

Employment Law Life-Cycle of a Director



It seems to me that Employers, business owners and directors are preoccupied with business excellence delving into books like Gary Keller's book '*The One Thing – the surprisingly simple truth behind extraordinary results*', and I should know as I find I do just that. Another surprisingly simple truth is that any success also requires that risk around the employment and dismissal of staff is properly managed.

With this in mind, I believe a brief review of the obligations and challenges during the life-cycle of a director may well be of use.

As with all employees, the employment of a director comes with many employment law considerations, some of which are unique to directors. The governance of directors straddles employment law as well as company law. As we at **Partners Employment Lawyers** are employment law specialists we highlight below key employment law considerations during the life-cycle of a director.

Stage 1 – Hiring a director

Being a director does not automatically render that individual an employee of a business. A directorship, like a company secretary, is an office, and this does not necessarily an employment relationship. Some directors are employees others may be self-employed, although for any that have stood before a Judge at Employment Tribunal to consider status will know the boundary can be very blurred.

Entering into an employment or service agreement with a director is likely to mean the director is an employee and the business must then be mindful of numerous employment law obligations that may apply. Factored into this is the impact of higher salaries and longer notice periods. This could mean the attainment of high compensation in the event of an unsuccessful unfair dismissal, wrongful dismissal and/or discrimination claim.

What should the contract include?

A director's contract of employment tends to have numerous provisions which are unique to directors and these would have little meaning in the contract of an average employee. Perhaps of greatest importance is the businesses need to protect its interests in the event of a senior level departure. There is always a risk of damage to the business arising from the director's access to clients and key staff. To tackle this we would advise inclusion of clauses to deal with the following:

- Confidentiality - high-level and seniority directors are likely to have information that could be damaging to the business. Suitable clauses must be drafted in respect of confidentiality.
- Restrictive covenants – these are used to protect an employer's business by restricting the activities of an employee once employment has ended. Carefully drafting is key to ensure enforceability given they are potentially a restraint of trade.
- Garden leave – this is when an employee is sent home and told to stay away from the business and not perform their duties for the duration of their all or part of their notice period on full pay. This is often used to protect the business and is especially relevant with directors who will be privy to confidential or sensitive information as well as have access to

clients and customers. This is a favoured approach by many employers simply because they enable exertion of additional control. A carefully drafted garden leave clause is highly recommended.

Other contractual considerations include the following: Will the business offer relocation expenses? Will the director be entitled to a bonus and on what basis will it be withheld? Will there be discretion in the size and payment of a bonus? Will they be given shares in the business? Will they be able to appoint a power of attorney to act on behalf of the business?

Considering all of these at the outset can greatly assist with issues during and at the point of departure of a director's. Clarity can enable productive working relationships.



Stage 2 – Directors' duties during the employment relationship

There are many different types of director, such as executive or non-executive. Irrespective of this, all directors owe fiduciary duties to their employer. For example, directors have duties to exercise reasonable care, skill and diligence, promote the success of the business and to avoid conflicts of interest. These are codified in statute and apply to all directors but we recommend that these should also be reinforced in the service agreement. However, it is not advisable to assume that a breach of any of these duties will automatically give grounds for a summary dismissal. Legal advice should be sought in such circumstances and a fair process must still be followed.

Directors often manage people and it is important for them as well as Human Resources stay ahead on changes in employment law as well as changes that may be needed to company policies and contractual documentation. The business may wish to consider giving training on various areas such as discrimination, bullying and harassment, social media and misuse to name a few and we frequently train our company clients in this way. Most reputable companies recognise training goes some way to preventing potential claims from employees and help protect the business.

What about family friendly rights?

Family friendly rights apply to directors in the same way as they would to any other type of employee, for example:

- Right to request flexible working - the current right to request flexible working is available to employees who have been continuously employed by a business for at least 26 weeks and who care for either a child or an adult.
- Maternity – the substantial protection afforded to employees includes the right to 52 weeks maternity leave, 39 weeks of which may be paid at statutory maternity pay and paid reasonable time off for antenatal care for qualifying employees.
- Paternity - the father of the child or partner of someone taking maternity leave may be entitled to up to two weeks paternity leave and statutory paternity pay.

Stage 3 – The End of the relationship

An employer may find that a director is under-performing, has committed an act of gross misconduct or is redundant. In all such cases it is most likely that termination of the relationship is the desired outcome. This is especially problematic with directors. Several steps are involved including checking the company's articles of association which may contain specific provisions on a procedure for the dismissal of a director. A failure to do so may be seen as suggestive of a failure to act reasonably and/or fairly. You may also have obligations to notify an appropriate regulatory body such as the FSA.

The reason for the dismissal will impact the business in different ways. For example, redundancy usually means that the director would be a 'good leaver' for the purposes of any stock options or bonuses. Gross misconduct would usually make them a 'bad leaver' and would also deprive them of notice monies.

What about the process?

Unfair dismissal law in the UK obliges employers to follow a fair procedure which may involve monitoring performance and giving warnings over a period of time. This applies to all employees and so in law, effectively means that an employed director may be put on a performance improvement plan before they are dismissed.

This is usually unrealistic given their seniority and in our experiences almost never put into practice. It is usual to agree a departure deal that includes recording the arrangements in a settlement agreement. Many issues will need to be agreed, such as the termination payment, the reference given to the director, if there is to be any announcements to the workforce as well as to client contact and handover.

Stage 4 – After the relationship has ended

Restrictive covenants in the director's service agreement continue to apply after the end of the director's employment. Carefully drafted restrictive covenants tailored to the specific departing employee's circumstances may preclude them from joining competitors or poaching clients and/or staff for a limited duration after their employment has ceased.

Also, certain aspects of the duties owed to the business continue to apply after the termination of the director's employment. These include to avoid conflicting interests as regards the exploitation of any property, information or opportunity of which the director became aware when they were a director. Similarly, it includes the duty not to accept benefits from third parties in relation to things done or omitted by the director during their directorship

At **Partners Employment Lawyers**, we are a specialist employment law firm. We take a collaborative approach and work with our clients and offer creative and constructive solutions to workplace issues in a cost-efficient, clear and concise way. We provide ad-hoc on-going support as well as in-house training on various topics specially tailored for specific business needs.

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