

SUMMARY OF THE LAW ON UNFAIR DISMISSAL



Employees are protected under the Employments Rights Act 1996 from being unfairly dismissed.

This booklet provides a basic outline of the law covering unfair dismissal and redundancy.

- UNFAIR DISMISSAL
- REMEDIES
- WRONGFUL DISMISSAL
- TRIBUNAL CLAIMS
- CONSTRUCTIVE DISMISSAL
- REDUNDANCY

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UNFAIR DISMISSAL?

What is unfair dismissal?

Employees with 2 years continuous service are entitled to not be unfairly dismissed. It is not possible for a worker with less than 2 years service to submit an unfair dismissal claim, unless the reason for dismissal is considered an automatically unfair reason.

What is an automatically unfair dismissal?

An automatically unfair dismissal is a dismissal which is considered so inherently unfair that the law does not require the worker to have 2 years continuous service with the employer. The following reasons are considered by law to be automatically unfair:-

- Membership (or non membership) of a trade union or for trade union activities.
- Health and safety.
- Making a protected disclosure that is in the public interest pursuant to the whistle blowing provisions of the ERA 1996.
- Bringing proceedings against the employer for breaking certain statutory employment rights.
- Pregnancy and for any reason related to maternity.
- It relates to the exertion of a statutory right.
- Trying to obtain (or prevent) recognition of an independent trade union.
- Taking part in lawful industrial action.
- In connection with the employee's rights with regard to parental, paternity or adoption leave, time off for looking after dependants, maternity leave or the right to ask to work flexibly.
- Taking action in connection with part-time workers' or fixed term workers' rights.
- Refusal by a shop worker to work on Sunday.
- Connected with an employee's function as a pension fund trustee.

If the Employment Tribunal decides that the reason or principal reason for dismissal is one of the above, it will not be required to consider the issue of fairness. The dismissal will be deemed to be automatically unfair.

WHEN IS DISMISSAL FAIR?

The law says that it is fair for employers to dismiss an employee for one of the following reasons:

- Misconduct at work.
- Lack of capability (or qualifications) to do the job.
- Redundancy.
- A statutory requirement.
- Some other substantial reason.

However, even if the employer convinces a Tribunal that they dismissed their employee for one of those reasons, they still have to show that they followed a reasonable procedure as set out in the ACAS (Advisory, Conciliation and Arbitration Service) code of practice. They must also show that the decision to dismiss fell within the range of reasonable responses open to an employer.

WHAT ABOUT STRIKES AND LOCK OUTS?

To be protected against unfair dismissal in connection with a strike or lock out, one of the following conditions needs to be fulfilled:

- The dismissal was within 12 weeks of the start of the protected industrial action.
- The dismissal took place more than 12 weeks after the start of the protected industrial action and the employee had ceased taking part in it within the 12 week period.
- The dismissal took place more than 12 weeks after the start of the protected industrial action, the employee had continued to take part in that industrial action but the employer had failed to take such procedural steps as would have been reasonable to resolve the dispute.

There is also a right to bring a claim for unfair dismissal if all or some employees are dismissed during an official strike or lockout but only a selected few are re-engaged within three months.

WITHOUT PREJUDICE DISCUSSIONS

Evidence of negotiations about ending the employment relationship on agreed terms (i.e., by settlement agreement) may be inadmissible in any subsequent Unfair Dismissal claim, unless for instance the Tribunal considers that anything said or done was improper, or was connected with improper behaviour.

INTERNAL APPEALS

If you are dismissed, then you should always use your employer's internal appeals system to challenge the decision. If your employer fails to follow the appeal procedure correctly, then that may strengthen your case in front of the employment tribunal, and may allow you to argue an increase of the compensatory award.

You will also want to consider lodging an internal grievance if, for example, you believe you have been treated less favourably than somebody else.

However, please note that neither an appeal nor a grievance being lodged alters your time limit to make a complaint to the Tribunal. This is strictly three months less a day from the date you are dismissed.

WHAT IS THE PROCEDURE FOR BRINGING A CLAIM FOR UNFAIR DISMISSAL?

The time limit for lodging a claim for unfair dismissal at the Employment Tribunal is three months, less one day, from the effective date of termination of the contract of employment. This time limit is strictly applied.

WHAT REMEDIES ARE AVAILABLE?

If a Tribunal finds in favour of the employee it can order:

- Reinstatement - getting their job back with no loss of money or security.
- Re-engagement - getting another job with the same employer.
- Compensation - a basic award calculated in a similar way to a redundancy payment plus a compensatory award to compensate the employee for the financial losses incurred as a result of the dismissal.

The maximum compensatory award for unfair dismissal is the lower of 1 years' salary or £118,223. However, unless the employee is a very high earner, it is rare for Tribunals to award this or similar amounts. Most will award for loss of earnings to the date of the hearing plus a limited amount to compensate for future loss.

Reinstatement and re-engagement are rarely ordered by Tribunals.

Tribunals can adjust awards up or down by 25 percent if they think that either the employer or employee unreasonably failed to follow the ACAS code of practice (www.acas.org.uk).

WHAT IS CONSTRUCTIVE DISMISSAL?

Constructive dismissal is when an employee resigns in response to a significant and fundamental breach of their employment contract by their employer. These cases are difficult to win.

Not every breach of contract will entitle an employee to resign and claim constructive dismissal as the breach (which could stem from a single event or an accumulation of them) must be a fundamental breach of contract (e.g. a breach of the implied term of mutual trust and confidence). To rely on the breach, the employee needs to resign soon after it occurred.

Claims for constructive dismissal must be lodged in the Tribunal within three months less one day of the last day of employment.

Tribunals can adjust awards up or down by 25 percent if they think that either the employer or employee unreasonably failed to follow the ACAS code of practice (www.acas.org.uk).

WHAT IS WRONGFUL DISMISSAL?

Unlike unfair dismissal, which is a statutory right, wrongful dismissal is a common law right. It arises when the employer terminates the worker's employment contract contrary to the terms contained in it. The paradigm example of wrongful dismissal is when the employer dismissed a worker without notice or payment in lieu of notice. In those circumstances compensation is usually loss of earnings for the notice period.

The minimum statutory periods of notice required from an employer are:

1 month to 2 years of employment = 1 week's notice

2 years to 12 years of employment = 1 week for each year worked

12 years plus of employment = 12 weeks' notice

WHAT IS PAY IN LIEU OF NOTICE?

If an employer dismisses an employee without payment, then the employer is in breach of contract and the employee can sue for the wages they would have received if notice had been given.

WHAT IS REDUNDANCY?

The law states that there is a genuine redundancy situation if an employee is dismissed because the business as a whole, or the particular workplace where the employee worked, has closed down. Likewise, if the employer decides to reduce the size of the workforce to do work of a particular kind.

If the employee can show that their dismissal fell into one of these categories, they will be entitled to a statutory redundancy payment if they have two or more years service.

Employees can lose their right to a statutory redundancy payment if:

- They are offered their old job back or a suitable alternative and they unreasonably refuse.
- They are dismissed for gross misconduct during the redundancy notice period.
- They resign before the end of the notice period.

WHAT HAPPENS IF THE EMPLOYER DOES NOT PAY?

Employees have three months less one day to bring a claim for the employer's failure to pay their statutory redundancy payment.

WHAT ARE PROTECTIVE AWARDS?

Before making 20 or more employees redundant, employers have to consult in good time with any independent trade union which is recognised for collective bargaining or, where no union is recognised, with elected representatives.

Appropriate information must be provided to the union and the employer has to consult with a view to reaching an agreement. If the employer fails to do so, the union can apply for a “protective award”.

The time limit for these claims is normally three months from the date the dismissals take effect.

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The information contained in this booklet is not a substitute for legal advice. You should talk to a lawyer or adviser before making a decision about what to do.