

Unfair Dismissal

Generally an employee who has completed two years employment has the right not to be unfairly dismissed.

The dismissal will be unfair unless:

- It was for one of five potentially fair reasons.
- In all the circumstances (including the employer's size and administrative resources) the employer acted reasonably in treating that reason as a sufficient reason for dismissal.

Dismissals for certain reasons are deemed automatically unfair and, in most such cases, employees do not need a qualifying period of employment, e.g. dismissal due to whistleblowing.

Who can claim unfair dismissal?

The right to bring a claim for unfair dismissal is available only to an employee who has been dismissed and who, in most cases, has two years' continuous employment.

The employee's work must have been done in Great Britain or have a sufficient connection to Great Britain.

Only employees have the right not to be unfairly dismissed. It is not possible for workers or the genuinely self-employed to claim unfair dismissal.

What is dismissal?

There are three types of dismissal:

- Termination by the employer
- Expiry of a fixed-term contract
- Constructive dismissal – constructive dismissal occurs where the employee terminates their employment in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

To succeed in a claim for constructive dismissal, the following must occur:

- There must be a repudiatory breach of contract by the employer.
- The employee resigns in response to that breach.
- The employee does not unreasonably delay before resigning (otherwise the employee may be treated as having affirmed the contract and therefore loses their right to claim constructive dismissal).
- The constructive dismissal must be unfair.

Normally a resignation by an employee will not amount to a dismissal unless the resignation arises from a constructive dismissal. There will also be no dismissal where employment has terminated by agreement between the employer and employee.

If there is no dismissal, employees cannot be unfairly dismissed.

Five fair reasons for dismissal

The five fair reasons for dismissal are:

- Capability or qualifications
- Conduct
- Redundancy
- Breach of statutory duty or restriction, e.g. an employee employed to drive losing their licence
- Some other substantial reason

The potentially fair reason of "some other substantial reason" is a catch-all type of reason designed to catch potentially fair dismissals that would not fall into any of the other four categories.

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Reasonableness (or fairness) of dismissal

Once an employer has established a potentially fair reason for the dismissal, an employment tribunal will consider whether the employer acted reasonably (fairly) in dismissing the employee for that reason. The issue of reasonableness is determined by deciding whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee, and is determined in accordance with equity and the substantial merits of the case.

In practice, the aspect of fairness is usually divided into two parts:

- Did the employer follow a fair procedure?
- Did the employer act reasonably in treating the reason as a sufficient reason for dismissal?

Procedural fairness

Although the details of the procedure to be followed will depend on the reason why the employee is dismissed, there are some principles of procedural fairness that apply to most cases, namely:

- The employee should know that they are at risk of dismissal.
- The employee should be allowed to make representations (usually at a meeting or hearing).
- The employee should usually be allowed a right of appeal.

The Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas Code) applies to dismissals involving misconduct and poor performance. The Acas Code does not have to be followed by employment tribunals but employers who fail to follow the code run the risk of a finding of unfair dismissal being made against them. A failure to follow the Acas Code can also result in compensation being increased or decreased by up to 25% for a party's unreasonable failure to comply with the code.

According to the Acas Code an employer considering a case of alleged misconduct or poor performance should:

- Investigate the issues.
- Inform the employee of the issues in writing.
- Conduct a disciplinary hearing or meeting with the employee.
- Inform the employee of the decision in writing and include a right of appeal.

Substantive fairness

The test as to whether an employer has acted reasonably is whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

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Reasonableness of capability dismissals

When deciding if the employer acted reasonably in dismissing an employee for lack of capability or qualifications, an employment tribunal will consider factors such as:

- Whether the employee knew what was required of them.
- Whether the employer took steps to minimise the risk of poor performance.
- Whether there was a proper appraisal of the employee and the problem was identified.
- Whether the employer provided training, supervision and encouragement.
- Whether the employer warned the employee of the consequences of failing to improve.
- Whether the employer gave the employee a chance to improve.
- In some cases, whether the employer considered alternative employment.

Reasonableness of conduct dismissals

A dismissal on the grounds of conduct will only be fair in the following circumstances:

- At the time of dismissal the employer believed the employee to be guilty of misconduct.
- At the time of dismissal the employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- At the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

The decision to dismiss must be within a range of reasonable responses.

Reasonableness of redundancy dismissals

An employer will normally not act reasonably in a redundancy dismissal unless it:

- Warns and consults any affected employees.
- Adopts a fair basis on which to select for redundancy.
- Takes such steps as may be reasonable to avoid or minimise redundancy by redeploying potentially redundant employees within its own organisation.

Reasonableness of dismissals for breach of a statutory restriction

In deciding whether dismissal for breach of a statutory restriction was fair and reasonable, employment tribunals will consider such matters as:

- The extent of the statutory restriction and the extent to which it affects the employee's ability to do their job.
- The duration of the statutory restriction.
- Any alternatives to dismissal, e.g. adjustments to the job or alternative employment.

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Reasonableness of dismissals for some other substantial reason

Dismissals for some other substantial reason will depend upon the circumstances of the case that can involve:

- Investigating the situation.
- Consulting with the employee.
- Warning the employee of the risk of dismissal.
- Giving the employee an opportunity to state their case.
- Exploring alternatives to dismissal.
- Balancing the needs of the employer and the employee.

Acas early conciliation

In almost all unfair dismissal claims, employees are required to commence the Acas early conciliation process. There is then an automatic extension of time to the usual time limit for submitting a claim (see below). Broadly speaking, time stops running when the Claimant contacts Acas and starts again when the Claimant receives an early conciliation certificate. Furthermore, if the time remaining at that point would be less than a month, it is automatically increased to a month.

Time limits

Subject to the rules on the automatic extension of time for Acas early conciliation, a claim for unfair dismissal must be presented within three months from the effective date of termination. For example, if the last day of employment is 13 March, the claim must be received by the tribunal on or before 12 June.

Remedies

If an employment tribunal finds that an employee has been unfairly dismissed, the remedies that it will consider are: reinstatement, re-engagement, compensation

In the vast majority of cases reinstatement or re-engagement are impractical and therefore compensation is by far the most common remedy.

Compensation

Compensation will consist of a basic award and a compensatory award. The basic award is calculated in a similar way to a statutory redundancy payment, based on a formula that takes into account age, length of service and the amount of a week's pay. A compensatory award will be based upon what the tribunal believes is just and equitable based on the financial loss caused to the employee by the unfair dismissal, and is usually made up of loss of salary, pension and other benefits. A compensatory award is subject to an upper limit (save for dismissals due to whistleblowing or health and safety reasons). The maximum compensatory award is the lower of 52 weeks' pay or a numerical figure set by the government in April each year.

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