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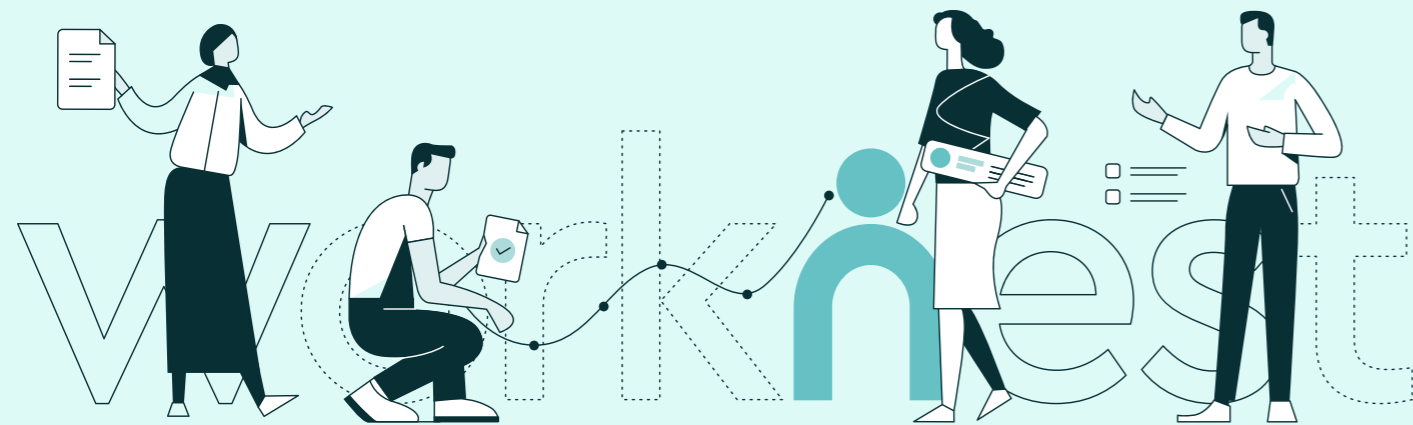
A guide to

Fair and Unfair Dismissals



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When it comes to dismissing an employee, there are right and wrong ways to go about it. Get it wrong, and you could find yourself in an Employment Tribunal.

With the average award for unfair dismissal sitting at £13,749, missteps can be costly. This short guide aims to help you understand the key elements of a fair dismissal and, crucially, what might make a dismissal unfair, so that you can avoid legal pitfalls. We'll also explore the other types of dismissal employers must be alert to, including automatic unfair dismissal, constructive dismissal, and wrongful dismissal, and how to reduce your risk of these claims.



Important

In October 2024, the Labour government published the Employment Rights Bill, which will see significant changes to many areas of employment law, including in relation to unfair dismissal. The most significant change is that protection from unfair dismissal will become a 'day one' right. However, it seems highly likely that there will be some caveats to this, where an employee is in their probationary period.

At the time of writing, how, and what, this will look like remains to be seen. In any event, based on current indications of timeframes, this change will not come into force until 2026.

What is a fair dismissal?

In order for a dismissal to be fair, employers must:

1. Have a valid reason to dismiss

The Employment Rights Act 1996 lists **five potentially fair reasons** for dismissal.

These are:

1. **Conduct:** Conduct-related reasons may include theft, fraud, bullying, or negligence. This could be either one serious incident that warrants dismissal for a first offence (i.e. gross misconduct) or a series of minor offences like persistent lateness.
2. **Capability:** Dismissal can be related to the employee's capability or qualification for the role, such as long-term sickness absence or performance concerns.
3. **Redundancy:** Dismissal may occur due to redundancy, such as in the event of a business closure or role elimination.
4. **Statutory restrictions:** Dismissal may become necessary if continuing to employ the person would break the law, such as a driver losing their driving licence.
5. **"Some other substantial reason":** If none of the above potentially fair reasons for dismissal apply, employers may be able to dismiss an employee for some other substantial reason (SOSR). There is no statutory definition or official guidance on SOSR, but it generally acts as a 'catch-all' category. Examples of SOSR dismissals include cases where an employee receives a long prison sentence, their conduct outside of work damages the employer's reputation, or they refuse to accept changes to their contractual terms.



Important

SOSR is **not** a green light to dismiss employees who you don't particularly like.

2. Act reasonably in the circumstances

From a legal standpoint, it's not enough that the employer has a valid reason to dismiss; you must also be able to demonstrate that you acted reasonably in the circumstances.

While there is no legal definition of "reasonableness", in determining whether a dismissal was fair, an Employment Tribunal will consider a number of factors, including whether the employer followed a fair procedure. For example, did they:

- Properly **investigate the issues** and consider mitigating circumstances?
- Inform the employee of the **issues in writing** and notify them of the potential for dismissal?
- Conduct a **disciplinary hearing** with the employee to give them an opportunity to respond?
- Allow the employee to be **accompanied** at any hearings?
- Inform the employee of the **decision to dismiss in writing**?
- Give the employee the chance to **appeal**?

In addition to these components of a fair dismissal procedure, a Tribunal will consider:

- Whether the decision to dismiss fell within the **band of reasonable responses**. For example, even if the employer does have grounds for dismissal, would an informal discussion, letter of concern or written warning have been more appropriate?
- Whether the employer **set clear standards** of conduct and performance.
- Whether the employee could be expected to **understand the consequences** of their behaviour.

- Whether the employer's **policy has been applied consistently and fairly**. In other words, how were similar offences dealt with in the past?

Important

Even if the employer follows a fair dismissal procedure, the employee may have certain **protected characteristics** that still render the dismissal unfair.



What makes a dismissal unfair?

A dismissal will be considered unfair if:

1. The reason for dismissal **does not fall under the scope of one of the five potentially fair reasons** for dismissal outlined above;
2. The employer **did not follow a fair disciplinary or dismissal process**; and/or
3. The decision to dismiss was **outside the range of reasonable responses** open to the employer.

In cases of misconduct or performance concerns, employers should follow the procedures set out in the [Acas Code of Practice on Disciplinary and Grievance Procedures](#), as an Employment Tribunal will take this into account when assessing whether an employer has acted reasonably.

If it is found that an employer has *unreasonably* failed to follow the relevant procedure in the Code, a Tribunal may consider that the dismissal is unfair.

Likewise, in redundancy situations, the main elements to a fair redundancy process are:

- Warning employees of redundancies;
- Creating and applying fair and non-discriminatory scoring criteria; and
- Consulting with employees and exploring suitable alternative employment options.

If you fail to follow a fair selection or consultation process, you may find that the dismissal is deemed unfair.

An employee with at least two years' service may be able to submit a claim to a Tribunal for unfair dismissal. Claims must generally be submitted within three months of the date the employee's employment was terminated.



Did you know?

If an Employment Tribunal finds that the employee has been unfairly dismissed, it may order reinstatement, re-engagement or compensation.

For unfair dismissal claims, compensation is divided into two parts: the basic award (currently capped at £19,290) and the compensatory award (currently capped at £105,707 or 12 months' gross pay, whichever is lower). However, if the dismissal is *automatically* unfair, compensation is uncapped.

What is automatic unfair dismissal?

In some cases, dismissal will be automatically unfair. This means that the reason for the dismissal is considered unlawful by law, regardless of the employer's process or actions.

For example, employers cannot legally dismiss an employee, or select them for redundancy, if the main or sole reason for their dismissal is that they are pregnant, on maternity or paternity leave, or exercising any of their statutory rights in respect to this.

Likewise, it is automatically unfair to select or dismiss an employee for any reason connected to them:

- Making a **protected disclosure** (whistleblowing);
- Refusing to work or undertake certain duties due to **health and safety concerns**;
- Trying to assert a **statutory employment right** (such as refusing to perform certain activities that would breach the Working Time Regulations);
- Having **part-time status**;
- Participating in **Trade Union activities**, including taking part in industrial action or acting as an employee representative; or
- Requesting to **work flexibly**.

Warning

In normal circumstances, employees must have two years' service to bring a claim for unfair dismissal. However, in cases of automatically unfair dismissal, the usual time constraints don't apply. Therefore, if any of the above reasons for dismissal apply, an individual can usually bring an unfair dismissal claim irrespective of length of service, and regardless of whether you have acted reasonably or not.

What's more, because employers cannot justify or defend a dismissal which is automatically unfair, it is significantly easier for an employee's claim to succeed. And, unlike ordinary unfair dismissal, there's **no maximum compensation limit** if the dismissal is automatically unfair, greatly increasing financial risk to employers.

To avoid automatic unfair dismissal claims:

- ☑ Understand the protected characteristics under the Equality Act 2010 and ensure that dismissal decisions are not based on these factors.
- ☑ Implement and adhere to fair and transparent disciplinary procedures, allowing employees to respond to any concerns before a dismissal decision is made.
- ☑ Avoid retaliatory dismissals for actions such as making discrimination complaints or requesting flexible working arrangements.

What is constructive dismissal?

Not all dismissals involve an employer directly terminating an employee. Sometimes, an employer's actions create such a hostile working environment that the employee feels forced to resign. This is known as constructive dismissal.

Constructive dismissal can occur when, for example, the employer breaches a fundamental term of the employment contract or behaves in a way that makes it impossible for the employee to continue working.

In these situations, even though the employee wasn't directly dismissed, their resignation is treated as a dismissal since it wasn't a voluntary decision. As such, they are entitled to resign without providing notice and may bring a claim for constructive dismissal.

In order for a claim to succeed:

- **There must be a fundamental breach of contract by the employer.** In other words, the employer's actions must be serious enough that the employee is left with no option but to resign.
- **The employee's resignation must be as a direct result of an actual or anticipatory breach.** An anticipatory breach – whereby the employer indicates their intention not to perform their obligations – negates the employee's responsibility to perform their requirements under the contract.

- **The employee would be expected to have actually left their job in relation to the breach.** If they remain with the employer too long following the breach, it may be considered that they have accepted the conduct and 'affirmed' the contract. Failure to leave may also undermine the employee's claim that the relationship become so unbearable that they could not continue working for the employer.

Did you know?

In order for constructive dismissal to apply, the employer's actions must breach a fundamental term that goes to the root of the employee's contract.

This covers both express terms (those that are explicitly outlined in the employee's contract or that have been verbally agreed by the parties) and implied terms (those that are not written down but that are still understood to exist because of the conduct of the parties).

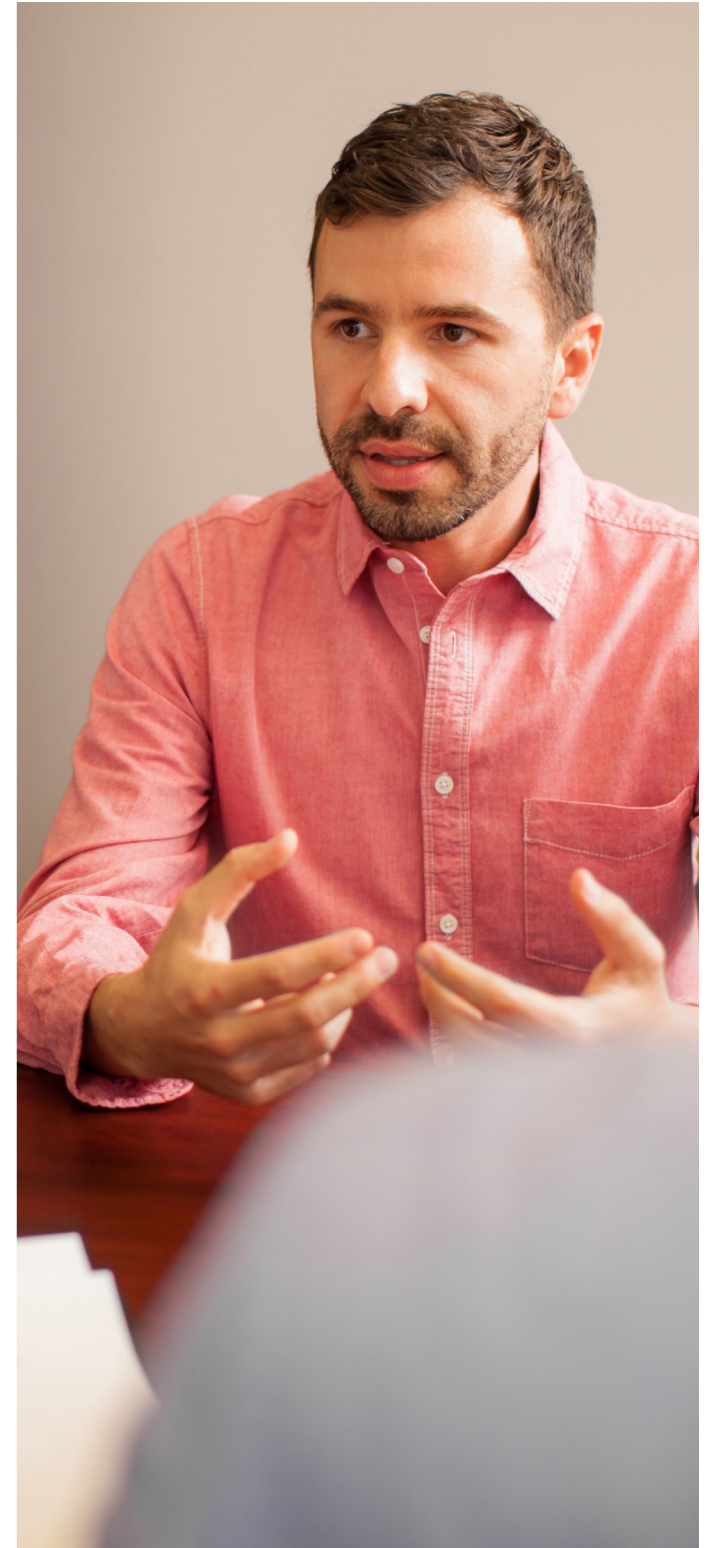
The most commonly cited implied term in constructive dismissal claims is the duty of mutual trust and confidence. While this is a mutual duty, most claims citing breach of trust and confidence are brought by employees.

Common causes of constructive dismissal include:

- Refusing to pay an employee contractual overtime;
- Taking away an employee's contractual benefits;
- Demoting an employee without reasonable and proper cause;
- Reducing an employee's hours;
- Failing to address an employee's grievance;
- Requiring an employee to relocate to another site without proper notice; and
- Not providing a safe working environment.

To avoid constructive dismissal claims:

- ☑ Make sure that you and your managers are familiar with the terms and conditions of your contracts and are careful not to take any steps that may violate them.
- ☑ If you wish to make changes to a contractual term, discuss this with the employee first. Unilateral changes can contribute to a feeling of unfair treatment, leading to constructive dismissal claims.
- ☑ Train managers to spot workplace problems and intervene at the earliest possible opportunity to prevent them from escalating.
- ☑ Encourage employees to raise a formal grievance if they have a complaint. This can limit the risk of employees feeling that the only way to rectify the problem is to resign.



What is wrongful dismissal?

While unfair dismissal relates to the fairness of the employer's actions and procedures, wrongful dismissal occurs when an employer breaches the terms of an employee's contract, usually by failing to provide the required notice period.

Employees can claim damages for the pay and benefits they would have received if the contract had been followed. Unlike unfair dismissal, there is no minimum service requirement to make a wrongful dismissal claim, and these claims can be brought to the County Court, High Court, or an Employment Tribunal.

To avoid wrongful dismissal claims:

- ✓ Adhere to the terms outlined in the employee's contract of employment, including notice periods and other dismissal procedures.
- ✓ Always give the appropriate notice period as specified in the contract, unless there are exceptional circumstances that justify immediate dismissal.
- ✓ Clearly communicate and document any relevant company policies regarding dismissal, ensuring employees understand their contractual rights and obligations.

Get dismissal right: speak to a professional

Dismissal is often more complicated than employers expect, and given the legal complexities involved, the potential for missteps is high.

Before taking action, speak to our Employment Law and HR experts. They can guide you through the appropriate procedure, offer tailored advice to ensure the dismissal is legally compliant and fair, and highlight any risks involved.

Contact our team today for personalised, professional support.

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