

## **Dismissal Cases**

This note does not purport to be an exhaustive examination of the law relating to dismissals, nor to deal in any way with discrimination at work. Please consult your lawyer for detailed advice.

### **1 HAS THERE BEEN A DISMISSAL?**

- a) Claims for wrongful or unfair dismissal, or for a redundancy payment can be made only if, in law, the employee has been dismissed. Usually this is entirely straightforward.
- b) Sometimes, it is possible to contend that a dismissal has taken place, even though, strictly, the employee has resigned. This situation, known as constructive dismissal, would arise where the employer has committed a breach of the contract of employment so serious that the employee is entitled to treat the breach as bringing the contract to an end. This can be a very difficult point, requiring the closest consideration. If this might apply to you, ask for our information note "*Constructive Dismissal*".

### **2 WRONGFUL DISMISSAL**

#### **a) What is wrongful dismissal?**

- i) The terms of every employee's employment are governed by his contract. Usually there is a written document setting out these terms (albeit perhaps, as amended from time to time). Occasionally, however, an employer will fail to issue a written contract, or even a statement of terms. In these cases, the law will imply some terms or other terms might arise by custom and usage. Unless the parties agree, the other relevant terms would have to be established by the Court or Tribunal.
- ii) Whether or not it is all written down, the contract will provide for the payment of salary and other benefits to the employee, which will continue until the employment comes to an end.
- iii) It will also provide the manner in which the contract of employment might lawfully be brought to an end by notice. If the period of notice were not specified, a court would apply a reasonable period, subject to certain statutory minima.
- iv) A wrongful dismissal arises where an employer unlawfully dismisses an employee in a manner which does not comply with the terms (as to notice, or otherwise) set out in the contract. Note that, in some circumstances, an employer may dismiss without notice.



- v) Problems can arise if it can be alleged that the contract of employment is illegal. This might be the situation where, at any stage, payments have been made without appropriate deduction of tax and/or National Insurance. A Court or Tribunal will not make an order to enforce an illegal contract.

**b) What can be claimed?**

- i) If the employer fails to allow the appropriate notice period, this would be a breach of contract, entitling the employee to claim damages.
- ii) The damages would be the amount which would be necessary to put the employee in the same financial position as he would have been in had the employer complied with the terms in the contract.
- iii) In a simple case, this might mean that an employee dismissed with one week's notice, rather than the two weeks to which he is contractually entitled, would be able to claim one week's net pay by way of damages, to make up the difference.
- iv) In a more complicated case, it might be necessary to establish the actual net value of the whole of the employee's remuneration package, including fringe benefits, in order to calculate the sum that he has lost.
- v) The employee might also be entitled to other contractual benefits, such as accrued holiday pay
- vi) There may have to be deducted from the claim any ex gratia (ie discretionary) payment that the employer might make.

**c) Where should the claim be brought?**

- i) Claims for damages for breach of an employment contract may be brought in either the County Court or the Employment Tribunal. There are essential differences between them.

	County Court	Employment Tribunal
Early conciliation	No procedure.	The matter must be referred to ACAS before the claim can be issued.
Proceedings	Relatively formal; heard by a Judge.	Less formal; usually heard by an Employment Judge alone, sometimes with two lay members.

Time limits	Six years from the breach.	Three months from the “effective date of termination”.
Court fees	Varies according to the amount claimed	No fees.
Timescale	Probably not less than a year to trial.	Three to six months to Tribunal hearing.
Orders for costs	Unless the matter is disposed of under the Small Claims Procedure or the sum awarded is less than £10,000, the loser usually ordered to pay greater part of winner’s costs (although the procedure for calculating this can be cumbersome and expensive, in itself).	Loser generally <u>not</u> ordered to pay any part of winner’s costs (although this is a possibility).
Limit of award	No limit.	£25,000 (in addition to award for unfair dismissal)

**d) Other relevant points**

In establishing whether an employer was justified in dismissing an employee without notice, the Court or Tribunal can take into account relevant matters which did not come to the attention of the employer until after the dismissal.

- e)** Fees are now payable in both the Court and Tribunal upon issue, setting down and when certain interim applications are made.

**3 UNFAIR DISMISSAL**

**a) What is unfair dismissal?**

- i) An employee who has two years’ continuous service for his employer or a connected employer, has a statutory right not to be unfairly dismissed.



- ii) If an application is made alleging unfair dismissal, the employee must show that a dismissal has occurred (but see 1b) above). Having done so, the employer must show what the principal reason for the dismissal was, and that it was one of the following. If he fails in this, the dismissal will be adjudged unfair:
  - A a reason related to the capability or qualifications of the employee;
  - B a reason related to the conduct of the employee;
  - C redundancy;
  - D continuation of the work would have been unlawful;
  - E some other substantial reason, justifying the dismissal.
- iii) Some dismissals, for union, health and safety, maternity and some other reasons, are automatically unfair, and a claim can be brought even though the employee has less than 2 years' continuous service.
- iv) An employer who dismisses for a reason relating to the employee's conduct must follow the ACAS Code of Practice on Disciplinary Procedures. Although not extensive, the Code still contains too many provisions to be dealt with in this note.
- v) If it is established that the reason for the dismissal is a "potentially fair" one (as listed at 3a)ii),, the Tribunal must then consider whether, in all the circumstances, the dismissal was fair or unfair. In particular, the procedure followed by the employer will be carefully looked at.
- vi) An unfair dismissal claim must be commenced by reference to ACAS for early conciliation within 3 months of the date the dismissal takes effect, or the right to bring a claim will probably be lost.

#### **b) What can be claimed?**

- i) Once there has been a finding of unfair dismissal, the Tribunal must decide upon the remedy.
- ii) It should consider first ordering reinstatement of the employee or his re-engagement in the same or a different position. Should an employer fail to abide by such an order, increased compensation can be ordered. In practice, the Tribunal will often acknowledge the fact that the relationship between the employer and employee has broken down, and reinstatement or re-engagement is impractical and rarely ordered.
- iii) Much more common is an award of compensation. The overall compensation figure is calculated in two parts: a Basic Award and a Compensatory Award.



- A The **Basic Award** is calculated in substantially the same way as a statutory redundancy payment. The employee receives:
    - (a) one and a half weeks' pay for each complete year of employment while the employee was aged 41 or over; plus
    - (b) one week's pay for each complete year of employment while the employee was aged between 22 and 40; plus
    - (c) half a week's pay for each complete year of employment up to the age of 21.
  - B The maximum amount of a week's pay is fixed by regulation and, for dismissals where the effective date of termination is on or after 6 April 2018, is £508. The maximum number of years of employment which can be taken into account is 20. It therefore follows that the maximum Basic Award (for an employee aged 61 or over, with at least 20 years' service) would be £15,240.
  - C The Basic Award can be reduced in the light of any conduct on the part of the employee prior to the dismissal or the giving of notice, should the Tribunal consider this "just and equitable".
  - D If the reason for dismissal is redundancy, the Tribunal will offset the Basic Award against any redundancy payment which the employer might have made to the employee.
- iv) The **Compensatory Award** is intended to provide compensation for the employee, and is calculated after the Tribunal has established exactly what he has lost, by reason of the unfair dismissal. The calculation will take account of the following:
- A Any notice pay that might be due;
  - B Loss of earnings and other benefits as at the date of the Tribunal Hearing;
  - C Loss of future earnings and benefits;
  - D Out of pocket expenses;
  - E Loss of pension rights;
  - F Loss of statutory protection (in a new job, it would be two years before the employee had acquired rights in respect of redundancy or unfair dismissal);
- v) In a case where the reason for dismissal was other than redundancy, the Tribunal will offset the Compensatory Award against any discretionary

payment made by the employer.

- vi) The maximum Compensatory Award is fixed by regulation and has been varied yearly in line with changes in the Retail Prices Index. Where the effective date of termination is on or after 6 April 2017 the maximum award is the lower of £83,541 or 52 weeks' gross pay (not including benefits).
- vii) The Compensatory Award can be reduced (or disallowed) in certain circumstances:
  - A Where the employee was guilty of misconduct which came to light only after the dismissal;
  - B Where, by his conduct, the employee contributed in some way to his dismissal;
  - C Where the employee was responsible for any failure to follow the Code of Practice.
  - D Having regard to what the situation would have been had the employer acted fairly;
  - E Where the employee has failed to take reasonable steps to keep his loss to a minimum;
  - F Where the employer has made ex gratia (or discretionary) payments, credit will be given for these.
  - G Special considerations apply in union related or health and safety cases, and those where the employer refuses to comply with an order to re-instate or re-engage the employee.
- viii) The Compensatory Award can be increased if the employer was responsible for any failure to follow the ACAS Code of Practice (whichever applies).

#### **4 SETTING OFF ONE CLAIM AGAINST ANOTHER**

The employee cannot be compensated more than once for the same loss. Therefore, an award of compensation for lack of notice in a wrongful dismissal case will not usually be duplicated in the loss of earnings aspect of a Compensatory Award for unfair dismissal.

#### **5 ACAS AND NEGOTIATED SETTLEMENTS**

- a) Before he is able to issue a claim in the Employment Tribunal, an employee must refer the matter to the Advisory, Conciliation and Arbitration Service (ACAS) so that it can investigate the possibility of the parties agreeing to settle the case. The Claimant can only issue his claim when ACAS issues a certificate confirming that the early conciliation attempts have failed.

- b) ACAS will still be available to assist in negotiations and a settlement after the claim is underway.
- c) Should the parties agree a settlement, this must be confirmed in one of the following ways, if it is to be fully binding on the parties:
  - i) An agreed order of the Tribunal (if the claim has been issued);
  - ii) An agreement in Form COT3 prepared and signed by the Conciliation Officer all parties, as well as ;
  - iii) A “Settlement Agreement” in specified form, which requires the employee to take independent legal advice.
- d) For the employee, a negotiated settlement has distinct advantages. An order of the Tribunal for the payment of compensation for unfair dismissal will be subject to “recoupment provisions”. These require the employer to pay direct to the Department of Works & Pensions out of the compensation awarded reimbursement of certain state benefits which the employee has received in respect of a period for which the Tribunal awards him compensation. This can have the effect of reducing substantially the net value of the award to the employee. The recoupment provisions do not apply to negotiated settlements, and there is no obligation to reimburse the Department.

It is also not uncommon for a negotiated settlement to include provision for the employer to make available a reference in agreed terms. A Tribunal has no power to order that a reference be given.