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STANDING UP FOR YOU

Summary of the law
on unfair dismissal
and redundancy

Our pledge to you

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Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

standing up for you

Contents

About this booklet	5
Unfair dismissal	5
What about strikes and lock outs?	8
What is the procedure for bringing a claim for unfair dismissal?	9
What is early conciliation?	9
What remedies are available?	9
What is interim relief?	10
What is constructive dismissal?	11
What is wrongful dismissal?	12
What is redundancy?	13
What happens if the employer does not pay?	14
What are protective awards?	14



The Spirit of Brotherhood
by Bernard Meadows

About this booklet

Workers are protected under the Employment Rights Act 1996 from being sacked or chosen unfairly for redundancy.

This booklet provides a basic outline of the law covering unfair dismissal and redundancy. It applies in England, Wales and Scotland (except where indicated) only.

- Unfair dismissal.
- Tribunal claims.
- Remedies.
- Wrongful dismissal.
- Redundancy.

Unfair dismissal?

Constructive dismissal.

What is unfair dismissal?

Unfair dismissal is a statutory right available to employees who believe they have been dismissed unfairly or unreasonably by their employer.

Who qualifies for the right?

Generally only employees who have worked for a certain period (called the 'qualifying period') have a right to bring a claim for unfair dismissal.

The qualifying period is two years.

These are some exceptions for those who are dismissed automatically and those who are dismissed principally for a reason related to political opinion or affiliation.

What is an automatically unfair dismissal?

Certain dismissals are “automatically unfair” in which case the employee just has to show that the dismissal was for one of the following reasons:

- Membership (or non membership) of a trade union or for trade union activities.
- Health and safety.
- Bringing proceedings against the employer for breaking certain statutory employment rights.
- Refusing to forego a right under the Working Time Regulations.
- Seeking to enforce rights under the National Minimum Wage Act.
- Making a protected disclosure under whistleblowing legislation.
- Trying to obtain (or prevent) recognition of an independent trade union.
- Seeking to exercise the right to be accompanied at a grievance or disciplinary hearing.
- 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 a Sunday.
- Connected with an employee's function as a pension fund trustee.
- In breach of the Information and Consultation Regulations 2004.
- Making a request in relation to study or training.



When is a 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 acted reasonably when dismissing for that reason. The ACAS Code of Practice on Disciplinary and Grievance Procedures is taken into account by employment tribunals when determining whether an employer has acted reasonably when dismissing on grounds of conduct and capability. The employer 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 lock out but only a selected few are re-engaged within three months.



What is the procedure for bringing a claim for unfair dismissal?

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

It is therefore very important to accurately work out your effective date of termination (EDT). If your employer dismisses you with notice then the EDT is the date that your notice comes to an end. If you were dismissed without notice then the EDT is the date on which you are told you

have been dismissed. If you have any doubt about when your employment terminated then you should use the earliest possible date to calculate the time limit.

A claim for unfair dismissal can not be lodged at a Tribunal unless there has been early conciliation.

What is early conciliation?

Early conciliation is the requirement to contact the ACAS (Advisory, Conciliation and Arbitration Service) before lodging an employment tribunal claim. You can do this over the phone or by completing an online form on the ACAS website (www.acas.org.uk).

Early conciliation usually lasts for four weeks after which an early conciliation certificate is issued. The early conciliation certificate number must be inserted in the employment tribunal claim form. If it is not, the claim form will be rejected and the claim may go out of time.

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 account for financial losses incurred as a result of the dismissal.

The compensatory award is subject to a 'cap' which means the award is limited to 52 weeks' pay or £80,451 – whichever is lower. However, it is rare for Tribunals to award the maximum. 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 interim relief?

In limited cases, an employee may seek an order for interim relief to reinstate them pending the main hearing. This only applies if the principal reason for dismissal was because of trade union membership or activities, activities as a health and safety representative, a working time representative, a pension fund trustee, and an employee representative for Tupa or collective redundancy purposes.

An application for interim relief has to be made at the same time a claim for unfair dismissal is made.

Early conciliation does not apply to a claim for interim relief.

Interim relief will only be granted if the Tribunal decides that the claim for unfair dismissal has a pretty good chance of succeeding at a full hearing.

Where interim relief is granted this prevents a dismissal from taking effect. A Tribunal will ask the employer if they are willing to reinstate or re-engage the employee. If this is not possible, the Tribunal will make an order for the continuation of the contract.

What is constructive dismissal?

Constructive dismissal is when an employee resigns in response to a significant and fundamental breach of their contract of employment by their employer. These cases are hard 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 terms of mutual trust and confidence). To rely on the breach, the employee needs to resign fairly 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. Early conciliation applies to constructive dismissal.

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 dismissal in breach of a contract. This happens if the employer terminates an employment contract contrary to the terms contained within it, for example, by failing to give the correct notice period. When this happens, the employer is liable to pay damages which amount to the 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

Employees may have a more generous contractual entitlement so they should check their contract to ascertain if that is the case.

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.

Some employers are prepared to pay this sum gross, rather than net, but entitlement depends on the contract of employment.

What is redundancy?

The law says 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 may be entitled to a statutory redundancy payment, but only if they have two or more years continuous service since the age of 18.

For each complete year of continuous employment up to a maximum of 20 years, an employee is entitled to:

- Age 41 and over: one and a half week's pay per year of service
- Age 22 to 40: one week's pay per year of service
- Up to age 21: half a week's pay per year of service

There is a limit to the basic weekly pay which can be claimed which is updated every year. Currently it is £489.

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.
- They resign before the end of the notice period.

A contractual redundancy payment is only payable if there is a contractual right to an enhanced payment. A policy which is expressed to be discretionary will not usually be contractual unless very specific conditions apply.

What happens if the employer does not pay?

Employees have three months less one day to bring a claim if employers fail to pay their contractual redundancy payment and six months less one day of the failure to pay their statutory redundancy payment.

If a contractual redundancy entitlement is more than £25,000, a claim for breach of contract can be brought to the County Court in England or the Sheriff Court or Court of Sessions in Scotland. In England, the time limit for bringing a claim is six years, in Scotland it is five.

What are protective awards?

Where an employer proposes to make 20 or more employees redundant within a period of 90 days or less, he must consult with any independent trade union which is recognised for collective bargaining or, where no union is recognised, with elected representatives.

Consultation must begin in 'good time' and in any event must begin 45 days before the first of the dismissals where the employer proposes to make 100 or more employees redundant, or 30 days before the first of the dismissals where there are 20 to 99 employees.

Consultation must happen with a view to achieving an agreement. This includes:

- avoiding the dismissals
- reducing the number of employees to be dismissed, and
- mitigating the consequences of dismissal.

Appropriate information must be provided to the union when it is recognised. If the employer fails to collectively consult, the union can apply for a "protective award". This is anything up to 90 days pay, according to the circumstances, for each employee affected.

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



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