



UK Employee Terminations: Two Things to Consider

Insights

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When involuntarily terminating an employee in the United Kingdom, there are at least two perspectives on the necessity of termination payment, as explained in a recent decision from the Employment Appeal Tribunal. In *Weston Recovery Services v. Fisher* the EAT emphasized that the statutory standards for unfair dismissal under the Employment Rights Act of 1996 are distinct and separate from the question of whether an employee was entitled to payment in lieu of notice under his or her employment agreement:

(a) **Gross Misconduct Voiding Contractual Notice Clause:** at common law, a contractual duty to give notice or make payment in lieu of notice is voided only by gross misconduct by an employee, which is conduct during employment that is so severe that it amounts to “a repudiatory breach of the contract of employment entitling the employer to terminate the contract without notice or pay in lieu of notice”; and

(b) **Unfair Termination Under the Employment Rights Act of 1996:** under the Act, the question of whether a termination is actionably unfair turns on whether the employer can show (i) a potentially fair reason for the dismissal, (ii) that the employer followed a reasonably fair investigatory and disciplinary procedure under statutory requirements, (iii) that “the sanction of dismissal for that misconduct fell within the range of reasonable responses” to the type of misconduct alleged.

See *Weston Recover v. Fisher* (UKEAT/0062/10/ZT) at pp. 4-5. A dismissal may satisfy the standards for a fair termination under the Employment Rights Act of 1996, and therefore give rise to no liability for termination compensation under the statute, but yet still not be based on misconduct that is sufficiently severe to void the employer’s duty to make a payment in lieu of notice under an employment contract. That is what the EAT ruled in *Weston Recovery v. Fisher* -- although the termination was “fair” and not actionable under the Act, the employer still owed a payment in lieu of notice because the tribunal below had found the employee’s conduct did not rise to the level of “gross misconduct” to void the contractual duties.

The lesson: When addressing potentially terminable employee misconduct by a UK based employee, employers should apply investigation, disciplinary and termination procedures that comport with statutory standards of fairness, but then must always make a separate determination of whether any payment in lieu of notice may be due to the employee under common law contract standards. Employee misconduct that is sufficient to consider termination to be “fair” may or may not rise to the

level of “gross misconduct” that is severe enough to be considered a repudiatory breach that voids the employer’s duty to make a contractually agreed payment in lieu of notice.

A copy of the EAT's opinion is available in PDF format below.

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[Weston Recovery v Fisher decision.pdf \(106.52 kb\)](#)

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