

Guide to unfair dismissal

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Guide to unfair dismissal

This guide covers:

- the right not to be unfairly dismissed;
- who can bring a claim?
- components of a fair dismissal;
- potentially fair reasons for dismissal;
- automatically unfair reasons for dismissal;
- reasonableness of the dismissal;
- fair procedure;
- constructive unfair dismissal;
- claims in the employment tribunals;
- remedies; and
- settlement of claims.

The right not to be unfairly dismissed

Employees have the statutory right not to be unfairly dismissed. The right is contained in the Employment Rights Act 1996 (ERA) and gives employees this protection in addition to their basic contractual rights.

An employee who considers that they have been unfairly dismissed may bring a claim in an employment tribunal.

Who can bring a claim?

To bring a claim for unfair dismissal an individual must:

- be an employee (workers and independent contractors are not covered); and
- have two years' continuous service with the employer.

However, there are important exceptions to these general requirements which mean that, in some circumstances, an employee does not need any qualifying period of continuous service to bring a claim.

To bring a claim, the employee must also have been "dismissed". "Dismissal" means:

- termination of the contract by the employer, with or without notice;
- the expiry or non-renewal of a fixed-term contract of employment; and

- where the employee terminates the contract (with or without notice) in circumstances such that they are entitled to do so because of the employer’s conduct (usually known as “constructive dismissal” – see [Constructive unfair dismissal](#) below).

If the employer dismisses the employee by giving them no notice or less than the statutory minimum notice period, the effective date of dismissal, for the purposes of calculating whether the employee has the requisite period of continuous service required to bring a claim for unfair dismissal, is the date on which the statutory minimum notice period would have expired. If the employee is constructively dismissed, the extra time is also added to their effective date of dismissal. The extra time is not added where the employer was entitled to dismiss without notice, for example, if the employee was guilty of gross misconduct.

The statutory minimum notice period is:

Period of service	Minimum period of notice
One month or more but less than two years	Not less than one week
Two years or more	One week for each complete year of service, up to a maximum of 12 weeks’ notice

Components of a fair dismissal

To constitute a fair dismissal:

- the reason (or the main reason) for dismissal must be one of the potentially “fair” reasons set out in the ERA; **and**
- the employer must have acted reasonably in all the circumstances (including the size and the administrative resources available to the employer) in treating that reason as a sufficient reason for dismissing the employee; **and**
- the employer must have followed a fair procedure in effecting the dismissal.

Potentially fair reasons for dismissal

There are five potentially fair reasons for dismissal:

- the employee’s incapability or lack of qualifications (which includes poor performance) to do the work they were employed to do;
- the employee’s misconduct;
- redundancy;
- that it would breach a statutory provision or duty to continue to employ the employee (which is uncommon); or

- some other substantial reason (SOSR) justifying dismissal of an employee in that job.

Automatically unfair reasons for dismissal

A dismissal will be automatically unfair if the reason (or, if more than one, the principal reason) for the dismissal is one of a number of prescribed reasons. These include:

- pregnancy, taking maternity/parental leave or time off for dependants*;
- performing certain health and safety activities*;
- asserting a right under the Working Time Regulations 1998 (for example, the right not to work more than 48 hours per week)*;
- exercising or seeking to exercise certain rights in relation to the right to request to be accompanied at disciplinary and grievance hearings*;
- having served or having been called for jury service*;
- making or threatening to make a protected disclosure (whistleblowing)*;
- exercising or asserting rights in relation to flexible working*;
- asserting certain statutory rights*;
- that the employee has a criminal conviction which is in fact deemed to be spent under the Rehabilitation of Offenders Act 1974;
- asserting the rights of a part-time worker*;
- asserting the rights of a fixed-term employee*;
- refusal by shop/betting workers to work on Sunday in certain circumstances*;
- selection for redundancy on any of the above grounds*.

Dismissals in relation to other matters including industrial action, trade union activity, acting as an employee representative, national minimum wage and rights in relation to tax credits are also automatically unfair in certain circumstances.

*For the categories of automatic unfair dismissal (or for selection for redundancy on those grounds) marked with an asterisk in the list above (and some others not listed above), there is no minimum service requirement for individuals to bring a claim.

Reasonableness of the dismissal

Even if an employer has a potentially fair reason for dismissal, they must still act reasonably in dismissing the employee for that reason. The employer's size and administrative resources will be relevant, as will all the circumstances of the particular case.

An employer must: (i) [follow a fair procedure](#); and (ii) their decision to dismiss the employee must fall within the [range of reasonable responses](#) that a reasonable employer in those circumstances and in that business might have adopted.

Fair procedure

Although the details of the procedure to be followed will depend on the reason why the employer is considering dismissal, the key principles of procedural fairness are that an employee should: (i) know that they are at risk of dismissal and the reasons why; (ii) be given an opportunity to make representations; and (iii) in some cases, be offered a right of appeal.

Acas Code of Practice

The [Acas Code of Practice on disciplinary and grievance procedures](#) applies to “disciplinary situations”, which includes misconduct and poor performance dismissals.

Failure to follow the Acas Code will not itself lead to a finding of unfair dismissal, although it must be taken into account by tribunals in relevant cases in deciding whether an employer has followed a fair procedure.

The Acas Code is concise, principles based and aims to provide employees and employers with basic practical guidance. It focuses on the key principles that underpin the handling of disciplinary and grievance situations in the workplace.

The Acas Code does not apply to redundancy dismissals or to the non-renewal of fixed-term contracts on their expiry, although employers will still need to follow a fair procedure when dismissing employees for these reasons. For more information on procedural fairness in redundancy dismissals, please see our [Guide to redundancy](#).

The Acas Code sets out basic requirements of fairness and states that “*it is intended to provide the standard of reasonable behaviour in most instances*”. In particular, the Code provides that:

- both employers and employees should raise and deal with issues promptly and act consistently;
- employers should carry out necessary investigations;
- employees should be informed of the basis of the problem and have a chance to set out their case and answer any allegations that have been made;
- employees should be offered the right of appeal; and
- employees retain the statutory right to be accompanied at disciplinary and grievance meetings.

The Acas Code envisages a three stage disciplinary process, with each stage following the basic principles set out above. For a first instance of misconduct or poor performance, a written warning will usually be appropriate. A failure to improve would then lead to a final written warning, with dismissal only following if there was a continued failure to improve after the final written warning. The Code acknowledges that in some circumstances a first instance of misconduct or poor performance may be sufficiently serious to warrant a final written warning and that in cases of gross misconduct, summary dismissal without any prior warnings may be appropriate. However, the Code clearly expects the three stage process to be followed in most cases.

Acas guide to discipline and grievances at work

The Acas Code is accompanied by non-statutory guidance which has been prepared by Acas to help employers and employees understand the Code. Employment tribunals are not required to take the guide into account although, in practice, it is likely to be a valuable source of reference. The guide contains good practice advice to assist employers and employees dealing with discipline and grievances at work including on matters such as preparing for disciplinary meetings, an employee's right to be accompanied and the need to retain written records. For further information on the right to be accompanied, please see our [Guide to the right to be accompanied](#).

Contractual procedures

Occasionally, employers adopt contractual dismissal or disciplinary procedures. A failure to follow any such contractual procedure is likely to render a dismissal unfair (and probably also wrongful ie in breach of contract).

Constructive unfair dismissal

A constructive unfair dismissal claim arises where there is a repudiatory breach by the employer of an express or implied term of the contract of employment. Such a claim can be based on one single act by the employer, or a series of acts by the employer that, taken individually, may not be sufficient but in their totality amount to a fundamental breach of trust and confidence between the employee and their employer. In either case, such a breach entitles the employee to resign in response to that breach and bring a constructive unfair dismissal claim (subject to having the requisite period of continuous service). This is in addition to any other claim the employee may have as a result of the employer's breach of contract eg wrongful dismissal and/or a discrimination claim.

Claims in the employment tribunals

An employee may bring an unfair dismissal claim against their employer in the employment tribunals.

The time limit for presenting an unfair dismissal claim is three months from the "effective date" of dismissal. The effective date is:

- if notice is given by the employee or the employer, the date on which that notice expires;
- if no notice is given, the date on which the employment is ended;
- where the employment ends due to the expiry of a fixed-term contract without it being renewed, the date the term expires.

The tribunal may extend time where it was not "reasonably practicable" for the claim to be presented in time. The time limit may also be extended through participation in the Acas early conciliation scheme.

Remedies

An employee who is found to have been unfairly dismissed has the potential remedies set out below.

Reinstatement or re-engagement

Reinstatement is an order that the employee must be treated by the employer as if they had not been dismissed. This means that they get their old job back, together with all seniority and service rights as if they had not been away from work.

Re-engagement is an order that the employee is re-engaged by the employer or an associated employer in comparable employment or other suitable employment.

In these instances, the employee is also compensated for back pay and benefits from the date of dismissal. If an employer does not comply with these orders, additional compensation can be awarded of between 26 and 52 weeks' pay. Reinstatement and re-engagement orders are in practice very rarely made (on average, in less than 2% of tribunal cases).

Compensation

Any compensation awarded is usually made up of (i) a **basic award** (or statutory redundancy payment in redundancy situations); and (ii) a **compensatory award**.

Basic award

A basic award is calculated as follows:

- ½ a week's pay for each complete year of service in which the employee is aged 21 or below;
- one week's pay for each complete year of service in which the employee is aged between 22 and 40; and
- 1½ weeks' pay for each complete year of service in which the employee is aged 41 or over.

In all cases a week's pay is capped at the statutory maximum, currently £700 for dismissals occurring on or after 6 April 2024. The maximum number of years' service that may be taken into account is 20, meaning that the maximum basic award is currently £21,000 for dismissals occurring on or after 6 April 2024.

There is a minimum basic award for certain types of dismissal.

Statutory redundancy payment

If an employee is dismissed by reason of redundancy, they are entitled to a statutory redundancy payment instead of a basic award if they have two or more years' service. The statutory redundancy payment is calculated in the same way as the basic award.

Compensatory award

A compensatory award is an amount based on what the tribunal considers to be just and equitable by reference to the loss sustained by the employee in consequence of their unfair dismissal. Loss can include:

- expenses reasonably incurred as a result of the dismissal;
- loss of benefits including loss of pension rights;
- loss of net earnings from dismissal to date of hearing;

- future loss of net earnings; and
- a sum reflecting loss of statutory rights (usually around £250).

In most cases the compensatory award is capped. For dismissals occurring on or after 6 April 2024, the compensatory award is capped at the lower of 52 weeks' pay and the statutory cap of £115,115.

A week's pay for these purposes is to be calculated in accordance with the ERA and is generally accepted to be the gross amount of an employee's basic pay only per week, excluding supplemental amounts such as bonuses and overtime.

There is no cap on the compensatory award for unfair dismissals (or selection for redundancy) for reasons relating to (i) health and safety and (ii) public interest disclosures (whistleblowing).

Reductions in compensation

Tribunals have the discretion to reduce awards in certain circumstances (sometimes to nothing). These include:

- where the Acas Code is relevant, any award made to an employee may be reduced by up to 25% if the tribunal considers the employee has unreasonably failed to comply with the Code;
- if the employee has not taken reasonable steps to mitigate their losses (for example, by finding another job);
- contributory fault by the employee ie that the employee's own actions contributed in part to their dismissal – compensation will be reduced on a percentage basis depending on the employee's conduct and may be up to 100%;
- if the employee would have been dismissed even if the appropriate procedure had been followed (for example, if redundancy was inevitable);
- if misconduct took place before dismissal which was only discovered after the date of dismissal; and
- if the employer has made certain payments to the employee, for example, a payment in lieu of notice.

Increase in compensation

If the Acas Code is applicable to the claim, tribunals will have discretion to increase any award made to an employee by up to 25% if it considers the employer has unreasonably failed to comply with the Code.

Settlement of claims

As a statutory claim, unfair dismissal may only be settled via a settlement agreement or through an ACAS conciliation officer.

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Further resources

Acas's [Code of Practice on disciplinary and grievance procedures](#)

Acas's [guide to discipline and grievances at work](#)

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