



## REDUNDANCY AND UNFAIR DISMISSAL



THOMPSONS  
SOLICITORS

*Workers are protected under the Employment Rights Act 1996 from being sacked or chosen for redundancy unfairly. All employees are protected from and against unfair dismissal after one year of continuous service.*

*Some dismissals are automatically unfair. This leaflet explains what constitutes unfair dismissal and how to take a claim for it. Other leaflets in the series cover individual and trade union rights in other circumstances.*

### UNFAIR DISMISSAL

#### *What is unfair dismissal?*

Dismissals for certain reasons are “automatically unfair”. If a dismissal takes place for one of those reasons, all the employee has to show for a successful claim against the employer is that the dismissal was for that reason.

Other dismissals may be unfair depending on the circumstances. The majority of unfair dismissals fall into this second category.

#### *Automatically unfair dismissals*

A dismissal or selection for redundancy is automatically unfair if:

- n it is for trade union membership (or non membership) or for trade union activities
- n it is because of reasonable activity by the employee regarding dangerous health & safety situations or because of refusal to work in situations of serious and imminent danger
- n it arose because the employee had complained or brought proceedings against the employer for breaking certain statutory employment rights

- n it was as a result of sex, race or disability discrimination
- n the reason or principle reason for the dismissal is the employee's pregnancy or any other reason connected with the pregnancy
- n when the employee's work is transferred to another employer, such as in contracting out, and the transfer or a reason connected with it is the reason or the principal for the dismissal
- n the employee was dismissed for refusing to forego a right under the working time regulations
- n the employee was dismissed for seeking to enforce rights under the National Minimum Wage Act
- n the employee was dismissed for making a protected disclosure under the whistle blowing legislation
- n the employee was dismissed for acting to obtain (or prevent) recognition of an independent trade union
- n the dismissal was for seeking to exercise the right to be accompanied at a grievance or disciplinary hearing
- n the employee was dismissed for taking part in lawful industrial action
- n the dismissal was in connection with the employee's rights with regard to parental leave, time off for looking after dependants or maternity leave
- n the employee was dismissed for taking action in connection with part time workers' rights
- n a shop worker is dismissed for refusing Sunday work
- n the dismissal was connected with an employee's function as a pension fund trustee
- n the employee was dismissed after 1 October 2004 in breach of the new statutory dismissal and disciplinary procedure

### **Other unfair dismissals**

A dismissal may be fair if the reason for it was:

- n lack of capability or qualifications
- n misconduct
- n redundancy (but fair selection for redundancy may be unfair dismissal)
- n contravention of a legal duty (e.g. a driver who loses their license)
- n some other substantial reason justifying dismissal

It is not enough for employers to show the reason falls within one of the above categories. Employers must follow reasonable procedures before dismissing, as set out in the ACAS code of conduct unless they prove that they followed the statutory procedure and would have dismissed anyway had they followed the higher standards in the ACAS code. They must also show that the decision to dismiss fell within the range of reasonable responses by an employer.

### **Strikes and lockouts**

***Protection for unfair dismissal in connection with a strike or lock out needs one of the following conditions to be fulfilled:***

- n the employee was dismissed within eight weeks of the start of the protected industrial action by the employee
- n the dismissal took place more than eight weeks after the start of the protected industrial action and the employee had ceased taking part in the industrial action within the eight week period
- n the dismissal took place more than eight 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 lockout but only a selected few are re-engaged within three months.

However there is no right time to bring a claim for unfair dismissal if the industrial action was unofficial.

### Who is covered?

All employees are covered for claims listed as automatically unfair dismissal. However in all other cases the protection is only available to employees who have at least one years' continuous service.

Employees who have reached normal retirement age are not covered, although this will change with age discrimination legislation.

### How to bring a claim for unfair dismissal

A claim form ET1 must be lodged with the employment tribunal three months, less one day, from the effective date of termination of the contract of employment.

For example, if employment ended on 2 January 2002 then form ET1 must be received at the tribunal office by 1 April 2002. **The time limit is very strictly enforced.**

In sex, race and disability discrimination cases the time limit is three months from the act of discrimination (or the last act of discrimination complained of where there is a series of linked acts).

From October 2004, an employee must first follow the new statutory procedure that gives a right to appeal against dismissal. The three month time limit is extended by a further three months to allow this procedure to operate.

### Remedies for unfair dismissal

***If a tribunal finds in favour of the employee claiming unfair dismissal it can order:***

- n reinstatement - getting the job back with no loss of money or security
- n re-engagement - getting another job with the same employer with or without loss of money or security
- n compensation - a basic award calculated in a similar way to a redundancy plus a compensatory award to compensate the employee for the financial losses incurred as a result of the dismissal.

The maximum compensation award is presently £51,000. Unless the employee is a very high earner it is rare for tribunals to award this amount. Most will award for loss of earnings to the date of hearing plus a limited amount of future loss such as six months from the date of the hearing

Reinstatement and re-engagement are rarely ordered by tribunals.

Some types of cases can attract special compensation such as if the reason for the unfair dismissal was related to trade union membership or action taken to avoid a dangerous health & safety situation.

From October 2004, compensation may be increased or reduced if either party failed to follow the new statutory dismissal and disciplinary procedure.

### Reduction of awards

If the tribunal thinks the conduct of the employee contributed to the dismissal or that since the dismissal the employee has not acted to minimise his or her losses the compensation can be reduced.

### **Other orders**

In some special cases, an employee can apply urgently to the tribunal for an order for interim relief to reinstate pending the main hearing. Such cases include where the reason for the dismissal was for trade union or health & safety activities, as a pension fund trustee, acting in relation to union recognition or exercising rights to be accompanied to a disciplinary or grievance hearing.

An application for interim relief has to be made within seven days of the dismissal.

### **Constructive dismissal**

Constructive dismissal is where an employee resigns in circumstances where they are entitled to do so because of the employer's conduct. Constructive dismissal claims are extremely hard to win as it is necessary to prove that the employee was forced to leave as a result of a breach of their contract of employment by their employer. It must be shown that the breach was a serious one and that the employee left neither too quickly nor too long after the breach occurred. The tribunal will consider whether the employer had a fair reason for the contract of employment coming to an end and whether the employer had acted reasonably in all the circumstances.

From October 2004, unless there are special circumstances (e.g. threats or continuing harassment by the employer) the employee must write to the employer raising a grievance and attend one or two meetings before bringing an unfair constructive dismissal claim to an employment tribunal. The normal three months time limit is extended by a further three months to allow this to happen.

Compensation may be reduced if the applicant failed to follow the statutory grievance procedure.

### **Wrongful dismissal**

Wrongful dismissal means dismissal in breach of contract.

Contracts can be both written or agreed verbally. In addition to the terms that have been written down and signed by both parties, or supplied and not disputed, there will be further terms. These may have been agreed verbally at an interview or during the employment relationship or they may arise from custom and practice. They could be imposed by law or found in a collective agreement made between the trade union and the employer.

Dispute may arise from employers and employees not agreeing on precisely what terms have been settled orally or are implied into the contract from custom and practice or otherwise.

An employer has an obligation to send every employee a written statement of their main terms and conditions. If this is not done or it is incorrect a claim can be made to the employment tribunal.

### **Notice**

An employment relationship continues until retirement unless it is ended by the employer or employee or by mutual agreement (except in the case of fixed-term contracts). Unless one party is in breach of the contract then the party that wishes to terminate the contract must give the proper notice of intention to do so. If the employer fails to give notice, dismissal is wrongful.

However, the only remedy the law provides for in wrongful dismissal is payment in lieu of notice, which is the minimum set by law unless the employment contract states otherwise. If a contract provides for longer periods then that amount can be claimed.

The amount awarded will usually be net of tax and national insurance and less any earnings from new employment during the notice period.

***The minimum periods of notice required from an employer are as follows:***

- 1 month to 2 years = 1 week
- 2 years to 12 years = 1 week for each year worked
- 12 years plus = 12 weeks

***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.

**Redundancy**

***The legal definition of a redundancy situation is:***

- n the employer has ceased or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed
- n the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish

If the reason for dismissal falls within the definitions above the employee may be entitled to a statutory redundancy payment. Many companies have redundancy schemes which are more generous than the statutory provisions.

***Redundancy payments - you are eligible for a payment if:***

- n you have two or more years continuous service since the age of 18
- n you are below "normal" retirement age (which will usually depend on your employer's normal practice on retirement)

**Payments**

***For each full year of continuous employment up to a maximum age of 20, an employee is entitled to:***

- From age 41 to 64: 1½ week's pay
- From age 22 to 40: 1 week's pay
- From age 18 to 21: ½ a week's pay

A reduction is applied in the final year before normal retirement age.

The calculations are made on the basis of basic pay and overtime is only included if it is guaranteed and required. There is a cap to the basic pay which can be claimed. The current maximum is £240 per week.

**Disqualification from Payment**

***You can lose your right to a redundancy payment if:***

- n you are offered your old job back or a suitable alternative and you unreasonably refuse
- n you are dismissed for gross misconduct during the redundancy notice
- n you resign before the end of the notice period

***Employer does not pay***

From October 2004, unless there are special circumstances (e.g. threats or continuing harassment by the employer) the employee must write to the employer raising a grievance and attend one or two meetings before complaining to an employment

tribunal about failure to pay redundancy payment.

The normal time limit of six months from the dismissal taking effect is extended by a further three months to allow this to happen. Compensation may be reduced if the applicant failed to follow the statutory grievance procedure.

If the employer is insolvent then statutory compensation will be paid. Some debts to former employees are treated as preferential and liquidators may be able to meet the claim. Seek legal advice from the union in such cases.

### **Protective Awards**

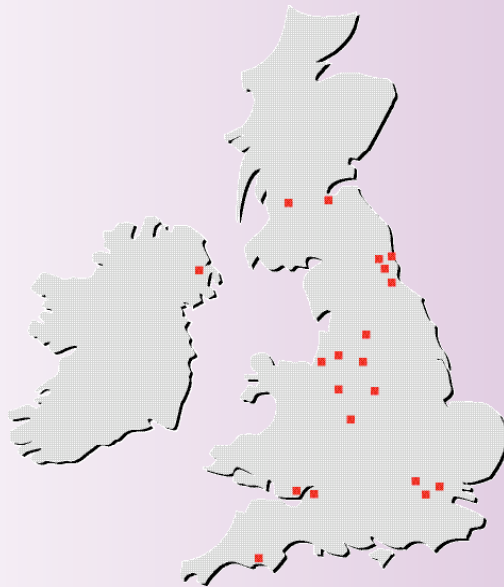
Before making 20 or more employees redundant the employer is required to consult at the earliest opportunity with any independent trade union which is recognised for collective bargaining or, where no union is recognised, with elected representatives.

Appropriate information must be provided to the union and the employer has to consult with a view to reaching an agreement. If the employer fails to do so, 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 dismissals take effect.

**Thompsons is the largest specialised personal injury and employment rights law firm in the UK with an unrivalled network of offices and formidable resources.**

**We run over 70,000 cases a year and secure more compensation for injured people than any other law firm.**



**HEAD OFFICE**  
**Congress House**  
020 7290 0000

**BELFAST**  
028 9089 0400

**BIRMINGHAM**  
0121 2621 200

**BRISTOL**  
0117 3042400

**CARDIFF**  
029 2044 5300

**DURHAM**  
0191 3845 610

**EDINBURGH**  
0131 2254 297

**GLASGOW**  
0141 2218 840

**HARROW**  
020 8872 8600

**ILFORD**  
020 8709 6200

**LEEDS**  
0113 2056300

**LIVERPOOL**  
0151 2241 600

**MANCHESTER**  
0161 8193 500

**MIDDLESBROUGH**  
01642 554 162

**NEWCASTLE-UPON-TYNE**  
0191 2690 400

**NOTTINGHAM**  
0115 9897200

**PLYMOUTH**  
01752 253 085

**SHEFFIELD**  
0114 2703300

**SOUTH SHIELDS**  
0191 4974 440

**STOKE ON TRENT**  
01782 406 200

**[www.thompsons.law.co.uk](http://www.thompsons.law.co.uk)**

19926/0804/30ERU