

Real Business

Experts explain: An SME guide to unfair dismissal

6 January 2021

We turned to the experts for advice on how to ensure you stay within the law when dismissing employees. Hear direct from top legal experts who specialise in unfair dismissal.

“The key to a fair dismissal is often following the correct processes,” says James Tamm, Director of Legal Services at employment law and HR support firm Ellis Whittam. “Each potentially fair reason for dismissal has its own considerations but a fair procedure will be crucial to them all.”

What is unfair dismissal?

“Unfair dismissal is where an employee’s contract of employment is terminated, and it can be shown to be unfair,” says Shola Khan of Roythornes Solicitors. Generally speaking, employers can terminate employment in the following circumstances:

- Employee misconduct;
- Employee capability or qualification issues;
- A genuine redundancy situation;
- A statutory requirement; or
- Some other substantial reason.

“Employees can make a claim for unfair dismissal if they are an employee (including part time and fixed term employees) and have worked for their employer for two years or more (subject to automatic unfair dismissal claims where there is no length of service requirement).”

“Even if the business has a fair reason for dismissal, an employee may still have a claim for unfair dismissal if the business used an incorrect or flawed procedure when dismissing the employee,” says Anita Kalra, Managing Director of KLG Law.

Echoing James Tamm, she too stresses the importance for “businesses (to) tread carefully when making dismissals to avoid potential claims.”

The three types of unfair dismissal

“Unfair dismissal claims can be summarised into three different types,” Kalra explains:

1. **Unfair dismissal where an employee with at least two years of continuous service is dismissed without fair reason or/and fair procedure.** “The key for this claim is the length of service requirement. Without this, the employee is not eligible to bring a claim under current legislation.”
2. **Claim for constructive unfair dismissal.** “This is where the employee has resigned from their position due to the employers conduct. The conduct must be sufficiently serious to warrant a resignation and again the employee must have at least two years of continuous service.”

3. **Automatic unfair dismissal.** “This is where an employer has dismissed an employee in breach of a statutory right. For example, if an employee has been dismissed for whistleblowing or if an employee has been dismissed for a discriminatory reason. In these circumstances, employees can bring a claim equivalent to unfair dismissal without the requirement of two years of continuous service.”

“Many people think you can dismiss someone without risk if they have less than two years’ service,” says Joanne Moseley, Senior Associate at Irwin Mitchell. “It’s true that, generally, someone needs to have worked for their employer for at least two years before they are able to bring a complaint of unfair dismissal. But there are important exceptions where a dismissal is treated as automatically unfair even if it occurs on the first day of employment.

“There are a surprisingly high number of reasons that are treated as automatically unfair in the context of a dismissal.

“For example, if your employee announces she is pregnant and you decide to dismiss her because she will be taking a period of maternity leave that will cause disruption to your business, that will be treated as an unfair dismissal and pregnancy discrimination.

“Both of these claims are ‘day one’ rights. Similarly, if you dismiss your employee for having made a protected disclosure under the whistleblowing provisions, they’ll be able to claim automatic unfair dismissal even if they have only been employed for a month.”

“Automatically unfair dismissals are a really bad day at the office” – Kevin McNerney, barrister at St John’s Buildings

“There is no maximum compensation,” says McNerney. “These dismissals are where the reason or, if more than one reason, the principal reason is one that is specifically prohibited by law. For example, if a whistleblower is dismissed for his allegations, that may well be false, then it’s unfair no matter what procedure was in place.

“Another reason that would trigger this sort of unfair dismissal is the employee made a request for flexible working.”

How does an employee make a claim?

“It is very easy for an employee to make a claim,” says James Tamm. “It can be done online and the claim form can be completed in a matter of minutes. Once that is done, the employer is in a process that can be difficult to stop.

“Even for the most spurious of cases, the tribunal will not dismiss the case out of hand. An employer will instead have to file a response then take part in a hearing to have the claim struck out.”

Shola Khan outlines the procedure employees must follow to make a claim:

1. Employees should note that the time to make a claim for unfair dismissal is three months (less one day) from the date that the dismissal took place.
2. The first step is to contact ACAS, who will offer the employee the option of ‘early conciliation’ which is a free service whereby ACAS offers both parties the opportunity to come to an agreement before going to Tribunal.
3. If early conciliation is unsuccessful, the employee should make a claim to the Employment Tribunal within the relevant timeframe.

Stephen Mutch, a director at Pannone Corporate LLP adds: "If the claim has been validly submitted then it will proceed to a formal hearing. This is held at one of the Employment Tribunal venues across the country and is conducted by an Employment Judge in a manner similar to most court cases."

"Each side must present its case using witness evidence and documentary evidence before a decision is made."

"Any witnesses can be cross-examined on their testimony. A typical unfair dismissal claim last for 1-2 days and takes between 6 and 12 months from the claim being submitted to a hearing."

Compensation – how much could an employee get?

Stephen Morrall, Partner at Hunters Law LLP:

"Where unfair dismissal is established, the available remedies are reinstatement, reengagement or compensation. Compensation will consist of:

- a basic award, calculated by reference to the employee's age, week's pay (capped at £538 gross) and length of service, up to £16,140;
- a compensatory award of an amount that it considers fair to compensate for financial loss up to the lower of £88,519 or 52 x a week's pay; and
- an additional award of between 26 and 52 weeks' pay if the employer does not comply with an order for reinstatement or reengagement."

What you can do to prevent an unfair dismissal claim

"It's crucial that, before taking any steps to dismiss staff, employers consider whether there is a link to any potential automatic unfair dismissal argument, to carefully frame the reason for dismissal and follow a fair procedure to ensure the employee is given an opportunity to present their case prior to a final decision being made," says Melanie Morton of Nelsons.

"Prevention is always better than cure," says Sally-Ann Hall-Jones, CEO at Reality HR, "and the best defence is to avoid getting into dismissal situations in the first place.

"This starts from the very beginning with recruitment processes that bring in people who are a good fit, and an induction that sets them off on the right foot."

"The ability to informally resolve any issues before they escalate can remove the need to dismiss an employee."

"Procedurally, employers should follow a disciplinary procedure that needs to comply with the ACAS Code on Disciplinary and Grievance Procedures. These specify that before dismissal – except for redundancy and fixed-term contract expiry – an employer should:

- Investigate and establish the facts of the case;
- Inform the employee of the problem;
- Invite the employee to a meeting at which they have the right to be accompanied by a colleague or a trade union representative; and
- Offer a right of appeal against the outcome.

"By taking the time to follow the correct procedures and ensuring the employee is given the opportunity to defend their role, an employer offers themselves the best chance of not being challenged for unfair dismissal."

“A strong foundation to preventing successful claims is having detailed and up-to-date employment contracts and a staff handbook in place, and reasonably following the procedures in them.” – Musab Hemsj, Partner at specialist HR solicitors LexLeyton

“What we find over and over again is that addressing workplace conflict is often avoided,” Alex Efthymiades, a director at Consensio, says. “This means that issues that may have been easily resolved, are left to fester and grow. And once relationships break down, things become formal very quickly.

“Any type of formal process tends to entrench parties further, because, instead of looking for win/win outcomes, it becomes about finding a victim and a perpetrator, not resolving a conflict amicably and collaboratively.

“The focus needs to be on the prevention of conflict. The culture of organisations needs to shift to embrace the early and informal resolution of conflict in a cooperative and non-blaming manner.”

Conclusion

“As an employer, you need to pay particular attention to the rules surrounding dismissals, especially given the current climate and issues brought on by Covid-19,” Shola Khan says.

Stephen Mutch concludes: “The very best thing that an employer can do to prevent a claim for unfair dismissal is take specific legal advice on their obligations as early as possible so that they know what is required and they can avoid what can be a costly and time-consuming legal dispute.