

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

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Wrongful dismissal

Contracts of employment usually have termination provisions which define the notice that either party must give the other in order to bring the contract to an end.

The Employment Rights Act 1996 set down minimum periods of notice which an employer must give to terminate an employee's contract. These are:

Less than one month's service no notice required

One month to 2 years' service 1 week' notice

2 or more years' service 1 week's notice for each complete year of
service to a maximum of 12 weeks

Failure to give the requisite notice is a breach of contract and an employee can claim compensation for damages equal to the pay due for the notice period. This is a wrongful dismissal claim to an Employment Tribunal.

Employers normally have three ways of handling the notice period when dismissing an employee:

- Expect the employee to work as normal
- Dismiss with immediate effect and give pay in lieu of notice – in effect they are paying the breach-of-contract damages up front. Technically they should compensate for all benefits lost by the failure to give notice e.g. holiday entitlement should be calculated up to the end of the notice period
- The employee is not required to work during the notice period but is paid as normal – this is sometimes referred to as 'garden leave'

It is only lawful to dismiss without notice in response to a fundamental breach of contract by the employee, often called gross misconduct.

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

Unfair dismissal

Despite the employer's contractual right to terminate employment, employment protection law dictates that any dismissal must be 'fair' and gives employees the right to complain to an Employment Tribunal if they believe their dismissal to be unfair. If the Tribunal finds in their favour they are entitled to ask to be re-employed or for compensation.

Is there a dismissal?

In making a claim it is for the employee to show that they were, in fact, dismissed. This does not normally present a problem when there has been an express dismissal by the employer. However, sometimes an employee may feel they have been dismissed after the employer has used words which are in fact ambiguous e.g. 'perhaps it's time you looked for another job'. A tribunal would consider all the circumstances surrounding the use of ambiguous words and ask how a reasonable person would (or could) interpret those words.

A employee can also resign in the face of a fundamental breach of contract by his/her employer and claim that this resignation is in fact a 'constructive dismissal'.

Similarly a resignation under duress ('resign or you will be sacked') will be classed as a dismissal

Automatic unfair dismissal

There are some dismissals which are 'automatically unfair' and all employees, irrespective of their length of service, have the right to complain if their dismissal is for one of the protected reasons. There are over 20 automatically unfair reasons. Examples are where the reason or principal reason for dismissal is:

- Related to being summoned to attend jury service
- Related to pregnancy, childbirth or maternity/paternity/adoption leave, or for requesting 'flexible working'
- For a health & safety reason
- Because the employee asserted a statutory right
- In connection to their trade union membership (or non-membership) or activities

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

In addition, if a dismissal is itself an act of discrimination or victimisation, or if a resignation follows harassment, then an employee can submit a discrimination claim, irrespective of their length of service.

Fair dismissal

Other than for the protected reasons, only employees with at least 52 week's continuous service can present an unfair dismissal claim. Provided it was not for gross misconduct, an employee who is dismissed without notice after 51 weeks' service will be treated as having 52 weeks' service by virtue of the statutory minimum notice period.

If a claimant can show that he/she has been dismissed (or constructively dismissed), for that dismissal to be fair the employer will need to show two things:

- That the reason or principal reason for dismissal was one of the six potentially fair reasons, and
- That the way the dismissal was handled was procedurally fair and, if related to conduct or poor performance, was in line with the ACAS Code of Practice

It is usually quite difficult to show fairness once an employee has shown they were constructively dismissed, which is why the argument in such cases is focussed on 'dismissal or resignation'

The six potentially fair reasons are:

1. Related to conduct i.e. misconduct
2. Related to capability i.e. incapability due to incompetence/lack of qualification or ill-health
3. Redundancy
4. Retirement at age 65 or more (or a lower age if that age can be 'objectively justified' (see Fact Sheet no 4) – note that from 1st October 2011 the default retirement age of 65 will no longer apply
5. Contravention of statutory duty or restriction
6. 'Some other substantial reason' e.g. criminal conviction resulting in a custodial sentence'; pressure from a client

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

Misconduct dismissals

When assessing the fairness of a misconduct dismissal Employment Tribunal will Apply the so-called Burchell v BHS test:

- At the time of dismissal, did the employer genuinely believe that the employee was guilty of misconduct? A genuine and reasonable belief is enough- there does not need to be direct proof and 'genuine belief' falls a long way short of the 'beyond reasonable doubt' standard of the criminal law
- Did the employer have reasonable grounds for that belief and at the time (s)he formed that belief, had (s)he carried out as much investigation as was reasonable in the circumstances? The size and resources of the employer will be relevant, but whatever their size, employers are not required to adopt a forensic investigation, just one that is reasonable.
- Was dismissal a reasonable response in all the circumstances?

Tribunals are not allowed to substitute their own beliefs or ask themselves what action they would have taken – they are obliged to recognise that there is a range of reasonableness as regards both the thoroughness or the investigation and whether dismissal was a proportionate response.

For dismissals post 1st April 2009, a misconduct dismissal will also be judged against the ACAS Code of Practice, the main provisions of which reflect case law:

1. Establish the facts – i.e. investigate
2. Inform the employee of the problem (preferably in writing), including providing the evidence from the investigation
3. Before making a decision, hold a meeting with the employee to discuss the problem, having given reasonable time for them to be prepared and allowing them to be accompanied by a colleague or trade union rep
4. Provide the opportunity to appeal against any disciplinary decision

An employer's failure to comply with the Code may in itself contribute to the decision by a Tribunal that a dismissal was unfair; and, if unfair, a party's failure

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

to comply may result in an increase or decrease in the compensation awarded by up to 25%. For example, if the employer did not offer an appeal, or failed to hear an appeal, the Tribunal has the discretion to increase the compensation award; conversely submitting a claim without first having used the appeal process may result in the award being reduced.

Capability Dismissals

Similar principles apply to dismissals where an employee's competence/work performance is in question and the ACAS Code also applies.

However, where an employee is incapable of working due to illness or injury, the ACAS Code is not directly applicable, although it is still wise to allow the employee their say before making the final decision to dismiss and to permit an appeal, since Tribunals will still assess the reasonableness of the decision.

Ill-health dismissals should follow the following principles:

- A judgement of 'incapability' should be based on relevant medical evidence e.g. doctors' reports, input from occupational health specialists, medical examination. In seeking such evidence employers must have the employee's express permission to seek a report from their GP or medical specialist. Where this permission is not forthcoming, employers are entitled to rely on whatever evidence they can get, including asking the employee to attend an independent medical examination or an occupational health assessment. If the employee refuses to attend such examinations/assessments, then the employer would probably be reasonable in acting in the absence of medical evidence, or treating the refusal as misconduct.
- Consideration should be given to alternative work the employee could do and be offered as an alternative to dismissal
- Consideration should be given to what adjustments can be made to working methods or terms & conditions to enable the employee to return to work – an absolute requirement where the employee is disabled
- Adequate consultation with the employee

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

- Where there is a contractual right to sick pay, it might look unreasonable to dismiss before those sick pay entitlements are exhausted.

Redundancy dismissals

A dismissal is only by reason of redundancy if:

- a) The employer has ceased (or intends) to cease to carry on in the businesses in which the employee was employed i.e. closed the business, or
- b) The employer has ceased (or intends) to cease to carry on the businesses at the place where the employee is employed i.e. closes the employee's workplace, or
- c) There is, or it is expected that there will be, a requirement for fewer employees to carry out work of a particular kind, either generally or at the employee's workplace.

In the case of a) all employees in the business will be redundant – where this is 20 or more the employer will normally have to comply with the collective consultation requirements (not covered in this Factsheet).

In the case of b) all employees at the workplace will be redundancy. Again the collective consultation provisions apply, but in addition it is reasonable to consider whether alternative work can be offered at other workplaces. Where this opportunity is limited, but there are more than one employee who could potentially be offered alternative work, then similar selection processes should be used as apply to selective redundancies under c)

If a redundancy dismissal in the case of c) is to be fair, an employer will need to:

- Define the 'pool' for selection – this might be a pool of one person, but is more likely to be two or more employees who *could* be selected
- Define objective criteria against which to assess the employees in the pool
- Apply those assessment criteria fairly and objectively
- Consult with those selected before a final decision is made
- Consider alternative employment options and make offers of suitable alternative employment where applicable
- Provide an appeal mechanism

Of course, an employer might choose to consult with all those in the pool and seek agreement on alternatives to dismissal and/or ask for volunteers. Indeed

D3 Employee Solutions Factsheet

No 3 An Employee's right not to be unfairly dismissed

where there are more than 20 involved over a 90-day period, the employer is obliged to consult with representatives.

Retirement Dismissals

See Fact Sheet 4

Remedies For Unfair Dismissal

If a Tribunal finds a dismissal unfair it can order reinstatement (i.e. reemployment to their old job) or reengagement (i.e. reemployment to a different job). Such orders would be combined with compensation for lost earnings and benefits in the period since dismissal.

Where the claimant does not seek reemployment or the Tribunal assesses that reemployment is not practicable, then it will award compensation, consisting of:

- i) A Basic Award – equivalent to a statutory minimum redundancy payment
- ii) A Compensatory Award to reflect the financial losses incurred by the Claimant as a result of the dismissal. There is a cap on this award (currently £66,200)

The Claimant will need to show that (s)he has sought to mitigate the financial losses (i.e. has been active in seeking alternative work)

There are circumstances where the award can be increased or reduced.

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