



## Fact Sheet on Dismissal

### Unfair dismissal

- The law relating to unfair dismissal is found in the [Employment Rights Act 1996](#) as amended.
- In order to succeed in defending claim of unfair dismissal, an employer must show that:
  - it had a competent reason for dismissing the employee;
  - it was one of the 6 potentially fair reasons to dismiss the employee; and
  - that it acted reasonably in dismissing the employee for that reason.

### Fair dismissal

- An employer cannot simply dismiss an employee just because it feels like it. There must be a genuine reason.
- The 6 potentially fair reasons for dismissing an employee are:
  - conduct (ie misconduct);
  - capability or qualifications;
  - retirement;
  - redundancy;
  - that the employee could not continue to work in the position which s/he held without contravention (either on his/her part or on that of the employer) of a duty or restriction imposed by or under an enactment; or
  - some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

‘capability’ means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

‘qualifications’ means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

- In determining whether the dismissal is fair or unfair (having regard to the reason shown by the employer) an employment tribunal will consider:
  - (having regard to the size and administrative resources of the employer’s undertaking) whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
  - equity and the substantial merits of the case.

## Reasonable procedure

- From 1 October 2004, all employers must have a written disciplinary procedure in line with the ACAS Code of Practice and an employer will have to demonstrate that it has acted reasonably when dismissing an employee. In any event, an employer will have to show that:
  - it invited the employee to a disciplinary meeting in writing and informing him/her of the right of accompaniment to that meeting;
  - it carried out a reasonable investigation (ie gathered information and evidence as was necessary) into the circumstances surrounding the allegation, which gave rise to the dismissal;
  - a meeting was held with the employee where the reason for dismissal was put and the employee was given the opportunity to respond and give reasons why her/his employment should not be terminated;
  - having heard all the information available, considered the employee's reasons why s/he should not be dismissed and any alternatives to dismissal, the only option available to the employer was to dismiss; and
  - in reaching the conclusion to dismiss, the employer should have taken account of the employee's disciplinary record, length of service, age and work record.
- Normally for an employee to claim unfair dismissal, s/he must have been employed for a minimum of 1 year. Although there are exceptions which are automatically unfair dismissal, where an employee has been dismissed in connection with:
  - pregnancy and childbirth;
  - raising health and safety issues;
  - shop workers and betting workers who refuse Sunday work;
  - trustees of occupational pension schemes;
  - union membership or activities;
  - asserting a statutory right;
  - acting as an employee representative under TUPE or collective redundancy legislation;
  - time off to care for dependants;
  - asserting flexible working rights;
  - asserting working time rights;
  - acting as a companion in a disciplinary/grievance hearing;
  - making a public interest disclosure ("whistleblowing");
  - asserting national minimum wage rights.

## Constructive unfair dismissal

- Constructive dismissal relates to a breach of the employee's contract of employment. The dismissal will be unfair if the breach is of a fundamental term of the contract, ie it goes to the root of the contract.
- Terms and conditions of employment will normally be found in a letter of appointment, written particulars of employment (often referred to as a contract of employment) or in some instances a Staff Handbook. These terms are called "express" terms as they are definite. If they are ambiguous then they will normally be interpreted in favour of the employee.
- There are also "implied" terms incorporated within the employment relationship, such as:
  - mutual trust and confidence, ie to act in a manner which is likely to destroy or seriously damage the employment relationship;
  - good faith and fidelity, ie not to do anything that could jeopardise the employer's business;
  - not to act arbitrarily, capriciously or inequitably, ie to treat all employees the same;
  - to obey reasonable and lawful orders;
  - to provide a safe working environment;
  - to deal with employee grievances promptly.
- The employer does not necessarily have to actually breach the contract but merely threaten it.

- If the employer breaches the contract of employment then the employee can bring a claim for constructive unfair dismissal (but only if s/he has been employed for a minimum of 1 year).
- In order to succeed in claim of constructive unfair dismissal, an employee must show that:
  - the employer was in actual or anticipatory breach of contract;
  - the breach must be sufficiently serious to justify the employee resigning, ie is it a breach of a fundamental term that goes to the root of the contract (eg non payment of wages);
  - s/he resigned in response to the breach of contract and not for some unconnected reason; and
  - s/he did not delay too long in terminating the contract of employment.
- A claim for breach of contract and/or constructive unfair dismissal can only be brought once the employee's employment has actually ended.
- Note: if claim for breach of contract is brought in the employment tribunal then the former employer can in turn counterclaim for breach of contract (eg loss incurred due to the employee leaving prematurely).

## Wrongful dismissal

- This is a breach of the contract of employment. It will normally occur when an individual has been dismissed and the employer has failed to pay or provide notice as stipulated in the contract and/or has failed to comply with a contractual disciplinary procedure before dismissal.
- This applies to both employees and workers and a claim can be made irrespective of length of service.

## PLEASE NOTE

The material contained in this fact sheet is provided for general purposes only and does not constitute legal or other professional advice. Appropriate legal advice should be sought for specific circumstances and before action is taken.

## FOR MORE INFORMATION

If you have any questions about anything in this Fact Sheet, or for advice about employment law generally, please contact **Marc Jones** on **01895 201719**, or email [marc.jones@turbervilles.co.uk](mailto:marc.jones@turbervilles.co.uk).

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