Individual Employee Termination in Ireland

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A Practice Note addressing legal and practical considerations in Ireland regarding termination of individual employees. It reviews the reasons supporting a lawful individual employee termination as well as what constitutes an unlawful termination. It also addresses the procedures to communicate and carry individual employee terminations and best practices to minimise the risk of legal challenges.

Many countries have comprehensive laws that require just cause for individual employee terminations and compliance with strict termination procedures. Employers should be familiar with the details of these requirements and processes, which often include pre-termination steps and other preparation to avoid termination-related claims. This Note covers the reasons supporting lawful terminations in Ireland and the steps and proper way to carry out an individual employee termination process.

Individual Terminations

In Ireland, an employment relationship commonly ends in one of three ways:

- Resignation, when an employee decides to leave the employment.
- Dismissal, when an employer decides to end the employment relationship.
- Retirement, when an employee reaches retirement age or chooses to stop working.

A contract of employment can also end on the death of an employee or where an employee suffers permanent disablement. This is because the contract of employment is frustrated, that is, the parties are relieved of their legal obligations as the contract has become impossible to perform.

Dismissal in relation to an individual employee is defined as:

- The termination by the employer of the employee's contract of employment, with or without prior notice of termination.
- The termination by the employee of the contract of employment with the employer due to the employer's conduct, with or without prior notice of termination.
- The expiration of a fixed term contract of employment without it being renewed under the same terms or, in the case of a contract for a specific purpose, the completion of the project or task.

(Section 1, Unfair Dismissals Act 1977 to 2015 (UDA).)

For any dismissal under Irish legislation, employers must have:

- A substantial reason for making the dismissal.
- Followed a fair procedure and acted fairly at each stage of the investigation process by:
    - providing the employee with sufficient information about the reasons for their possible dismissal;
    - giving them a reasonable period of time to consider that information; and
    - giving them the opportunity to respond to the dismissal, at a hearing or meeting, before reaching the final decision.

Contrast with Collective Terminations

Collective termination usually arises because of a redundancy situation. It is referred to as a collective redundancy when:

- Five redundancies are made in an establishment employing 21 to 49 employees.
- Ten redundancies are made in an establishment employing 50 to 99 employees.
- Ten percent of employees are made redundant in an establishment employing 100 to 299 employees.
- At least 30 redundancies are made in an establishment that employs 300 or more people.

(Protection of Employment Acts, 1977 to 2014.)

Under the Protection of Employment Acts it is mandatory for employers, proposing a collective redundancy, to inform and consult with employee representatives and to notify the Minister for Enterprise, Trade and Employment before making any proposed redundancies. Employers are prohibited from issuing redundancy notices during the mandatory information and consultation period and must wait 30 days after the date of the Ministerial notification. Any attempt to make collective redundancies within the 30 days is an offence and the employer will be liable to pay a fine of EUR5,000 on summary conviction to the court service (see *Courts Service: Fines Imposed in the District Court*) who will then pass on the payment to the relevant department.

Requirements for Lawful Terminations

Section 6(1) of the UDA states:

> "Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal."

Generally, employers must ensure that they:

- Have substantial grounds for dismissal, follow a fair procedure, and act fairly and reasonably.
- Comply with the terms of the employment contract, particularly as regards the employee's notice period and any bonus or expense payments.
- Do not discriminate unlawfully.

The termination requirements under the UDA only apply to persons engaged under a contract of service and do not extend to persons who are contractors. Contractor relationships are deemed purely commercial and remedies for contractors lie in the civil court.

No At-Will

At-will employment does not exist in Ireland. The UDA overhauled Irish employment legislation and removed the ability to agree at-will employment. The UDA applies to employees who have at least 12 months of continuous service, subject to certain exceptions, and requires an employer to act reasonably in relation to an employee's dismissal.

Reasons Supporting a Lawful Termination

Section 6(1) of the UDA presumes all dismissals are unfair unless the employer can show that, on the balance of probabilities, there are substantial grounds justifying the dismissal and fair procedures applied throughout the dismissal process. Section 6(4) of the UDA outlines non-exhaustive grounds, on which the dismissal of the employee can be justified by the employer, including:

- Ability, competence, or capabilities of the employee.
- Conduct of the employee.
- Redundancy of the employee.
- Prohibition by statute or other substantial grounds justifying the dismissal (for example, the contract is frustrated by the employee going to jail).

Contractual grounds of termination must comply with minimum statutory requirements.

The burden of proof generally rests with the employer to demonstrate that a dismissal has been carried out fairly and that substantial grounds justify the termination. Failure to do so exposes the employer to complaints actionable before the Workplace Relations Commission (WRC), including:

- Unfair dismissal.
- Wrongful dismissal.
- Discriminatory dismissal.
- Constructive dismissal.

See *Unlawful Terminations*.

Ability, Competence, or Capability Reasons

A justifiable individual employee termination can arise from the employee's performance and capability, which includes poor performance and ill health (section 6(4), UDA). Employers are not required to establish the incompetency or incapability of the employee but need to show that the employer honestly believed that the employee was unable to do their work.

An employer can dismiss an employee for poor performance, but the fair procedures must be exhausted before resorting to a dismissal on this ground. Failure by the employer to follow these procedures can invite a claim for unfair dismissal. Unfortunately for employers, the fair procedures required for a dismissal on performance of an employee often involve protracted and drawn-out processes that can give rise to counter allegations of bullying from the employee in question. Case law (Berthold v Google 2014 25 E.L.R. 202 and *Counter Products Marketing (Ireland) Ltd v Mulcahy UD1419/2013*) dictates that the procedure followed in any performance improvement process must be clearly set out, whether by policy or a performance improvement plan, and the employee must be clearly appraised of the disciplinary action facing them.

Misconduct Reasons

Case law (*McGlinchey v Ryan [2010] IEHC 536*) indicates that breaches of an employment contract are enough for a dismissal to be considered fair as long as fair procedures have been followed. Breaches of an employment contract can include:

- A breach of trust and confidence.
- Theft.
- Failure to follow company policies.
- Failure to follow instruction.

In any cases involving suspected misconduct, it is crucial that employers apply fair procedures and act reasonably. Breaches can relate to a single act of misconduct or a series of less serious acts. The WRC applies a reasonable test to dismissals on the grounds of misconduct. This is particularly important if a dismissal is to be upheld as fair otherwise the WRC or the labour court is likely to find in favour of the dismissed employee.

Employers must ensure that they have disciplinary and grievance procedures in place which employees are aware of. The management staff must be familiar with how these procedures are applied. The disciplinary procedure must comply with the Code of Practice on Grievance and Disciplinary Procedures (S.I. No. 146, 2000) (Code of Practice) and be applied to all issues involving misconduct, capability, competence, or failure to meet company standards relating to behaviour. These must be carried out with regard to natural justice and fair procedures.

In certain circumstances, employees may be in breach of an implied duty which is not stated in the contract of employment. Implied duties define fundamental aspects of the employment relationship and relate to matters which are considered so basic that they are assumed.

A formal investigation is required to decide whether to terminate an employee for misconduct. If challenged, the general approach of the WRC in relation to dismissal for misconduct is to consider the nature and the extent of the enquiry carried out by the employer and the basis of the information obtained from the enquiry leading to the decision. A formal investigation is always required before any lawful dismissal is made for misconduct reasons.

The right to suspend an employee must stem from the employee's contract of employment or staff handbook, however, a suspension can be justified in circumstances where it is necessary to:

- Prevent the repetition of the conduct complained of.
- Prevent interference with evidence.
- Protect the employer's own business or reputation.

Business and Redundancy

Section 6(4) of the UDA outlines non-exhaustive grounds on which the dismissal of an employee can be justified by the employer. If legitimate business reasons arise, the employer is entitled to:

- Make an employee redundant. The general position is that an employer is entitled to dismiss one or all of its employees if their roles become redundant. This is only applicable to genuine redundancy situations where the employee has been fairly selected, and efforts have been made by the employer to source alternative work for the employee prior to redundancy.

- Dismiss the employee in circumstances where continuing to employ them in the position they hold contravenes a statutory restriction. For example, where the employee does not hold the required work permit, the relevant qualifications, or fails to obtain approval from a governing regulatory body to undertake the particular role in question.
- Use other grounds where *other substantial grounds* arise which do not fall under the other categories set out in section 6(4) of the UDA. This is a catch all category for any potentially fair reasons, including dismissal for failure to agree to any changes to the terms and conditions of the employment contract arising out of the reorganisation of the business.

According to section 6(6) of the UDA, it is on the employer to show that a dismissal was fair and that it resulted wholly or mainly from one of the grounds listed under section 6(4) of the UDA. If challenged, the WRC will not re-investigate but instead consider whether the decision to dismiss is the decision that a reasonable employer would have made in a similar situation and industry. The test of reasonableness will examine the nature and extent of the enquiry carried out by the employer, their conclusion following the enquiry, and their decision to dismiss the employee.

Where a business seeks to reduce employee headcount, whether for cost saving purposes or otherwise, it must be guided by the Redundancy Payments Acts1967 to 2014, which permit redundancies if:

- The work of a particular employee is no longer required.
- The work of certain employees can be covered by existing employees without taking on additional employees.
- The job changes and the new job requires particular skills or qualifications, or both, which the employee does not have.
- The business moves to a new location.

The employer's obligations under the UDA continue to apply further to a redundancy and employers must show that:

- A genuine redundancy situation existed.
- The employee was fairly selected.
- The employer acted reasonably at all stages including meeting with the affected employees on a consultation basis before dismissal.

A dismissal cannot be disguised as a redundancy, or the employees affected by it will have grounds to claim unfair dismissal.

Other Reasons That Support Lawful Terminations

Mutual Termination

Parties to an employment contract may agree to terminate the arrangement by mutual consent rather than go through capability, disciplinary, or redundancy proceedings. Unlike in the UK, in Ireland a mutual termination is not regulated or provided for by statute, regulation, or case law. Still, it is customary (and recommended) for parties to position a separation as a mutual termination. This option is not without risk and if termination negotiations break down, the employee could potentially allege that they were *constructively dismissed* or discriminated against.

The employee must be advised of and afforded the opportunity to seek independent advice before signing a mutual termination agreement. If the employee is not given this opportunity, any waiver entered is susceptible to be challenged later.

Resignation

A resignation is a unilateral termination act which, if expressed in clear and unconditional terms, brings a contract of employment to an end.

Employers are entitled to receive not less than one week's notice from an employee who has been in continuous employment for 13 weeks or more (section 6, Minimum Notice and Terms of Employment Act, 1973 to 2005). The parties should also be guided by the contractual terms which may provide for greater notice requirements.

An employee can resign without notice only where the parties have mutually agreed to waive the contractual notice requirements and accept payment in lieu of notice (PILON).

An employer can only make a PILON if they are entitled to under the contract. If they are not entitled to under the contract, they will need the consent of the departing party to implement PILON. Similarly, an employer cannot place an employee who is resigning on garden leave unless there is an express contractual term allowing them to.

Constructive dismissal is the termination by the employee of their contract of employment because of the employer's conduct, and where the employee is entitled to (or it is reasonable for them under the circumstances) to terminate the contract of employment (section 1, UDA).

If it appears that a resignation was made in the heat of the moment, an employer must follow best practices and allow a cooling off period of a day or two to ascertain if any other matters might arise which cast doubt on whether the employee intended to resign. Alternatively, an employer may consider inviting the employee to retract their resignation to avoid any claims of unlawful dismissal or unlawful process in connection with the resignation.

The employer is under no obligation, unless there is an internal policy in place, to conduct exit interviews with employees and there is no obligation on the departing employees to comply with them.

Unlawful Terminations

An employee cannot bring an unfair dismissal claim unless they have 52 weeks of continuous employment service. However, there is no service threshold, and the dismissal is automatically deemed unfair, if it results wholly or mainly from the employee's:

- Trade union membership (or proposed membership).
- Religious or political opinions.
- Having raised a protected disclosure (that is, where the employee raises concerns about possible wrongdoing at work).
- Civil or criminal proceedings, whether actual, threatened, or proposed against the employer where the employee is a party or a witness.
- Exercise or proposed exercise of statutory rights under legislation to maternity leave, paternity leave, adoptive leave, parental leave, force majeure, or carer's leave.
- Race, colour, or sexual orientation.
- Age.
- Membership of the travelling community.

- Pregnancy and attendance at ante-natal classes.

(Section 6(4), UDA.)

Pregnant employees, employees who have recently given birth, and employees on maternity leave have significant protections from dismissal. In the absence of strong evidence that a decision to terminate an employee's role was entirely separate to pregnancy, an employer is likely to find it difficult to defend a claim of discrimination on the grounds of gender or pregnancy.

Although terminations under these circumstances are unlawful, an employee may agree to waive any claim they may have in exchange for an ex-gratia termination payment. It is recommended that any arrangement reached is recorded in writing and that the employee is encouraged to obtain appropriate independent advice before signing a severance agreement.

An employee who has been unlawfully dismissed has the following options:

- A claim of unfair dismissal actionable before the WRC. This form of complaint must be lodged within six months following the date of dismissal (12 months in exceptional circumstances).
- A civil action seeking an injunction to prevent the dismissal. This must be initiated as soon as possible, as time is of the essence.
- A civil action alleging breach of contract six years from the date of the breach or action.

Probationary Period and Termination

Probation is recognised as the period at the beginning of the employment relationship during which an employer assesses whether the employee is suitable for permanent employment. Although not compulsory, it is highly unusual for an employment contract not to contain a probationary period clause. There are no mandatory probationary period limits although the UDA states that an employee will gain certain statutory protections against dismissal when they achieve 52 weeks of continuous employment service. It is therefore recommended that contractual probationary periods must not exceed 11 months. In practice, most probationary periods last between three to six months and reserve the right for an employer to extend this period on a reasonable basis.

Probationary periods are usually dictated by the employer but if it is a term of the employment contract it can be negotiated between the parties. Probationary periods must be in writing and set out in the contract of employment.

The termination rights that the employer has during the probationary period depend on the express contractual clauses contained in the employment contract.

Employees who are dismissed during their probationary period have, however, limited courses of redress as they do not meet the service requirements to bring a claim under the UDA. This service threshold is waived where the dismissal relates to pregnancy, trade union membership, or is of a discriminatory nature. For circumstances under which the employer cannot terminate, even during the probationary period, see *Unlawful Terminations*.

Another avenue of redress for an employee dismissed during their probationary period is to seek a non-binding recommendation from the WRC under section 20(1) of the Industrial Relations Act, 1969. This may happen, for example, where the employee initially referred the dispute to the WRC Adjudication Service, but the employer did not agree to have the case heard by the Adjudication Officer. In these circumstances, the WRC will inform the employee that the employer has not agreed to the adjudication hearing and that a direct referral may be made via the Labour Court under section 20(1) of the Industrial Relations

Act, 1969. As the Labour Courts recommendation is not legally binding on the employer, aside for the potential for negative PR attaching to the employing entity or asserting pressures by Trade Union representatives, there is no legal means available for the employee to enforce a favourable recommendation.

If an employer has a probationary period policy, it must be complied with before a dismissal is made during the probationary period. If an employer fails to comply with the probationary policy, they may expose themselves to a claim for injunctive relief or wrongful dismissal (or both) before the civil courts.

Probationary period clauses must at a minimum, include:

- The length of the probationary period and reserve the employer's discretion to extend this period.
- Employer discretion for a shorter notice period during the probationary period and for PILON.
- Termination of the employee for any reason or, for no reason, during the probationary period.
- A statement that the disciplinary procedure does not apply to a dismissal during the probationary period.

Fair Procedures for Individual Terminations

An employer must have an objectively justifiable reason for dismissing an employee and for a dismissal to be classified as fair. The employer must also advise the employee of the issue against them, and give the employee an opportunity to rectify the situation, which in some instances can involve:

- Training, retraining, or monitoring.
- Warning the employee of the consequences of failing to meet the requirements.
- Giving them a warning if the situation fails to improve.

Employers must always adhere to their disciplinary procedure which should model the Code of Practice. An employer's disciplinary procedure must, as a minimum, involve one oral warning, followed by a written warning, and then a final written warning before dismissal.

Fair Procedures

The procedure implemented by the employer in arriving at the decision to dismiss must follow the rules of natural justice including:

- The employer must write to the employee inviting them to attend a formal disciplinary meeting to be conducted in accordance with the disciplinary procedure. The letter must give a summary as to why the disciplinary meeting is necessary and possible sanctions facing the employee if the concerns are upheld.
- The employee has the right to be represented by an appropriate person at the disciplinary meeting. This is usually a colleague or trade union representative where appropriate.
- At the meeting, the employee must be given the opportunity to respond in full to the allegations or complaints made against them and to have their submissions considered before a decision is made.

- The employee has the right to an impartial and fair hearing without bias.
- The penalty imposed must be fair and proportionate to the employee's breach.
- The employee must be entitled to appeal the decision to dismiss them.

It is not necessary to follow specific steps to facilitate the termination of a fixed term contract. The employment of a fixed-term employee will terminate on the fulfilment of a predefined condition, being either a predetermined end date or on the completion of a particular task or event. A fixed term contract should specify a reasonable notice period which complies with section 4(1) of the Minimum Notice and Terms of Employment Act 1973 and reserves the right of either party to prematurely terminate the fixed term contract.

Correct procedures must be followed, including in matters that might involve gross misconduct. If gross misconduct is confirmed, however, then neither the notice period nor a written warning is required.

Preliminary Internal Process

The fundamental requirement in any dismissal process is that an employer must ensure that:

- Substantial grounds exist which justify the dismissal.
- Their conduct was adequate, with fair procedures having been applied throughout the termination process.

The core principles of fair procedures which must be considered include whether the:

- Employee was made aware of the disciplinary policy being applied to the investigation process.
- Employee was made aware of the allegations against them.
- Employee was allowed representation during the disciplinary process.
- Employee was given the opportunity to counter the allegations.
- Employee was given the opportunity to cross examine any witnesses.
- Employee was given an opportunity to review and comment on all the documentary evidence provided to the decision maker.
- Decision maker was impartial.

These cover a non-exhaustive list of the fundamental aspects of the disciplinary process. Where due process is not applied, any decision to terminate the employment relationship is likely to be deemed flawed and unfair.

Communication, Consultation and Approvals

Notice

Notice of termination is one of the most important provisions in a contract of employment. When terminating an employee's contract of employment, an employer must comply with:

- The termination provisions of the contract.
- The statutory and other legal duties.
- The employees' entitlement to a minimum notice of termination of their employment which is relative to their length of service. The minimum statutory notice periods which correlate with the employee's duration of service are:
    - one week's notice for an employment period of 13 weeks to two years;
    - two weeks' notice for an employment period of two to five years;
    - four weeks' notice for an employment period of five to ten years;
    - six weeks' notice for an employment period of ten to 15 years; and
    - eight weeks' notice for an employment period of more than 15 years.

(Section 4, Minimum Notice and Terms of Employment Acts 1973 to 2005.)

Where an employee's contractual notice period is greater than their statutory notice period entitlement, the contractual notice period applies. An employee is not entitled to a notice period or PILON if they are dismissed for misconduct.

It is advisable to issue a termination letter, communicating the decision to dismiss, to the employee in compliance with *section 14(4) of the UDA*. The employer must, within 14 days of being requested by the employee, provide details of the grounds for dismissal in writing.

For a more detailed discussion on this point, see *Practice Note, Notice of Termination Ireland*.

Termination Payments

At termination, dismissed employees are entitled to receive:

- Their normal salary payments up to the date of termination.
- Their notice payment, whether statutory notice entitlement (pursuant to the Minimum Notice and Terms of Employment Acts 1973 to 2005) or contractual notice payment, whichever amount is greater.
- Any accrued but unused annual leave entitlement paid as PILON.
- Any bonus and commission payments where the terms of the governing scheme entitle the dismissed employee to payments of accrued benefit at termination.

Employers can only make *PILON* if permitted in the employment contract or if agreed between the parties. Employers are not obliged to offer an enhanced termination payment unless it is customary to offer it or where the termination could potentially give rise to legal action by the employee. It is best practice to record any payment made in a severance agreement.

An employee who is guilty of *gross misconduct*, or other *repudiatory breach* of contract, does not have a right to a notice period or PILON.

An employee on a fixed-term contract is entitled not to be dismissed before the expiry of the term unless there is a provision in the contract for earlier termination on notice. This does not apply in cases of gross misconduct or other repudiatory breach.

Effective Date of Termination

A contract of employment ends on the date on which the termination is communicated to the employee and not the date on which the employee is informed that their appeal against the dismissal has failed. An employee will remain in employment only where an employee's contract of employment, or the company's disciplinary procedure, state that termination will not take effect until after the conclusion of the appeal process. Employers must therefore ensure that, in the event of dismissal, the employee's status pending the appeal is clear and where an appeal is pursued by the employee it must be addressed swiftly.

Termination and Other Related Agreements

When dealing with termination agreements the employer must run a risk assessment and cost benefit analysis. In cases involving disruptive employees or senior executives, it is common for employers to negotiate an exit package rather than dismissing the employee and potentially facing costly litigation and negative publicity. In return, the employer offers consideration higher than any statutory payment entitlement. To avoid risk, parties must enter into a written severance agreement to be signed in full and final settlement of all claims. Before the severance agreement is signed, the employee must be advised to obtain appropriate independent advice with employers ensuring that the agreement reached refers to all applicable statutes not being enforced. Failure to adhere to these formalities will leave the agreement and any deviation from legislation susceptible to challenge at a later date.

If an employer wishes to put a severance agreement in place, it is important that the employee signs it voluntarily and that they fully understand the contents and implications of the agreement before signing. To ensure informed consent, employers must write to the employee and advise them of the necessity to take appropriate independent advice before entering the agreement. There is no requirement for it to be professional legal advice, but it must be deemed appropriate. It is then the employee's responsibility to obtain this advice.

It is also typical to restate confidentiality and non-compete clauses, as well as any relevant intellectual property ownership clauses in the severance agreement.

Challenging a Dismissal

Employees can enforce their employment rights by filing a complaint with the WRC or pursuing an action with the civil court.

The most common grounds for challenging a dismissal are:

- **Unfair dismissal**. A dismissal is automatically deemed to be unfair, placing the onus on the employer to prove otherwise. An unfair dismissal claim is brought before the WRC. Employees are protected under the UDA if they have completed 52 weeks of continuous employment. The WRC has the power to reinstate, re-engage, or award compensation of up to a maximum of 104 weeks remuneration. Unlike the civil court, the WRC cannot award costs to the successful party so there is greater incentive to initiate an action for unfair dismissal before the WRC where the cost is lower for the unsuccessful party.
- **Wrongful dismissal**. This claim is actionable before the civil court and is limited to dismissals which are in breach of contractual terms. Loss and consequential compensation for wrongful dismissal is limited solely to the salary lost during the notice period. The option of bringing a claim in the civil court is significant because there are limitations

to statutory forms of redress. For example, employees need a minimum of one year's continuous service to be able to bring a claim for unfair dismissal, other than in limited exceptional cases.

- **Discriminatory dismissal**. If an employee is discriminatorily dismissed, they may bring a claim to the WRC under the Employment Equality Acts 1998 to 2021 and, in limited circumstances, to the circuit court.
- **Constructive dismissal**. Where an employee terminates their contract of employment with or without notice due to the employer's adverse conduct, the employee may bring a claim for constructive dismissal to the WRC under the UDA. The burden of proof is reversed for these claims, and it is for the employee to prove that they were constructively dismissed.
- **Injunction**. An employee can apply to the civil court to seek an injunction to restrain a wrongful dismissal and reinstate their employment position if the employer did not follow fair procedures. For the application to be successful the employee must demonstrate that:
    - they are likely to succeed at the hearing of the main claim;
    - damages are inadequate; and
    - the balance of convenience favours the granting of an injunction. Injunctive relief is limited and will not be granted where a contract is terminated in line with its terms.

Employers frequently lose actions against them under the UDA due to failings in their disciplinary procedure, regardless of the behaviour complained of. The reasonableness of an employer's actions is of considerable importance and employers are encouraged to put in place a detailed disciplinary procedure, and to apply it consistently throughout the disciplinary process, before reaching a decision to dismiss. See also *Fair Procedures for Individual Terminations*.

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