employee's work is to be done by a different employee who is sufficiently qualified and capable.

Navigating a redundancy process is complex and requires a lot of preparatory work. It is also an area that Adare Human Resource Management has vast experience in given the work we do on behalf of client organisations, defending cases of unfair dismissal arising out of a redundancy situation. It is important to point out that the burden of proof in a claim for unfair dismissal is on the employer. While an organisation may believe they are justified in making an employee redundant, they risk leaving themselves open to claims if they don't follow correct policies and procedures.

Key legislation alongside the Redundancy Payments Acts 1967 – 2014 that needs to be considered when dealing with redundancies and potential dismissals includes the Unfair Dismissals Acts 1977 – 2015, Minimum Notice and Terms of Employment Acts 1973 – 2005 and the Employment Equality Acts 1998 – 2015.

Dismissal

In its most recent Annual Report, the WRC states that cases involving Unfair Dismissals are the second most common types of complaints they are dealing with. Based on the figures supplied in the report, Unfair Dismissals accounted for nearly 2,000 complaints in 2017 alone[1]; not an insignificant number!

To protect against claims of unfair dismissal, organisations should ensure the termination of an employee's contract is as a direct result of one or more of the "Three Cs"; Conduct, Competence (or qualification to perform the job) and Capability or arising from a genuine redundancy or that fact that it would contravene another statutory requirement.

[1] Workplace Relations Commission Annual Report 2017. Total number of complaints received – 14,001, 14% of which related to Unfair Dismissal.

Our experience representing organisations in the WRC has shown time and again that it will find in favour of the complainant due to poor processes and procedures being followed by the organisation. A recent example that was highlighted widely in the media was the case of a bus driver who shared a photograph of a faulty wheel on social media.

The WRC found that it was inappropriate for the driver to post negatively about his employer on social media, but he had been unfairly dismissed as the organisation had not adequately communicated its social media policy.

Another WRC finding from last year that demonstrates the importance of following correct procedure was a case where an employee had been dismissed based on an allegation made by a colleague. However, the organisation did not investigate the allegation and, therefore, could not show that the dismissal was in fact fair.

Regularly review policies and procedures

When we work with client organisations reviewing their practices and policies, we often identify shortcomings that can leave them vulnerable to potential issues. Not only is it important to have robust policies in place, it is equally important that they are adhered to and reviewed on a regular basis given the changes in employment legislation. Our team of experts can provide the necessary experience and expertise to support your organisation.

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