

Unfair dismissal

Employment Rights Advice Leaflet

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Many employees have legal protection against being unfairly dismissed from their job. If they do, they can make a complaint of Unfair Dismissal to an Employment Tribunal (ET). But not everyone is protected and there are certain conditions which must be satisfied before you can bring a claim.

There are a number of legal stages involved in any claim for Unfair Dismissal:

- you must be an **employee**. This is not necessarily a straight-forward issue, as there is no simple legal test. Most casual or agency workers and self-employed people are excluded from claiming Unfair Dismissal;
- you must have been **continuously employed** by your employer **for over one year**, or be able to show that the **dismissal** was for an **“automatically unfair” reason**;
- you must show that you have been **dismissed**;
- your employer must show that your dismissal was one of **five potentially fair reasons for dismissal**;
- the employment tribunal must decide whether the **dismissal** was **fair/unfair in all the circumstances**.

Was there a dismissal?

You have been dismissed from your job if:

- your job is ended by your employer with or without notice;
- your fixed term contract expires and is not renewed;
- you are forced to resign;
- you are made redundant;
- the organisation for which you work has been taken over and the new employer refuses to take you on (see the ERAS leaflet **“Transfer of Undertakings”**).
- you resign, and claim constructive dismissal;

Constructive dismissal

Normally to claim unfair dismissal you have to show that there has been an *actual* dismissal. However sometimes it is possible to resign and still claim Unfair Dismissal. This is because in certain situations a resignation can count legally as a *“Constructive Dismissal”*.

In a case of Constructive Dismissal, the employee resigns in response to a fundamental breach of contract by the employer, so it is treated as a dismissal from a legal point of view. The following are possible examples of situations which can lead to a constructive dismissal:

- bullying or harassment;
- a significant pay cut;
- a major change in your hours of work, duties or place of work.

If you are thinking of resigning in this sort of situation you should always obtain advice first. Constructive Dismissal claims are hard to win. You need to show that there was a *“fundamental breach of contract”*. You must have resigned in response to this (this is best done by letter). You must not delay your decision and you must not have accepted the change in your terms and conditions.

Disputed dismissals

Forced resignation: If you are told to resign or be sacked, this is likely to count as a dismissal from a legal point of view, since it is really the employer who has decided that the contract should come to an end.

Misunderstandings: In some situations employers deny that they intended to dismiss an employee. Where the words used are clear and unambiguous, an employee is entitled to rely on their clear meaning. However the courts have tended to allow employers to back-track where words are spoken in the heat of the moment.

Reasons for Dismissal

Under the Employment Rights Act there are five potentially fair reasons why an employer can dismiss an employee:

Capability – this covers dismissals relating to an employee’s capacity to do a job, and includes dismissals for incompetence, as well as sickness absence.

Conduct – this covers all forms of misconduct, and includes dishonesty, violence and a refusal to carry out reasonable instructions.

Redundancy – this covers the closure of a business or a workplace, or the disappearance of a job through a reduced need for employees to do work of a particular kind (See ERAS leaflet – Statutory Redundancy Payments).

Statutory Restriction – this is rare and covers the situation where the employer dismisses an employee in order not to breach relevant legislation (for example dismissal of an HGV driver who has lost his/her license).

Some Other Substantial Reason – this is something of a catch-all category, and is often used by employers who wish to carry out a reorganization of a business.

Written Reasons for Dismissal

You should ask your employer to explain the reason why you have been dismissed. You normally have a right to this information if you have been continuously employed by your employer for at least one year. If you request written reasons, your employer has 14 days in which to reply. The employer's reply can be useful evidence in any tribunal claim. If your employer refuses, or gives an explanation which is inadequate or untrue, you can complain to an Employment Tribunal. If the tribunal upholds your complaint, it will award compensation of two weeks' gross pay.

Dismissals which are automatically unfair

Normally once a tribunal has decided the reason for dismissal it then has to go on to consider the fairness of the dismissal. However, there are certain reasons for dismissal which count as automatically unfair and, once the reason for the dismissal has been established, the employee has won his/her claim.

The following are examples of automatically unfair reasons for dismissal:

- dismissal for pregnancy/maternity reasons;
- dismissal for health and safety reasons;
- dismissal for trade union reasons;
- dismissal for minimum wage reasons;
- dismissal for "asserting a statutory right" i.e. standing up for your legal rights under selected employment legislation;
- dismissal for "whistle-blowing"- i.e. for making a protected disclosure in the

public interest, according to the procedure laid down in the Public Interest Disclosure Act 1998.

N.B. If you believe that you have been dismissed for any of the above reasons, you do not need to have one year's continuous employment to make a claim. However it is often difficult legally to prove that the above reasons are the real reason for your dismissal.

Discrimination

Often a dismissal can give rise to a Discrimination complaint as well as a claim for Unfair Dismissal. It is important not to overlook this. At present there is statutory protection against discrimination on the grounds of Sex, Race and Disability. If the dismissal is for a discriminatory reason, this is likely also to make any dismissal unfair.

Discrimination law is complex and it is always best to seek specialist advice before taking any action.

Fair or Unfair?

If there has been a dismissal, an Employment Tribunal then has to decide whether the decision to dismiss was fair or unfair in all the circumstances. It is the tribunal's job to consider all the evidence which is presented and to place the decision to dismiss in context. In doing this tribunals attach great weight to policies and procedures used by the employer (e.g. grievance/disciplinary procedures). Tribunals also normally consider the conduct of the employer and employee throughout the period of employment.

Time Limits for making a Claim

A complaint of Unfair Dismissal must be made to an ET within three months of the date on which your employment ends (the "effective date of termination"). This date is not always obvious and if in doubt you should seek further advice or make sure that you submit your claim early. The time limit is a strict one, and although an ET can extend the 3 month limit, it is very rare for tribunals to agree to do this in practice.

What can you get if you win?

If the ET decides that you have been unfairly dismissed, it has the power to order compensation, re-engagement (i.e. you are taken on by the same employer in a different capacity) or re-instatement (which means that you are employed on identical terms to before). However unfortunately it is fairly rare in practice for a tribunal to order re-instatement or re-engagement.

When a tribunal makes an award of compensation for Unfair Dismissal, it will be made up of a Basic award and a Compensatory award:

- **Basic award** - The basic award compensates you for the length of your employment with your employer and is calculated in almost exactly the same way as a redundancy payment. The amount depends on your gross weekly pay, your length of service and your age. The maximum figure is currently £7,500;
- **Compensatory award** – The compensatory award compensates you for any loss of earnings arising from your dismissal. It is up to the tribunal to decide how much is 'just and equitable in all the circumstances', but any loss of earnings award will be for a limited period only. The tribunal will consider the attempts which you have made to find other work since your dismissal (this is called “the

duty to mitigate your loss”); it will also take into account any earnings from a new job. The maximum amount that can be awarded is £52,600.

Resolving disputes

It is nearly always best to obtain advice immediately after you are dismissed. You can try to get help from your trade union, see a solicitor, or obtain advice from ERAS, your local Law Centre, Citizen's Advice Bureau or other independent advice centre.

Before making a complaint to an ET, you could try to negotiate a settlement with your employer. But if you do this, you need to be clear about the legal implications, and in particular how much compensation you would be entitled to if you won any tribunal claim.

If you make a complaint to an employment tribunal, a conciliation officer from ACAS will try to help you reach a settlement with your employer. Make sure that you obtain independent advice before you agree to any settlement. If no settlement is reached, the case will be heard by the tribunal. While it is possible to represent yourself, it is better if you can find someone else to represent you, as the law on Unfair Dismissal can be complex and tribunal hearings intimidating.

For further details contact:

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