



Employment Law Guide for Employers

# Unfair Dismissal



PENINSULA



# Unfair Dismissal

**This employment law guide explores the basics of unfair dismissal and offers guidance on how to avoid common pitfalls.**

By far the most recognisable term when considering employment law and employment rights is 'unfair dismissal'. An employee has a right not to be unfairly dismissed and this is generally contained within the Employment Rights Act 1996 although there are several other pieces of legislation which also provide rights in this area.

## What is an unfair dismissal?

An employer can be found to have unfairly dismissed an employee when they have:

- Dismissed for a reason that does not fall into one of the 'potentially fair reasons for dismissal'; or
- Dismissed for a potentially fair reason but not followed a fair procedure.

As shown above, even if the employer has a good reason for dismissing the employee, he can still be found to have unfairly dismissed when he does not correctly carry out the process leading to the dismissal. He must in all circumstances act 'reasonably'. Specifically, a tribunal will look at the following when determining whether a dismissal is fair or not:

- What is the reason for dismissal and is it a potentially fair reason?;
- Has the employer followed a fair, equitable and reasonable procedure?;

- In the circumstances of the case, has the employer acted reasonably?

## Who can claim unfair dismissal?

An individual must be an employee if they are to claim unfair dismissal i.e. a 'worker' or a self-employed individual are not eligible to make the claim.

The employee must have the necessary qualifying service. If the employee started employment before 6th April 2012, the necessary qualifying service is one year. If the start date was on or before 6th April 2012, the necessary qualifying service is two years.

Anyone who does not have the qualifying service is generally referred to as a 'short service' employee.

## What are the potentially fair reasons for dismissal?

There are 5 potentially fair reasons for dismissal:

- Conduct (behaviour);
- Capability (ability to perform the required duties);
- Redundancy;
- Statutory ban (where continued performance of the role would be unlawful i.e. where someone undertaking a job requiring a legal licence loses that licence)
- Some other substantial reason (a reason not falling into any of the specific ones above but substantial enough to warrant dismissal e.g. pressure from a third party)

### **Automatic unfair dismissal**

There are some reasons for dismissal which are 'automatically unfair'. This means that the tribunal is not required to determine the reasonableness of the employer's actions, so if it is determined that the dismissal was for one of stipulated reasons, then it will automatically be found unfair.

There are many automatically unfair reasons for dismissal, including on grounds relating to (this is not an exhaustive list):

- Discrimination;
- Making a protected disclosure;
- Leave for family reasons including maternity leave, parental leave and time off for dependants;
- Regulations on working time;
- Requests for flexible working;
- Making a health and safety complaint;
- Assertion of a statutory right;
- Pension auto-enrolment;
- National minimum wage.

The length of service requirement to claim unfair dismissal does not apply where automatic unfair dismissal is claimed. This means that an employee may bring this type of claim from day one of employment.

### **Procedural expectations**

Although an employer may have a potentially fair reason for dismissal, he must still ensure that a fair procedure is followed. Where there is a failure to follow a fair and reasonable procedure, the tribunal may still find the dismissal unfair.

Although all disciplinary circumstances invariably differ, as a minimum a tribunal will expect that an employee is informed of the employer's concerns; invited to a hearing so that they may put their case; and is afforded an appeal. The sanction applied should fit the level of breach and the employee should be given time to improve.

Even in gross misconduct situations where dismissal for a first offence is a suitable outcome, the employer is still expected to follow a procedure in terms of holding a hearing and affording an appeal.

The Acas Code of Practice on Disciplinary and Grievance Procedures sets out further guidance on procedural minimums. Failure to follow the Code, by both employer and employee, may mean any compensation at tribunal is adjusted.

### **Constructive dismissal**

Constructive dismissal is the term used to define the situation where an employee resigns but the resignation was in response to the employer's fundamental breach of employment contract leaving the employee no other alternative but to terminate employment.

The reason for resignation must be serious, for example, if the employer reduces the employee's pay for no good reason, or fails to pay the employee at all.

The length of service rules apply as normal to a claim of constructive dismissal.

## **Compensation**

Unfair dismissal compensation varies according to the employee's actual circumstances. It is, in the main, broken down into two parts: basic; and compensatory award.

The basic award is calculated according to a statutory formula by providing one week's pay for each completed year of service. One week's pay is subject to a cap (currently £508) however, this figure is reviewed annually.

The compensatory award looks to place the employee in the same financial position they would have been in had they not been dismissed and includes wage deficit; loss of pension contributions; medical insurance; company car etc.

The compensatory element of the award is currently capped at one year's pay, and subject to an overall cap of £83,682 or 52 weeks' pay.