ELA - INTRODUCTION TO EMPLOYMENT LAW COURSE 2023

DISMISSAL

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1.1 What is a dismissal?

Section 95(1) of the Employment Right Act 1996 (**ERA**) defines dismissal as where:

(a) the contract under which an employee is employed is terminated by the employer (whether with or without notice);

(b) an employee is employed under a limited-term contract and that contract terminates without being renewed; or

(c) the employee terminates the contract under which they are employed (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct i.e. the employee is constructively dismissed.

Practical points to note:

1) Employers are often tempted by fixed-term contracts thinking they will escape liability for unfair dismissal and/or redundancy payments. However, once an employee has been employed for two years then any dismissal must be for a fair reason.

2) A fixed-term employee has additional protection under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 irrespective of their length of service.

3) Although an employee generally needs two years' continuous service to bring a claim for unfair dismissal, there are a number of "automatically unfair" exceptions to this and so as an adviser you need to be asking the right questions. These are discussed further below and are set out in the Appendix attached to this paper (**Appendix**).

4) In any claim for unfair dismissal the Employment Tribunal will look at the reasonable belief of the employer and whether their actions were within a "range of reasonable responses". This is in contrast to the criminal law test of "beyond reasonable doubt" and is also different to the test for wrongful dismissal and constructive dismissal (discussed below).

1.2 **What is not a dismissal?**

Not every termination will amount to a dismissal for the purposes of section 95(1) of the ERA. The following will not count as dismissals:

(a) **Resignations**: resignation from employment by the employee will not usually amount to a dismissal. However, there are some exceptions to this general rule namely:

(i) if the resignation amounts to a constructive dismissal;

(ii) the employee resigns with notice, but the employer goes on to dismiss them during that notice period (although the employee's losses would be limited to the remainder of the notice period); or

(iii) the employer gives notice of dismissal, but the employee goes on to resign during the notice period with shorter or no notice.

(b) **Termination by agreement**: there will be no dismissal if both parties consent to termination. However, if the employee is offered little choice in the matter (e.g. if they are put under pressure in a meeting to agree termination or face dismissal, without the benefit of legal advice), this may still amount to an actual or constructive dismissal. Voluntary redundancy will not count as a termination by agreement where there is a genuine redundancy situation (i.e. it will still amount to a redundancy dismissal).

(c) **Termination by operation of law**: this includes circumstances in which a contract is frustrated at common law. Frustration involves an event that makes performance impossible or radically changes the contract without either party being at fault (e.g. if the employee is sent to prison or is excluded from their place of work by a third party).

(d) **Vanishing dismissals**: where an employee is successful in an appeal against a dismissal decision, the dismissal "vanishes". The consequence is that the employee will be reinstated with their continuity of service preserved and they will be unable to pursue a dismissal claim. This is the case even where the employee says to the appeal decision maker that they do not wish to return to work. If an employee does not wish to be reinstated then they must unequivocally withdraw their appeal against the dismissal before the appeal is decided (see Marangakis v Iceland Foods Limited [2022] EAT 161).

1.3 **What is a "wrongful dismissal"?**

Wrongful dismissal is a dismissal in breach of contract. There is no service requirement attached to a wrongful dismissal claim. A dismissal may be "wrongful", regardless of the employee's length of service.

Most commonly, wrongful dismissal occurs where an employee is dismissed without notice, or without the correct notice as required by the employee's contract of employment. The

dismissal will not be wrongful if the employer can show that the employee had committed a repudiatory breach of contract justifying dismissal without notice.

The other most common forms of wrongful dismissal are:

- termination of a fixed-term contract before it is due to expire in circumstances which do not entitle the employer to dismiss summarily;
- termination of a contract for a specific task before the task has been completed;
- dismissal in breach of a contractual disciplinary procedure;
- dismissal in breach of a contractual redundancy procedure; and
- dismissal where the contract may only be terminated on certain specified grounds and the employer dismisses the employee on some other ground (see McClelland v Northern Ireland General Health Services Board, 1957 1 WLR 594, HL).

An employee who has been wrongfully dismissed is entitled to claim damages based on the position they would have been in had the contract been performed properly.

There may be a wrongful dismissal if there is an actual dismissal or a constructive dismissal.

Practical points to note

1) There is (currently) a limit of £25,000 for a breach of contract claim in the Employment Tribunal.

2) Highly paid employees will usually bring a claim in the Employment Tribunal for unfair dismissal but specifically exclude a claim for their notice period, instead bringing this in the County or High Court (so as to avoid the cap of £25,000).

3) If a wrongful dismissal claim is brought in the Employment Tribunal, then it is for the Employment Tribunal to consider the evidence and decide, for example, whether there had been a fundamental breach of contract justifying immediate dismissal. This is very different to the test for unfair dismissal where the test is the reasonable belief of the employer.

4) A wrongfully dismissed employee does not have to give credit for money earned during what would have been their notice period – this is known as the "Norton Tool" principle. However, the Norton Tool principle does not apply in constructive dismissal cases (see Stuart Peters Limited v Bell, 2009 ICR 1556, CA).

5) If the employer finds out *after* the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal, the employer may rely on this to defend a claim of wrongful dismissal (see Boston Deep Sea Fishing and Ice Co v Ansell, 1888 39 ChD 339, CA).

6) The conduct relied upon by the employer for the purpose of defending a wrongful dismissal claim need not be recent as Williams v Leeds United Football Club, 2015 IRLR 383, QBD confirmed. In this case, an employee was deprived of his notice and redundancy after his employer, having trawled through his emails after his dismissal, found inappropriate emails to junior employees from 5.5 years previously.

7) However, an employer cannot rely on a separate breach of contract to escape liability for a debt that has already accrued under the contract. In Cavenagh v William Evans Ltd, 2012 ICR 1231, CA, the Court of Appeal held that the employer remained liable to pay an employee dismissed under a contractual pay in lieu of notice (**PILON**) clause, even though the employer later discovered that the employee had breached the contract before the employer had invoked the clause. The Court held that when the employer lawfully terminated the contract under the PILON clause a debt accrued to the employee. This was not extinguished by the later discovery of his prior misconduct.

8) In some cases, a wrongful dismissal claim may be more appropriately presented in the County or High Court rather than the Employment Tribunal. This includes where one or more of the following apply:

   i. the employee is highly paid and has a long notice period or is on a fixed-term contract with no early termination clause;

   ii. the employee has insufficient qualifying service for an unfair dismissal claim or is in an excluded category of employment;

   iii. the dismissal is wrongful but fair (e.g. a dismissal for genuine redundancy, but with inadequate notice);

   iv. there is a likelihood that, even if the dismissal were found to be unfair, compensation would be substantially reduced because of the employee's contributory conduct. There can be no deduction for contributory conduct in a successful action for wrongful dismissal;

   v. the employee is out of time to present an unfair dismissal claim. The unfair dismissal time limit is three months (subject to Acas early conciliation), while the limitation period for an action for breach of contract in the County or High Court is six years; and/or

   vi. the employee is seeking a remedy such as an injunction or declaration. The Employment Tribunal has no power to award such remedies.

1.4 What is "constructive dismissal"?

An employee is "constructively dismissed" where that employee is essentially forced to resign because of their employer's actions. A constructive dismissal may be wrongful, unfair or both.

To succeed in a constructive dismissal claim, an employee has to satisfy the following conditions:

(a) there must be a fundamental breach of contract by the employer;

(b) the breach must be sufficiently serious to justify the employee resigning or be the last in a series of incidents which justify the employee leaving;

(c) the employee must leave because of the employer's breach; and

(d) the employee must not affirm the contract.

Practical points to note

1) As a matter of law, an employee can resign on notice and still bring a claim for constructive unfair dismissal. In Cockram v Air Products Plc, 2014 ICR 1065, the employee claimed he had *not* affirmed the contract for the purposes of a constructive unfair dismissal claim when he resigned and gave more notice than he was required to give. The EAT said that under common law principles it has been held that a party faced with the choice of accepting a repudiatory breach (meaning the contract is at an end) or affirming the contract (meaning the contract continues), must usually resign without notice otherwise they may be taken to have affirmed the contract. However, the EAT went on to say that while the giving of notice to terminate may amount to affirmation of the contract at common law, it does not, by itself, constitute affirmation for the purposes of a constructive unfair dismissal claim.

2) If an employee *does* resign on notice, there is a risk that they will lose the ability to claim that they are free of any restrictive covenants because they may be deemed to have affirmed the contract. However, it is worth noting that in Quilter Private Client Advisers Ltd v Falconer, 2020 EWHC 3294 QB, the High Court doubted the approach in Cockram. The Court held that, provided the employee makes their objection to what has been done by the employer *"unambiguously clear"*, they are not necessarily to be taken to have affirmed the contract by giving a short notice period, and continuing to work and draw pay for a limited period of time. It would depend on the facts of each case and whether the employee has accepted the repudiation *"unambiguously and with sufficient dispatch".* The length and circumstances of the delay would need to be examined in each case.

3) The test for the Employment Tribunal or Court is not whether the conduct of the employer came within a "range of reasonable responses". This only comes into operation when considering the employer's fair reason for dismissal. In a constructive dismissal claim, the Employment Tribunal or Court must consider all of the facts and apply the test outlined above, i.e. has there been a fundamental breach of contract, was the breach sufficiently serious, did the employee resign in response and have they affirmed the contract?

4) In the case of a claim presented in the Employment Tribunal, where the employee can also pursue an unfair dismissal claim, when submitting an ET3 an advisor should always plead in the alternative e.g. *"if the Employment Tribunal finds that there was a dismissal then the respondent will say this was for a fair reason namely e.g. conduct."*

5) A fundamental breach of contract cannot be "cured". For example, just because an employer upholds a grievance, this does not mean the employee loses the right to claim constructive dismissal. However, in a constructive dismissal claim the Employment Tribunal or Court will look very carefully at whether the employee has delayed too long and, therefore, affirmed the contract. In Flatman v Essex County Council, 2021 UKEAT 0097/20/1201, the EAT held that where the actions of an employer amount to a fundamental breach of contract, nothing that the employer does after that point can cure that breach.

6) A repudiatory breach must be *an* effective cause of the resignation and does not have to be *the* effective cause e.g. it must have played a part in the decision (see Wright v North Ayrshire Council, 2014 ICR 77).

7) In Chindove v Morrisons Supermarket Plc, 2014 UKEAT 0201/13/2603, it was held that although a delay in resigning could often prove fatal, as the employee is deemed to have accepted the breach of contract, the EAT in this case said it was not so much the length of time but the reason for the delay and the actions of the employee. If the employee makes it clear he is unhappy and also is a person with family responsibilities and a need to have another job before leaving, then this may mean that delay is not fatal to the claim.

8) In Mari v Reuters Ltd, 2015 UKEAT 0539/13/3001, the EAT held that an employee had affirmed the contract where she had been off sick for 18 months and delayed her resignation until the end of that period. Further, during that period she had: (i) accepted 39 weeks' sick pay; (ii) repeatedly asked to access and use her work email account; (iii) enquired about permanent health insurance; and (iv) attended various welfare meetings. On the facts, these actions were said to demonstrate her wish for the contract to continue. However, the EAT noted that there may be *exceptional* cases where an employee is so ill that they are unable to resign promptly in response to the breach and where it would be unjust or unrealistic to hold that acceptance of sick pay amounted, or contributed, to affirmation of the contract.

9) In Kaur v Leeds Teaching Hospital NHS Trust, 2018 IRLR 833, the Court of Appeal confirmed that even where historical breaches have been affirmed, provided that the employee resigns in response to the "final straw", the affirmed breaches may still be taken into consideration in ascertaining whether the employee has been constructively dismissed.

10) In Gordon v J&D Pierce (Contracts) Ltd, UKEATS/0010/20/SS, the EAT held that for the purposes of a constructive dismissal claim, an employee did not affirm his contract by engaging in his employer's grievance procedure.

11) In Retirement Security Ltd v Wilson, 2019 UKEAT 0019/19/1107, the EAT held that an unreasonable investigation into allegations of misconduct can lead to a claim for constructive dismissal.

12) In Williams v Alderman Davies Church in Wales Primary School, 2020 UKEAT 0108/19/2001, the EAT stressed it was important to look at the series of conduct when considering whether there had been a repudiatory breach of contract. In this case the Tribunal found that the final straw was not, in fact, a final straw but, nevertheless, found that the employer had committed a fundamental breach. The EAT said that having made those findings of fact, they had to conclude there was a constructive dismissal.

13) In Chemcem Scotland v Ure, 2020 UKEAT 0036/19/1808, the EAT held that an employee's failure to return to work after her maternity leave constituted communication of her decision to treat the employer's repudiatory breaches as having terminated the contract, even though she said nothing to the employer. The EAT said that, ordinarily, it would be necessary for an employee to communicate a decision not to return to work. However, the employee's decision in this case was clear and the employer could not have been in any doubt about her intention.

1.5 **What is unfair dismissal?**

The right not to be unfairly dismissed is a statutory right and is, therefore, independent of the employee's contractual rights. It cannot be contracted out of, and, like a discrimination or whistleblowing claim, any claim for unfair dismissal can only be settled through a valid settlement or COT3 agreement.

Employers that dismiss an employee without a fair reason and/or without following a fair procedure lay themselves open to a claim for unfair dismissal. Even if there is a dismissal for a fair reason, it can still be unfair if a fair process has not been followed or the sanction is outside a range of reasonable responses.

In order for a dismissal to be "fair"::

i. it must be for one of the five potentially fair reasons set out in s.98 of the ERA;

ii. the employer must have acted reasonably in dismissing the employee for that reason under s98(4) of the ERA, taking into account its administrative resources, size and the principles of equity and the substantial merits of the case; and

iii. the sanction must be within a "range of reasonable responses" which means that whilst one employer may have given a final written warning another may have

dismissed (see Foley v Post Office; HSBC Bank Plc (formerly Midland Bank) v Madden, 2000 ICR 1283).

Practical points to note

1) It is not for the Employment Tribunal to substitute its own view for that of the employer, it is only required to consider what the employer reasonably believed.

2) However, it is open to the Employment Tribunal to decide that the reason given for the dismissal was not the real reason.

3) Even if the employer discovers a repudiatory breach of contract by the employee prior to their dismissal, this cannot be taken into consideration in relation to whether or not the dismissal is fair (see W Devis and Sons Ltd v Atkins, 1977 IRLR 314). However, it is likely to be relevant to the question of compensation, as this is awarded on a just and equitable basis.

4) Whether or not a dismissal is fair will be determined by the Employment Tribunal taking into account a number of matters:

   i. the statutory tests to be applied in accordance with s98 of the ERA;

   ii. the statutory Acas Code of Practice on Disciplinary and Grievance Procedures (**Acas Code**) which *must* be taken into account by the Employment Tribunal and a failure to adhere to it can result in an uplift to the compensation awarded by up to 25%;

   iii. the non-statutory Acas Guide on Discipline and Grievances, which *may* be taken into consideration by the Employment Tribunal; and

   iv. relevant case law.

1.6 **Who can bring a claim of unfair dismissal?**

To bring a claim of unfair dismissal individuals must satisfy a number of conditions including the following:

(a) They must be an employee i.e. work under a contract of employment.

(b) They must have at least two years' continuous employment at the date of termination of their contract of employment. However, the two-year qualifying period does not apply in the majority of cases where the dismissal is for an "automatically unfair" reason (see Appendix). It should be noted that the Labour Party has indicated that, if it comes to power after the next General Election, it will abolish the two-year qualifying period and make unfair dismissal a Day 1 employment right.

(c) They must have been "dismissed" within the meaning of the ERA i.e. the contract under which they are employed is terminated by the employer (whether with or

without notice), they are employed under a fixed-term contract and that contract expires and is not renewed, or they are constructively dismissed.

(d) They must be within the "territorial scope" of the ERA.

In Serco Ltd v Lawson, 2006 ICR 250 the House of Lords held that whether an employee can claim unfair dismissal should depend on whether they were working in Great Britain at the time of their dismissal, regardless of what was contemplated at the time their employment contract was entered into. The House of Lords held that employees based abroad will only be able to claim unfair dismissal in exceptional circumstances, for example:

(i) employees working for a British employer operating within an extra-territorial political or social enclave in a foreign country (such as a British military base);

(ii) employees posted abroad by a British employer for the purposes of a business carried on in Great Britain (such as a foreign correspondent for a British newspaper); and

(iii) employees whose employment had "equally strong connections" with Great Britain and British employment law.

However, in Ravat v Halliburton Manufacturing and Services Ltd, 2012 UKSC 1, the Supreme Court held that the categories set out in Serco were not exhaustive, merely examples of employees with a "substantial connection" to Great Britain. What matters is that the employment relationship has a *stronger* connection with Great Britain than with the foreign country where the employee works. This is to be decided by reference to a number of different factors and will depend on the specific facts in each case.

(e) They must not be excluded from bringing a claim. Certain classes of employees are barred from bringing a claim, namely members of the police service, the armed forces and certain types of fishermen. There are various other ways in which an employee might be excluded from bringing a claim including:

(i) where the contract is unlawful or being performed unlawfully;

(ii) where a valid settlement or COT3 agreement is in place restricting the employee's right to bring a claim;

(iii) where a claim in respect of the same issues has already been brought and disposed of by the Employment Tribunal (this includes where the claim has been struck out, settled or withdrawn);

(iv) where the claim is submitted out of time (unless the Employment Tribunal decides that it was not reasonably practicable for the employee to have

submitted the claim within the usual limitation period and orders an extension of time);

(v) where the employer is a foreign state entitled to state immunity;

(vi) where, at the time of the dismissal, the employee was taking part in unofficial strike action (unless the dismissal is for an automatically unfair reason) (s.237 of the Trade Union and Labour Relations (Consolidation) Act 1992); or

(vii) the individual has "employee shareholder" status, rather than "employee" status. From April 2013, the Government introduced a new employee shareholder status which meant that individuals who were given shares in the company worth more than £2,000 would be prevented from bringing claims for unfair dismissal against their employers (although they could still bring an automatic unfair dismissal claim or claim that the dismissal was an act of discrimination). However, the special tax reliefs for these arrangements were removed in relation to shares acquired on or after 1 December 2016, with the result that it is unlikely that employers will engage new employee shareholders after this date. Practically speaking, therefore, this issue rarely, if ever, arises.

Practical points to note:

1. Where an employee is nearing the two-year anniversary of their employment (which would entitle them to bring an unfair dismissal claim), it is important that termination takes effect more than one week before the anniversary date. This is because the ERA provides that where an employee is dismissed with no notice, or less than the statutory minimum notice due (including where a payment in lieu of notice is made), then the "effective date of termination" (**EDT**) used to calculate continuous service for the purposes of an unfair dismissal claim is deemed postponed to the date on which the proper *statutory* notice would have expired.[1] The EDT will also be extended in this way where the employee resigns and successfully claims constructive dismissal. However, if an Employment Tribunal finds that an employer was entitled to summarily dismiss an employee for gross misconduct, then the EDT will *not* be extended.[2] Where the extension rule applies, statutory notice is deemed to be given on the day of actual termination (or on the date that inadequate notice was given if given).[3] However, it has been held that the notice does not begin to run until the day *after* the notice is deemed given.[4] Since employees with under two years' service are entitled to one week's statutory notice, this means that the dismissal must take effect *more* than one week before the two-year anniversary to avoid the employee acquiring sufficient service for an unfair dismissal claim. For example, if an employee's two-year anniversary of employment fell on 21 November 2023, termination would need to take effect not later than 13 November 2023

[1] Section 97(2), ERA 1996.
[2] Lancaster & Duke Ltd v Wileman, 2019 ICR 125, EAT.
[3] Section 97(3), ERA 1996.
[4] West v Kneels, [1987] ICR; Wang v University of Keele, [2011]IRLR 542.

as the seven-day statutory notice period would be deemed to run from 14 November 2023 and would expire on 20 November 2023.

2. If an employee has worked for a business before their official start date, it will be a matter of fact in every case as to whether that time should be taken into consideration when calculating length of service (see O'Sullivan v DSM Demolition Ltd, 2020 UKEAT 0257/19/1505). In some cases, time that an individual spent working for the employer as a contractor/freelancer will, in fact, constitute employment and count towards their continuity of service.

1.7 **How can an employer dismiss fairly?**

There are five potentially "fair" reasons for dismissal set out in the ERA:

1. **Capability**: a reason related to the qualifications or capability of the employee for performing the kind of work which that employee was employed to do (capability is assessed by reference to skill, aptitude, health or any other physical or mental quality) (s98(2)(a) of the ERA).

2. **Conduct**: a reason relating to the conduct of the employee (s98(2)(b) of the ERA).

3. **Redundancy**: that the employee was redundant (s98(2)(c) of the ERA).

4. **Illegality**: that the employee could not continue to work in the position held without contravention of a duty or restriction imposed by or under an enactment (s98(2)(d) of the ERA).

5. **Some other substantial reason**: the reason must be of a kind such as to justify the dismissal of an employee holding the position which that employee held (s98(1)(b) of the ERA).

Practical points to note

1) The burden of proof for actual unfair dismissal is on the employer to show what the reason for dismissal was and that it was one of the reasons set out above. In a constructive unfair dismissal claim, the employee must first of all show there was a dismissal and then the employer has to show it was for a potentially fair reason.

2) The Employment Tribunal can decide that the reason for dismissal put forward by the employer is not the real reason, in which case the dismissal is likely to be unfair.

3) Once the employer has shown that the reason for the dismissal was for one of the five potentially fair reasons, the Tribunal will consider whether the dismissal was, in fact, fair. Here, the burden of proof is neither on the employer nor the employee but is neutral (see Boys and Girls Welfare Society v McDonald, 1996 IRLR 129 EAT). The Tribunal will consider if the employer acted reasonably in the circumstances in treating that reason as sufficient to justify the dismissal of the employee and whether

the dismissal was procedurally fair. Where employee puts forward evidence that suggests that the dismissal is unfair, the Tribunal will ask the employer for an explanation or a rebuttal. This is a common-sense approach and does not mean that the burden of proof has shifted to the employer as a matter of law (see Bradford & Bingley Plc v McCarthy UKEAT/0458/09).

4) If the employer has made a genuine mistake as to the reason for dismissal, and at the time of the dismissal the facts or beliefs were known to the employee, and, at the hearing of the claim, the employer airs those reasons, the Employment Tribunal may ignore the wrong label (see Abernethy v Mott, Hay & Anderson, 1974 ICR 323 CA).

5) A change of reason between the Employment Tribunal proceedings and an appeal will not generally be allowed (see Nelson v BBC, 1977 ICR 649 CA) for this reason, employers should consider pleading alternative grounds (e.g. redundancy, or in the alternative, some other substantial reason) and make sure that any reason which is not the one given at the time of dismissal is properly ventilated at the hearing.

6) Although employers may have more than one reason for dismissal, s98(1)(a) of the ERA requires that a *principal* reason for dismissal is identified. This is to stop employers putting forward multiple reasons under different categories in the hope of persuading the Employment Tribunal that one of them should 'stick'.

7) Employees who have sufficient service to claim unfair dismissal are entitled, on request, to a written statement setting out the reasons for their dismissal. Once requested, the employer has 14 days to provide the reasons to the employee. Employees who are dismissed while pregnant or during statutory maternity or adoption leave must be given a written statement of reasons without having to request it and regardless of their length of service.

1.8 Capability dismissals

Capability is given a specific meaning by the ERA. Section 98 of the ERA states that "capability" means capability assessed by reference to skill, aptitude, health or any physical or mental quality. "Qualifications" mean any degree, diploma, academic, technical or professional qualification relevant to the position which the employee held. The cases in this area generally fall into two categories: dismissals on the grounds of poor performance and ill-health dismissals. In cases of serious incompetence there may sometimes be an overlap with misconduct.

Practical points to note

1) To succeed in showing a fair dismissal for capability it is essential that the employer can show that it had informed the employee of what was required, and that the employee fell short of this.

2) This will almost always involve a series of meetings with the employee, to warn of the shortfall, giving reasonable time limits within which to improve and what will happen if the employee does not improve. It would be sensible for an employer to offer training or possible alternative roles. However, it may not be necessary to give the employee an opportunity to improve where there is evidence that he or she is unlikely to change their behaviour in future (see Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA).

3) It is also important that the employer follows the correct procedure that is appropriate to the circumstances. This is illustrated by the case of Welsh National Opera Ltd v Johnston, 2012 EWCA Civ 1046, CA. Here, the Court of Appeal held that the Employment Tribunal was wrong to conclude that concerns about an orchestral oboist's ensemble playing could not be dealt with under the procedure for 'poor artistic performance', as set out in the applicable collective agreement. By subjecting him instead to a modified version of the ordinary disciplinary procedure reserved for non-artistic capability issues, the employer had acted outside the range of reasonable responses, rendering his subsequent dismissal unfair.

4) If the dismissal is on the grounds of ill health capability, then it is very important that an employer:

    a. obtains medical evidence to ascertain how long the employee is anticipated to be away;

    b. considers if they are disabled and, therefore, whether reasonable adjustments could be made; and

    c. considers if there are other opportunities within the business that are suitable for them. If a job is offered at a lower rate of pay, if that is the only one available, then this will not be unreasonable (see British Gas Services Ltd v McCaull [2001] IRLR 60).

5) If the employee is in receipt of permanent health insurance, then there may be an express or an implied term that he should not be dismissed as this will bring these benefits to an end. Employers should be advised to tread extremely carefully in this scenario (see Aspden v Webbs Poultry & Meat Group Holdings Ltd, 1996 IRLR 521 and Awan v ICTS UK Ltd, UKEAT/0087/18).

6) There is no obligation on the employer to offer employment in a subsidiary company and even where the employee has reached his position through promotion, that employee has no automatic right to return to his old job (unless this was written into the contract at the time of the promotion). The employer's duty to consider redeploying the employee will depend on the circumstances of each particular case, although the size and administrative resources of the business will be especially important. For example, see Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair 1981 IRLR 520, EAT, which involved a small family business where redeployment was impracticable.

7) Even a multinational company may not necessarily be acting unreasonably if it fails to offer a long-serving employee alternative work. In Tyndall v Burmah Oil Trading Ltd EAT 655/83 an

employee with a good work record became incompetent and was retired early. He claimed unfair dismissal on the ground that the company should have found a niche role for him. The EAT, however, thought early retirement was a reasonable response as there was a recession and the employee was nearing retiring age (note that this case was before the law governing age discrimination).

8) In Sonvadi v Superdrug Stores plc ET Case No.57554/94 the employee was dismissed for incapability in July 1994 as a manager of one of the employer's stores. This was because of his lack of communication with his staff and his failure to motivate them. He had joined the company as a trainee manager, been promoted to assistant manager, and then promoted to the post of manager in April 1993. His main complaint was that dismissal was not a reasonable response and, at most, he should have been demoted. The company handbook said that demotion could be used as an alternative to dismissal. In rejecting his claim of unfair dismissal the Employment Tribunal said that there is no rule of law that demotion should *automatically* be considered in capability dismissals. The employer was entitled in the circumstances of this case to come to the view that the employee's appointment as an assistant manager would not work. The Employment Tribunal pointed out that in Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair (above), the EAT emphasised that the correct test is whether the dismissal fell within the range of options open to a reasonable employer in the circumstances and held that the Employment Tribunal had, therefore, applied the wrong test, i.e. it had said that the dismissal was unfair because a reasonable employer would have considered demotion rather than dismissal.

9) Employers will never be expected to create a post for an employee artificially but, in borderline cases, if a job is available and the employer has not offered it, the scales may be tipped in favour of the employee. There is a limit, however, as to how far an employer will be expected to accommodate an employee who is incapable of mastering the skills of the particular job that he or she is employed to do. In Watson v Commissioners of Inland Revenue, ET Case No.2105124/03 the question arose as to whether an employer had failed to act reasonably when declining to move the employee into a job that did not require the specific skills in respect of which the employee was especially weak. The employee accepted that the employer had reasonably reached a view that he was incapable of carrying out his duties to a satisfactory standard and conceded that the procedure leading to his dismissal had been fair. However, he contended that his dismissal was nonetheless unfair in that, given the large number of duties that someone in his grade could be called upon to undertake, he should have been moved sideways into a post that did not require him to perform the duties that he was incapable of carrying out satisfactorily. The Employment Tribunal rejected this argument and held that the employee had been fairly dismissed. There was no duty on the employer to move the employee sideways: were it otherwise, the employer might never be able to dismiss an employee such as the claimant fairly for lack of capability, since the employer would have to exhaust every potential post first.

10) Examples of where employees have been held to be fairly dismissed for capability include:

- Managers who, although successful in profit terms, have failed to establish good working relationships.

- Inflexible and unadaptable workers (see Abernethy v Mott, Hay & Anderson, 1974 ICR 323 CA).

- An employee who failed to reach the employer's standards, even when those standards are much higher than those of similar employers (see Fletcher v St Leonards School, EAT 25/87).

1.9 **Conduct dismissals**

Instant dismissal for misconduct will only be fair if it was extremely serious misconduct – known as "gross misconduct". Whether the alleged act of misconduct is sufficiently serious to merit summary dismissal will depend on the individual circumstances of the case. Less serious conduct should be dealt with through the warning process, culminating in a dismissal. Failure to do this is likely to be an unfair dismissal.

The leading case on the process to be followed in conduct dismissals is British Home Stores v Burchell, 1980 ICR 303, EAT (although there have been questions as to whether this is still good law, there is no appeal case on the point). The "Burchell test", as it is known, sets out the test as:

1. Did the employer have a reasonable suspicion, amounting to a belief in the guilt of the employee of that misconduct at that time?

2. Did the employer have reasonable grounds on which to base that belief?

3. Had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

The level of investigation carried out by an employer is the 'band of reasonable responses' test as set out in Sainsbury's Supermarkets v Hitt, 2003 IRLR 23, CA.

Practical points to note

1) In ILEA v Gravett, 1988 IRLR 497, EAT, Mr Justice Wood said:

"at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase."

2) Acas has published a guide to carrying out investigations and emphasises that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. In A v B, 2003 IRLR 405, EAT, the EAT said that the gravity of the charges and the potential effect on the employee will be relevant when

considering what is expected of a reasonable investigation. In its view, an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal.

3) Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. This is particularly so where the employee has been suspended and cannot communicate with witnesses.

4) However, the EAT has accepted that the standard of reasonableness will always be high where dismissal is a likely consequence, and so the serious effect on future employment and the fact that criminal charges are involved may not in practice alter that standard. See Salford Royal NHS Foundation Trust v Roldan, 2010 IRLR 721, CA where the employee, a nurse, not only faced criminal charges but also the risk of deportation. The Court saw the threat of the employee's deportation, which might have resulted from her dismissal, equally as deserving of careful investigation as the potential criminal charges she faced. The potentially serious adverse consequences that dismissal would have had on her reinforced the justification for the Employment Tribunal's finding that procedural errors meant that the employee's dismissal had been unfair, It follows that if a dismissal could 'blight' an employee's career in some significant way, the Employment Tribunal will be required to scrutinise the employer's procedures all the more carefully.

5) If the facts are in dispute, then there must always be an investigation but where an employee admits an act of gross misconduct and where the facts are not in dispute, it may not be necessary to carry out a full investigation. In Boys and Girls Welfare Society v McDonald, 1996 IRLR 129 EAT the claimant was employed as a residential social worker in a children's home. During an argument with a pupil, he spat at the child. He admitted doing so at the disciplinary hearing and was dismissed. The EAT said that it was not always necessary to apply the Burchell test where there was no real conflict on the facts.

6) Paragraph 6 of the Acas Code says that *'where practicable, different people should carry out the investigation and disciplinary hearing'.* Failure to do this may result in the dismissal being unfair as is demonstrated in Warren James Jewellers Ltd v Christy EAT 1041/02. Here, the employee was dismissed on suspicion of theft when the bank paying-in slip for a day when she was left in charge of the shop was short by £1,000. The area manager who acted as the investigating officer was also responsible for disciplining and dismissing the employee. The dismissal was held to be unfair. There had been no reasonable investigation and the same person had been the disciplining and investigating officer.

7) This same impartiality applies to witnesses. Whilst it is accepted that in small organisations it may be difficult to split these functions, for larger ones a dismissal may well be rendered unfair as a result of failing to do so. In Moyes v Hylton Castle Working Men's Social Club and Institute Ltd, 1986 IRLR 482, EAT, the employee was dismissed from his job as club steward after two incidents in which he allegedly sexually harassed a barmaid, the second of which was observed by the chairman and the assistant secretary of the club. The investigation was carried out by a sub-committee of five, which

included the two club officials who were witnesses to the second incident. A subsequent meeting of the full committee, which again included the chairman and assistant secretary, made the decision to dismiss. The Employment Tribunal said that the involvement of the two officials in the capacity of both witness and judge did not make the dismissal unfair, but the EAT overturned this and held that this was a breach of natural justice, and any reasonable observer would conclude that justice did not appear to have been done and had not been done.

8) Witnesses must be interviewed and although it is not necessary to interview all of them once a fact has been established, relying on a second-hand version of what happened rather than talking to one eyewitness can render a dismissal unfair - see Baxters (Butchers) Ltd v Hart, EAT 934/83.

9) It will not necessarily be unfair to dismiss an employee after resurrecting a previously concluded disciplinary process that had led to a lower sanction. In Lyfar-Cissé v Western Sussex University Hospitals NHS Foundation Trust and others, [2022] EAT 193, the employee had responsibility for improving race equality and she was Chair of its BME Network. She was disciplined following complaints that she had bullied and victimised one employee by interfering in the investigation of her sexual orientation complaint and that she had racially harassed and discriminated another employee. The outcome was that she was issued with a final written warning. Separately, a Care Quality Commission inspection concluded that bullying was rife within the Trust and, as a result, it was placed into "special measures". Another Trust took over day-to-day management and its Managing Director concluded that there was an issue as to whether the employee was a fit and proper person to provide leadership on equality issues. The disciplinary process was resurrected (despite the fact that a final written warning had already been issued) and the employee was dismissed on the grounds that her conduct had fatally undermined her ability to perform her role. The EAT acknowledged that although it was unusual to reopen disciplinary proceedings, there is no absolute rule against "double jeopardy" in disciplinary processes. The key question remains whether the dismissal is fair in all the circumstances – on the facts of this case, the dismissal was fair.

10) Dismissal once there has been a finding of gross misconduct should not be considered 'inevitable'. In Brito-Babapulle v Ealing Hospital NHS Trust, UKEAT/0358/12 the EAT held that dismissal may be "almost inevitable" once there had been a finding of gross misconduct, but there may be mitigating factors which mean that dismissal is not a reasonable response (for example, whether the employee has a long and unblemished record and the consequences of dismissal for the employee). However, on the facts of this case, the Court of Appeal ultimately went on to find that the employer had been entitled to dismiss an employee who had committed an act of gross misconduct.

11) In Burdis v Dorset County Council, UKEAT/0084/18/JOJ**,** the EAT confirmed that a conduct dismissal can encompass serious neglect, omission or carelessness – in this case, a failure to meet the role's requirements.

1.10 **Redundancy dismissals**

The statutory definition of redundancy set out in section 139(1) of the ERA is used to determine whether an employee has been made redundant for unfair dismissal purposes. The statutory definition covers three specific situations:

(a) the closure of a business;

(b) the closure of a particular place of work; or

(c) a diminishing need for employees to carry out work of a particular kind.

A dismissal will not be for redundancy unless it falls within one of these three situations. Carrying out a fair procedure is crucial if an employer wishes to avoid a finding of unfair dismissal.

Practical points to note

1) The guidelines that a reasonable employer is expected to follow in an individual redundancy situation were laid down by the EAT in Williams & Ors v Compair Maxam Ltd, 1982 ICR 156. An employee may have a number of complaints in relation to the redundancy process, i.e. that they were unfairly selected for redundancy, that it was unreasonable for the employer to have dismissed them for redundancy where alternative work was available, or that the employer's redundancy procedure was defective. Often this will be as a result of the employer's failure to consult.

2) In the Williams case, the EAT were quick to stress that it is not for the Employment Tribunal to impose their own standards on the employer and to conclude that perhaps they would have behaved differently in the circumstances. The correct question to ask is whether the dismissal lay within the "*range of conduct which a reasonable employer could have adopted*".

3) The various factors that the case set out, which a reasonable employer might be expected to consider, were:

   - whether the selection criteria are fair and objective and were fairly applied;
   - whether employees were warned about impending redundancies and consulted;
   - whether, if there is a union, the union's view was sought; and
   - whether any alternative work was available.

4) Although the Acas Code does not apply to redundancy, a failure to allow a companion during redundancy is likely to count against an employer on the question of reasonableness.

5) If an employer dismisses employees without first considering the question of the pool for selection, then the dismissal is likely to be unfair (see Taymech Ltd v Ryan EAT 633/94). In Fulcrum Pharma(Europe) Ltd v Bonassera, EAT 0198/10, the employer failed to properly consider a pool between an HR Manager and HR Executive who had stood in for her when she was away. The dismissal was unfair as result.

6) There may be a customary arrangement or agreed procedure with regards to selection of the pool but, if not, then employers have quite a degree of flexibility in defining the pool from which they will select employees for dismissal. This was confirmed in the case of Thomas & Betts Manufacturing Ltd v Harding, 1980 IRLR 255 CA.

7) What an employer needs to show is that they have applied their minds to the correct pool and acted from genuine motives. However, the Tribunal must be satisfied that the employer had acted reasonably, and they will consider the following:

    i. whether other groups of employees are doing similar work to the group from which selections are made;

    ii. whether employees' jobs are interchangeable;

    iii. whether the employee's inclusion is consistent with his or her previous position; and

    iv. whether the selection unit was agreed with the union (where applicable).

8) An employer might be acting unreasonably if it fails to consult on redundancy selection criteria where the selection criteria would inevitably lead to a redundancy pool of one. In order for redundancy consultation to be meaningful it must take place at a formative stage where it is still possible for the employee to influence the outcome. Adopting criteria which would lead to a pool of one (in effect, deciding who would be made redundant), without prior consultation, may be unfair (see Mogane v Bradford Teaching Hospitals NHS Foundation Trust, [2022] EAT 139).

9) An employer might be acting unreasonably if it has a number of different sites and treats these as different groups for the purposes of redundancy selection. If all of those at the various sites are doing work of the same kind and the sites are relatively close by, then failure to consider them as one group, could render the dismissal unfair.

10) In Capita Hartshead Ltd v Byard, UKEAT/0445/11 the EAT concluded that:

    i. it is not an Employment Tribunal's function to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct that a reasonable employer could have adopted (see Williams *ibid*);

ii. the "reasonable response" test is applicable to the selection of the pool from which the redundancies are to be drawn (see Hendy Banks City Print Limited v Fairbrother and ors, EAT 0691/04);

iii. there is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine and it will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem (see Taymech *ibid*);

iv. the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if it has genuinely applied its mind to the issue of who should be in the pool for consideration for redundancy; and

v. even if the employer has genuinely applied its mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

11) It is important, when choosing selection criteria, that they do not represent the personal opinion of one manager. They should be able to be verified by reference to information such as records of attendance, efficiency and length of service. Examples of subjective selection criteria have been given as follows:

    a. in Williams where employees, in the manager's opinion, **"***would keep the company viable*" was held to be subjective;

    b. in Smith v Haverhill Meat Products Ltd, ET 7631-40/85, selection based on who was "*best suited for the needs of the business under the new operating conditions*" was held to be too subjective;

    c. in GB Micros Ltd v Lewis, EAT 573/90, the selection of salesmen based on "*costs savings*" where those who cost most in terms of overheads but who generated least revenue were selected, was held not be an appropriate or objective selection criteria. In that case, the employer had failed to undertake any real appraisal of the employees and the selection process lacked objectivity.

12) The criteria must be fair and so in circumstances where one employee is on maternity leave, criteria which favour her over a male employee not on maternity leave can lead to a claim from the male employee of sex discrimination, as happened in Eversheds Legal Services Ltd v De Belin, 2011 IRLR 448. In this case, there were fair and measurable criteria which could have been used and not disadvantage the colleague on maternity leave and which were not used.

13) Employers should be wary that selecting those who cost the most, may lead them into an indirect age discrimination claim on the basis that, as a general rule, those who are

older and more senior are the most expensive. However, in the case of HM Land Registry v Benson, UKEAT/0197/11 volunteers were requested for redundancy. The employer refused to accept those between the ages of 50-54 because they could take early retirement on an unreduced pension, and this would have cost an extra £20 million. The Employment Tribunal considered this to be discriminatory but the EAT said that the Tribunal had got the test wrong, they had to accept that the employer had a legitimate aim, it was wrong to suggest that it was a bottomless pit in terms of resource and that the allocation of resources was a real 'need'.

14) If an employer applies objective selection criteria, then the Tribunal will not over-scrutinise either the criteria or their application. This was confirmed in British Aerospace Plc v Green, 1995 ICR 1006 CA and subsequently in Nicholls v Rockwell Automation Ltd, UKEAT 0540/11 and 0541/11 where the Employment Tribunal had found that there was a redundancy situation and a fair process, applied with no ulterior motive, but the dismissal was unfair as certain scores were *"clearly lower than they should have been".* They, therefore, concluded that the dismissal was unfair but there was a one third chance the claimant would have been made redundant in any event. The EAT held that the Employment Tribunal should not find a redundancy dismissal unfair by examining the scoring in a selection process unless the employer's motives were in question. The EAT substituted a finding that the claimant's dismissal was fair, saying that the Employment Tribunal had made mistakes by engaging in a detailed critique of certain items of scoring in determining if it was reasonable for the employer to dismiss the claimant and substituting its own view for that of the employer.

15) Employers are generally expected to consider alternatives to dismissal by reason of redundancy. Typically, this involves a consideration of things such as alternative ways of reducing headcount (such as restricting recruitment or reducing temporary staff), temporary work stoppages, reducing working hours or freezing or reducing pay and benefits. In Lovingangels Care Ltd v Mhindurwa, [2023] EAT 65, the EAT held that it was unfair to dismiss a live-in carer during the coronavirus pandemic by reason of redundancy without properly considering the alternative of placing the employee on furlough.

16) In Samsung Electronics (UK) Ltd v Monte-D'Cruz, 2012 UKEAT 0039/11, the EAT has confirmed that when an employee at risk of redundancy is being considered for suitable alternative employment, an employer has considerable flexibility when assessing their suitability for the role and may use subjective criteria. Good faith assessments of an employee's qualities are not normally liable to be second-guessed by a Tribunal. The Employment Tribunal in this case had strayed into a substitution mindset when deciding that the dismissal of an employee was unfair due in part to the failure to appoint him to the alternative role.

17) In Devon Primary Care Trust v Redman, 2013 EWCA Civ 1110, the Court of Appeal confirmed that the test as to whether the employee has unreasonably refused suitable alternative employment is not to "import" the band of reasonable responses test applied

in unfair dismissal cases but is, instead, to consider *"whether this particular employee in this particular situation acted reasonably in refusing the offer of employment".*

18) In Gwynedd Council v Barratt, UKEAT 0206/18, it was held that an employer can take a "forward thinking" approach using a competitive interview process when considering redundant employees for alternative employment, especially where the role is at a high level and involves a promotion.

1.11 **Illegality dismissals**

Section 98(2)(d) of the ERA provides that there is a potentially fair reason for dismissal if an employee *"could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment*".

This particular provision rarely comes up in practice, but it would cover, for example, the situation where an employee could not continue to work in the UK because of his immigration status or if an employee lost their driving licence and the job required them to drive. The cases that do exist have made clear that the employer should not assume and should make careful investigation before dismissing.

1.12 **Some other substantial reason ("SOSR") dismissals**

This is often described as a "catch all" provision. This does not mean that it covers all the other reasons for dismissal, but simply that it covers all other reasons that "*justify the dismissal of an employee holding the position that the employee held*".

It would cover, for example, dismissals arising out of a change to terms and conditions of employment, business reorganisations, and third-party pressure to dismiss.

As with the other potentially fair reasons discussed above, employers will be required to follow a fair procedure before dismissing on grounds of SOSR. The procedure to be followed will differ depending on the reason for dismissal.

Practical points to note

SOSR dismissals might include the following:

Business reorganisation

1) Tribunals recognise the right of employers to dismiss employees who refuse to go along with a business reorganisation. As Lord Denning MR said in Lesney Products and Co Ltd v Nolan and ors, 1977 IRLR 77, CA: *"[I]t is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency."*

2) Employees may be dismissed either for refusing to agree to changes arising out of a business reorganisation or because their services are no longer required owing, for example, to the introduction of new technology. It may be that such a reorganisation falls within the definition of redundancy.

3) Where an employee is dismissed for refusing to agree to a change in working conditions that the employer is entitled to impose under the contract, the dismissal may be for misconduct. But dismissals of employees who refuse to accept a business reorganisation are often pleaded under SOSR.

4) The employer does not have to show that the reorganisation is essential, and it is not for the Employment Tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. The employer only needs to show that there were clear advantages in introducing a particular change. The employer does not need to show any particular "quantum of improvement" will be achieved (see Kerry Foods Ltd v Lynch 2005, IRLR 680, EAT).

5) However, employers must do more than simply assert that there were good business reasons for a reorganisation involving dismissals and the Employment Tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons (see Catamaran Cruisers Ltd v Williams and ors, 1994 IRLR 386, EAT).

6) In Garside and Laycock Ltd v Booth, 2011 IRLR 735, EAT, the EAT accepted that SOSR was established when an employee was dismissed for refusing to accept a pay cut that the employer had proposed as an alternative to compulsory redundancies. However, when they sent the case back to the Employment Tribunal to consider reasonableness, the EAT emphasised that the Tribunal should consider the equity of a dismissal for this reason, in accordance with S.98(4)(b) of the ERA. The EAT indicated that such equitable considerations might include whether management was to be subject to the proposed pay cut as well as the rest of the workforce, and whether the implied equitable concept of fair dealing was observed in the manner in which the pay cut was negotiated.

Protection of the interests / reputation of the business

1) Employers are entitled to protect their commercial interests and to take the necessary steps to protect against potential threats from their employees. If dismissal is the step taken, then assuming there has been no misconduct, SOSR will usually be relied on.

2) If a business has confidential information and they know that one of their employees is married to, or in a relationship with, someone who works for a direct competitor, then it may be an SOSR reason for dismissal. For example:

    a. in Abey v R and E Holdings (Yorkshire) Ltd t/a Quick Pass School of Motoring, ET Case No.14985/82 a driving school receptionist had a relationship with one of the instructors. When he left to set up in competition, it had a substantial effect on

the employer's business and the receptionist was dismissed. The Employment Tribunal held the employee's dismissal to be fair.

b. in Simmons v SD Graphics Ltd, EAT 548/79, the EAT said that whether or not dismissal in circumstances when an employee is in a relationship with someone working for the competition is fair, is a question of fact for the Employment Tribunal. In that case, Ms Simmons was a telephonist/filing clerk with access to confidential information. She lived with a senior sales manager who moved to work for an aggressive competitor. Ms Simmons was dismissed. The EAT upheld the Tribunal's finding that she had been fairly dismissed for SOSR.

3) An employer that dismisses an employee after receiving information that the employee has been engaged in activities that could seriously damage the employer's business or reputation may be able to show SOSR for the dismissal. This is so even if the employee's conduct is unproven, or not directly relevant to his or her working responsibilities. For example, in Leach v Office of Communications, 2012 ICR 1269, CA, Mr Leach was employed in a senior position by Ofcom, a public authority. His job did not involve working with children or with issues specifically related to children, but child protection was one of Ofcom's responsibilities. The Metropolitan Police Child Abuse Investigation Command contacted Ofcom and made a number of allegations against Mr Leach, including that he had indecently assaulted a child and had visited brothels known to supply children. Ofcom took the view that the allegations carried a significant risk of reputational damage. Mr Leach was asked to a disciplinary meeting and, although he denied the allegations, Ofcom concluded that it had to accept the police advice that Mr Leach was a risk to children. It considered this to be a breach of the trust and confidence at the heart of the employment contract and dismissed Mr Leach with immediate effect. The Employment Tribunal held that Mr Leach had been fairly dismissed for SOSR. Given the nature of Ofcom's work, the allegations and Mr Leach's role, dismissal was within the range of reasonable responses and there were no reasonable alternatives available.

Dismissal for refusal to accept changes to terms and conditions

1. At common law, a contract may be varied only in accordance with its terms or with the parties' agreement. Where an employee refuses to accept a change to their terms and conditions and the employer dismisses for that reason, the reason may constitute SOSR.

2. Such cases are complicated by the fact that employees are entitled to resist unilateral changes to their terms and conditions and if the change concerns a fundamental term of the contract, the employee may be entitled to resign and claim constructive dismissal. However, as long as the employer has a sound business reason for dismissing an employee who refuses to accept a change to their terms of employment, it should be able to establish SOSR.

3. A dismissal following a failure to agree to a change will almost always be unfair where the employer has failed to follow a procedure of any kind or consulted with employees over the proposed change.

4. When considering the fairness of a dismissal, Tribunals will look at the full context of the proposed change. The assessment of reasonableness usually entails a balancing act in which the Tribunal considers the reasonableness of the employer in dismissing the employee with the reasonableness of the employee in refusing to accept the change. The factors which are commonly taken into consideration by the tribunal in assessing the reasonableness of a dismissal in these circumstances are:

    a. the employer's motives for introducing the changes;

    b. the employees' reasons for rejecting the changes;

    c. whether the employees were given reasonable warning of the proposed changes;

    d. whether the changes and full effect of those changes have been sufficiently and clearly explained to the employees;

    e. whether the employer has undertaken an assessment of the impact of the changes on employees and whether it has considered alternatives to any changes;

    f. whether the employer has attempted to obtain the employees' voluntary agreement to any of the changes;

    g. whether a reasonable and genuine consultation process with the affected employees has taken place. This will include listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions, where reasonable to do so;

    h. whether a majority of the employees affected have accepted the changes; and

    i. whether any recognised trade union recommended or objected to the changes.

5. Sometimes employers want to impose on an employee restrictive covenants to protect its business. In Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA, the employer sought to address loss of staff and confidential information by asking a number of its employees to sign new employment contracts containing wide restraint clauses. The employees were given little opportunity to consider the restraint clauses or to seek professional advice and were not warned that they would be dismissed if they rejected the new terms. When they refused to sign, they were dismissed. They subsequently brought claims of unfair dismissal. The Court of Appeal held that the question asked by s.98(1) of the ERA is whether the employer's reason is of a kind to justify the dismissal. The Court said that this means that the reason should fall into a category that is not excluded by law as a ground for dismissal. Accordingly, if the reason is whimsical or capricious or dishonest or discriminatory, it will be excluded by s.98(1). But if the reason falls into a category that can legally form a ground for dismissal, then it can be potentially fair as SOSR under s.98(1). An employee's refusal to accept covenants proposed by the employer for the protection of his legitimate interests can legally be a ground for dismissal.

6. On 24 January 2023, the Government published the draft "Statutory Code of Practice on Dismissal and Re-engagement" and launched a consultation seeking views on the draft Code. The Code details how businesses should hold fair, transparent and meaningful consultations on proposed changes to employment terms and includes practical steps to follow. As a statutory Code, the Tribunals and Courts would be required to take it into account when considering relevant cases, including unfair dismissal, and would have the power to apply an uplift of up to 25% to an employee's compensation where the Code applied, and the employer had unreasonably failed to follow it. The consultation closed on 18 April 2023 and the Government's response is awaited.

Third party pressure

1) Sometimes the employer comes under pressure from a third party to dismiss. In Dobie v Burns International Security Services (UK) Ltd, 1984 ICR 812, CA, a County Council had a contractual right to approve or disapprove the employment or continued employment of security staff provided by the employer. Friction developed between a senior local authority employee and Mr Dobie, who was dismissed as a result. Mr Dobie brought a claim of unfair dismissal. The Employment Tribunal ruled that third-party pressure to dismiss can amount to SOSR and the Court of Appeal upheld this decision.

2) The employer does not have to establish the truth of any allegations made against the employee or agree with the request to dismiss in order to rely on third-party pressure as the reason for dismissal. In Edwards v Curtis t/a Arkive Computing, EAT 845/95, Mr Edwards was dismissed at the insistence of the employer's only customer, who had complained about the standard of his work. Mr Edwards argued that he had been dismissed for lack of capability and sought to argue that he was capable of doing his job. The Employment Tribunal, rejecting Mr Edward's suggestion, held that the dismissal had resulted from the pressure applied by the customer and was therefore fair. The EAT upheld the Employment Tribunal's decision.

Breakdown in trust and confidence

1) One of the most common uses of SOSR for dismissal is breakdown in of trust and confidence between the parties. In Leach (*ibid*) the EAT warned against the tendency of parties to assume that loss of trust and confidence automatically brings obligations under an employment contract to an end, which it does not. The EAT emphasised the importance of identifying why the employer considered it impossible to continue to employ the employee - in that case, the employer's need to avert damage to its reputation. The Court of Appeal agreed on appeal. Lord Justice Mummery noted that breakdown in trust and confidence is not a convenient label to stick on any situation in which the employer feels let down by an employee, or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate.

Miscellaneous reasons

- **Persistent absences**: in Wilson v Post Office, 2000 IRLR 834, CA, the Court of Appeal held that the dismissal of an employee for his persistent absences was for SOSR. Although ill health had caused the absences, the employer's reason for dismissal was that Mr Wilson's attendance record did not meet the requirements of the agreed attendance procedure. The Employment Tribunal had made a mistake when it had characterised the reason for dismissal as capability.

- **Inappropriate conduct in a private capacity**: in Abiaefo v Enfield Community Care NHS Trust, EAT 152/96 the EAT upheld the Employment Tribunal's finding that a health visitor was fairly dismissed for SOSR when it was discovered that she had hit her small son with a stick.

- **Genuine but mistaken belief that to continue to employ would contravene the law**: in Hounslow London Borough Council v Klusova 2008 ICR 396, CA, the Court of Appeal held that an employer's genuine but mistaken belief in the unlawfulness of a Russian national's continued employment under immigration rules was SOSR for dismissal. The employer's failure to consult the employee over its concerns as to the lawfulness of her employment, and its failure to consider Home Office guidance on immigration checks, were not so serious as to evidence a lack of genuine belief in the unlawfulness of her continued employment.

- **Imprisonment**: if a sentence is too short to frustrate the contract, and the employee is dismissed, SOSR can be invoked as the reason for dismissal (see Kingston v British Railways Board 1984 ICR 781, CA). The nature of the offence, as well as the length of service are relevant to the question of whether the dismissal was fair.

1.13 **Reasonableness of dismissal and section 98(4) of ERA:**

Identifying a fair reason for the dismissal is not the end of the matter. The Employment Tribunal must also decide whether the employer acted reasonably in dismissing the employee for that reason. Section 98(4) of the ERA provides that, where an employer can show a potentially fair reason for dismissal:

> *"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

In practice, this test is approached by considering the following two questions:

- **Procedural fairness:** Did the employer follow a fair procedure? In relation to conduct and performance dismissals, this also includes following the Acas Code.

- **Substantive fairness:** Did the employer act reasonably in treating the reason as a sufficient reason for dismissal (i.e. was the employer's decision within the "range of reasonable responses" available to them?)

1.14 **Procedural fairness:**

In order to act reasonably, an employer must follow a fair procedure when dismissing the employee. The precise format of the procedure to be followed will depend on the reason for dismissal (and, as above, the Acas Code will apply to conduct and performance dismissals). For example:

- in a redundancy dismissal it will be necessary to use appropriate pools of potentially redundant employees, consult with "at risk" employees and use objective selection criteria to decide who will be made redundant; or

- in a performance dismissal, it will usually be necessary to have warned the employee of where they are falling short and provide them with a window of time to achieve the desired standard (with training and support if needed).

A discussion of the different types of procedures to be followed for different dismissals is beyond the scope of this talk and paper (although note that the Introduction to Employment Law Course 2023 has included separate sessions covering the procedures to be followed in conduct and redundancy dismissals).

However, there are some fundamental principles of procedural fairness that will apply to most types of dismissals:

- the employee should know that they are at risk of dismissal and the reason for this;

- the employee should be allowed to make representations (usually at a meeting or hearing); and

- they should usually be offered a right of appeal.

Although procedural fairness is integral to whether a dismissal will be viewed a fair, it is recognised that even where a procedure is unfair, a fair procedure would not necessarily have avoided the outcome of dismissal.

In Polkey v AE Dayton Services Ltd, 1987 IRLR 503 (HL), it was decided that where a dismissal is procedurally unfair, the employer *cannot* argue the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will always be regarded as unfair (this rule is subject to a limited exception in redundancy dismissal cases where consultation with the employee would have been utterly futile). However, the fact that a fair procedure would have not changed the

outcome may be reflected in the amount of compensation awarded to the employee. The compensatory award may be reduced to reflect the chance that there would have been a fair dismissal had the correct procedure been followed. This is known as a "Polkey deduction".

1.15 **The Acas Code of Practice on Disciplinary and Grievance Procedures:**

The Acas Code is a statutory code which provides basic practical guidance for employers and employees on how to handle disciplinary and grievance situations in the workplace. As a statutory code, it will be taken into account by the Employment Tribunal deciding relevant cases.

When does the Acas Code apply?

The Acas Code explicitly says that it applies to all misconduct and poor performance dismissals and that it does *not* apply to redundancy dismissals and the non-renewal of fixed-term contracts (although employers are still expected to follow a fair process in such cases).

The Acas Code is silent as to whether it applies to ill-health dismissals, which suggests that it does not apply. In Holmes v Qinetiq Ltd, UKEAT 0206/15, an employee was dismissed on the grounds of ill-health on the basis that he was no longer capable of doing his job. The dismissal was found to be unfair. However, the Employment Tribunal held that the power to increase compensation for failure to comply with the requirements of the Acas Code did *not* extend to dismissal on the grounds of ill-health because:

- the Acas Code does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill-health or sickness absence;
- the concept of incapability in section 98(2)(a) of the ERA on the grounds of medical incapacity does not involve an element of culpability; and
- apart from the effects of his illness, the employee was able to perform his job and there was no suggestion that he was culpable in relation to his conduct or performance.

Accordingly, the Employment Tribunal held that the employer was not required to follow the Acas Code and, therefore, no uplift to the compensation was awarded. The decision was upheld on appeal. The EAT concluded that the Acas Code only applies to an ill-health situation where there is *culpable* behaviour at play which needed to be punished (e.g. a failure to comply with the employer's sickness reporting procedure). Whilst this decision may reassure employers seeking to dismiss on capability grounds that the Acas Code does not apply, it may be wise to adhere to the Acas Code's principles in any event. This is because the employer may not always be aware at the outset whether there is any culpable conduct requiring sanction.

The Acas Code is also silent on whether it applies to SOSR dismissals and there has been conflicting case law on this issue.

- In Lund v St Edmund's School, Canterbury, UKEAT/0514/12, the EAT held that the Acas Code did apply in circumstances where the relationship between the parties had broken down and the internal disciplinary procedure had been invoked. The EAT said that the Acas Code applies to SOSR dismissals where the disciplinary procedure has been, or *ought* to have been, invoked.

- In Hussain v Jurys Inns Group Ltd UKEAT/0283/15, the EAT said, *obiter*, that if the Acas Code is given a purposive construction, it should apply to SOSR dismissals. Yet in Phoenix House Ltd v Stockman and another UKEAT/0264/15, the EAT disagreed with Hussain, and held that the Acas Code does not apply to dismissals for SOSR. While elements of the Acas Code are capable of being, and should be, applied to SOSR dismissals, the EAT said that Parliament could not have intended to require compliance with the letter of the Acas Code in this situation, without saying so expressly. Given the uncertainty on this issue, again, it would be wise to observe the Acas Code where the employee is culpable in some way, even if the reason for dismissal is not badged as misconduct or poor performance.

It should also be noted that the Acas Code may apply to sham redundancy dismissals and discriminatory dismissals where other reasons at play mean there is "disciplinary situation" for the purposes of the Acas Code. In Rentplus UK Ltd v Coulson [2022] EAT 81, the EAT considered it was implicit in the Tribunal's reasoning that the claimant was in a "disciplinary situation" to which the Acas Code applied, namely that she was dismissed due to dissatisfaction with her personally and/or her performance, which was tainted by sex discrimination.

1.16 The Acas Code is based on compliance with the following key principles of fairness:

(a) dealing promptly with issues (acting without unreasonable delay);

(b) acting consistently;

(c) carrying out an appropriate level of investigation;

(d) properly informing employees of the basis of the concerns;

(e) giving an employee the opportunity to state their case at a hearing / meeting;

(f) allowing employees to be accompanied at formal meetings; and

(g) informing the employee of the decision and offering the right of appeal against formal decisions.

1.17 As a statutory code, the Acas Code will be taken into account by the Employment Tribunal deciding relevant cases.

1.18 The Acas Code is supplemented by a longer non-statutory guide, *Discipline and grievances at work: The Acas Guide,* which provides more detailed guidance on best practice. The Guide does not have to be taken into account by the Employment Tribunals but does contain some

useful guidance developed from case law, and, therefore, employers would be wise to consult it, alongside the Acas Code itself.

1.19 A failure to follow the Acas Code may mean the dismissal is held to be procedurally unfair (although it would still be open to the employer to argue that a Polkey deduction should be made). In addition, if the employer has unreasonably failed to follow the Acas Code, the Employment Tribunal may increase the compensatory award by up to 25% (subject to the overall cap on that award).

1.20 **The "range of reasonable responses" test:**

In considering the question of reasonableness, the Employment Tribunal must consider whether the decision to dismiss fell within the "band of reasonable responses" of a reasonable employer. The test is whether it was reasonable for an employer in those circumstances and in that business to take the decision it did (see Iceland Frozen Foods Ltd v Jones, 1982 IRLR 439). The test applies both to the decision to dismiss and to the investigation which led to that decision (see Sainsbury's Supermarkets Ltd v Hitt, 2003 IRLR 23).

The Employment Tribunal may only take into account the facts known to the employer at the time of the dismissal. Generally, this means the facts known to the dismissal decision-maker at the time of reaching the dismissal decision (Orr v Milton Keynes Council, 2011 EWCA Civ 62). However, in Royal Mail Group Ltd v Jhuti, 2020 IRLR 129, the Supreme Court devised a narrow exception to this general rule. It was held that the motivations of someone who was responsible for an investigation might also be attributed to the employer (meaning that if that person was improperly motivated to dismiss for a reason which had been kept hidden from the decision-maker, then that hidden reason could be treated as known to the employer at the time of dismissal). In Jhuti, the hidden reason was that the employee had blown the whistle. This was concealed from the dismissal decision-maker, who had dismissed on poor performance grounds.

It is irrelevant whether or not the Employment Tribunal would have dismissed the employee if it had been in the employer's shoes: the Tribunal must not substitute its view for that of the employer. That said, the range of reasonable responses is not infinitely wide and is subject to limits.

1.21 **Automatically unfair reasons for dismissal:**

In certain circumstances, a dismissal (or selection for a redundancy dismissal) is deemed "automatically unfair". These include dismissals (or selection for redundancy) for reasons connected to pregnancy or childbirth, health and safety activities, whistleblowing, exercising various time off rights, or asserting a statutory right under ERA 1996. A full list of automatically unfair reasons for dismissal (or selection for redundancy) is set out in the Appendix to this paper.

If an automatically unfair reason is established as the reason for dismissal (or selection for redundancy), the Employment Tribunal must find the dismissal unfair without going on to consider the reasonableness of the decision.

Two-year service requirement

For the majority of inadmissible reasons, there is no requirement for the employee to have served the usual two-year qualifying period of service to be protected from unfair dismissal. This means that employees are protected from dismissal for an automatically unfair reason from Day One of employment.

Only in the following three types of automatically unfair dismissal is two years' continuous service required:

- dismissal because of a spent conviction;
- dismissal where there is a transfer of an undertaking, and the transfer is the sole or principal reason for the dismissal; or
- dismissal in connection with exercising prescribed rights in relation to the removal of the Swedish derogation.

Cap on compensation

In cases where the claimant was dismissed (or selected for redundancy) for carrying out health and safety activities or for whistleblowing, there is no upper limit on the compensatory award. In all other cases, the usual upper limit will apply (discussed below).

Availability of interim relief

Employees may apply for "interim relief" within seven days of their dismissal where it is claimed that the dismissal was for certain automatically unfair reasons.[5] If successful, the Employment Tribunal will order the employer to continue employing the employee or, failing that, to continue paying their salary until the final determination of their claim (and such monies are not repayable even where the employee ultimately loses the claim).

1.22 **Remedies:**

If the Employment Tribunal upholds an employee's complaint of unfair dismissal it may make an order of reinstatement or re-engagement of the employee or an order for compensation.

1.23 **Reinstatement and re-engagement:**

Reinstatement is where the employer is ordered to treat the employee in every respect as if they had not been dismissed. This means that the employee is awarded arrears of pay

[5] Namely trade union membership or activities, whistleblowing, or activities as a health and safety representative, working time representative, an employee representative in the context of a collective redundancy or TUPE transfer, or as a pension scheme trustee.

(without a cap) and all rights and privileges in relation to the employee's contract of employment are restored.

If the employer refuses to comply with a reinstatement order, an additional award of between 26 and 52 weeks' pay capped at the statutory limit (currently £643 per week) can be made.

If the Employment Tribunal does not order reinstatement, it must go on to consider re-engagement. Re-engagement is where the employee is re-employed in a job comparable to that from which the employee was dismissed or other suitable employment i.e. not in the same job.

In practice, reinstatement and re-engagement orders are rarely ordered. However, in some circumstances, they can be an extremely powerful weapon for claimants, particularly in ordinary unfair dismissal claims where the compensatory award is capped at the statutory maximum. If the claimant is a high earner and there is a long delay between the dismissal and re-engagement, there is the potential for a large arrears of pay award to be made. For example, in Jones v JP Morgan Securities Plc [2021] 12 WLUK, the employee was dismissed for gross misconduct, purportedly for market manipulation that had occurred four years earlier. The employee succeeded in a claim of unfair dismissal. At the remedies hearing, the Tribunal said it would not be practicable to reinstate him. However, it took into account the fact that the bank had said that its regulatory reference would state the employee was not a fit and proper person. In effect, this meant that he would never be able to work in a regulated role in the financial services sector in the UK again. In these circumstances, re-engagement was the only way that the unfair dismissal could be *"made right".* Consequently, the Tribunal ordered that the employee be re-engaged at an associated employer in Hong Kong, rather than the UK. Further, an award of over £1.5 million was made to reflect lost salary and benefits between the period of dismissal and re-engagement.

Practical points to note:

1) When acting for an employee it is always tactically helpful to include a claim for reinstatement as this gives more to argue for in terms of compensation, especially at the moment with such long delays in the Employment Tribunal process.

2) However, the claimant should consider how the proceedings are conducted and whether this would prevent a successful claim of reinstatement.

3) In Kelly v PGA European Tour, 2021 EWCA Civ 549, a loss of trust and confidence in the employee is relevant to whether the Employment Tribunal will make an award for reinstatement or re-engagement.

1.24 **Awards of compensation:**

An award of compensation is made up of the following:

(a) a basic award; and

(b) a compensatory award.

Basic award

In a standard unfair dismissal case the basic award is calculated in the same way as statutory redundancy pay, namely by reference to the employee's age and length of service. It is calculated as follows:

(a) half a week's pay for each year of completed employment in which the employee was under 22;

(b) one week's pay for each year of completed employment in which the employee was not below the age of 22 (i.e. between 22 and 40); and

(c) one and a half's week's pay for each year of completed employment in which the employee was not below the age of 41.

One week's pay is subject to the statutory cap (currently £643). Based on this amount, the current maximum basic award is £19,290. This will rise in April 2024.

Some types of automatically unfair dismissal attract a minimum basic award. Currently, the minimum basic award is £7,836. Such cases are where the reason or principal reason for dismissal is:

- trade union membership or activities;
- carrying out activities as a health and safety representative;
- carrying out functions as a workforce representative;
- carrying out duties as an occupational pension scheme trustee; and
- carrying out functions or activities as an employee representative.

Compensatory award

The amount of the compensatory award is such amount as the Employment Tribunal considers "just and equitable" in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. There is a cap on the maximum compensatory award that may be awarded, which is the lower of a statutory cap (currently £105,707) and 52 weeks' pay.

The calculation of the compensatory award is not based on a formula. Section 123 of the ERA provides that the award shall be *"such amount as the tribunal considers just and equitable in the all the circumstances having to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"*. Therefore, the key factors relevant to the various heads of loss (see below) are whether the loss in question is:

- a consequence of the unfair dismissal;
- attributable to the employer; and
- just and equitable.

The typical heads of loss that are considered when calculating a compensatory award are as follows:

(a) immediate loss of earnings (i.e. loss from termination until the date of the hearing);

(b) future loss of earnings;

(c) expenses;

(d) loss of statutory rights; and

(e) loss of pension rights.

The Employment Tribunal's ability to award compensation is very wide and can, for example, include the costs of letting a property, car hire, renting a new property and costs of retraining.

Practical points to note

1. The employee is under an obligation to mitigate their loss, therefore, keeping a record of all roles they could have done since dismissal will assist in showing they have not mitigated their loss. Where an employee unreasonably fails to mitigate their losses, this can result in a reduction to the compensation awarded (usually by the amount of income that would have been earned had the losses been mitigated).

2. Compensation can be reduced if it can be shown that the employee would have been dismissed in any event. This is not limited to procedurally unfair dismissals.

3. Compensation may be reduced where the employee's conduct has contributed to the dismissal – this usually referred to as "contributory fault".

    a. **Basic award:** the basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have caused or contributed to dismissal or for the employer even to have known about it at the time of dismissal.

    b. **Compensatory award:** where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers "just and equitable". This creates a duty on Employment Tribunals to consider making a reduction for contributory fault in any case where it has found contributory fault by the employee. This is the case even if the issue is not expressly raised by the parties.

4. There is special guidance for the Employment Tribunal on calculating pension loss.

1.25 **Acas Code uplift and financial penalties:**

As discussed above, if an employer has unreasonably failed to comply with the Acas Code, then the Employment Tribunal may uplift the compensatory award by up to 25% (subject to the overall cap).

Tribunals may also impose a fine on an employer of up to £20,000 if it believes that the employer has disregarded the employee's rights, and this must be factored into any risk analysis.

APPENDIX

LIST OF AUTOMATICALLY UNFAIR REASONS FOR DISMISSAL

Reasons for which no qualifying period required

Reason for dismissal	Compensatory award capped?
Unfair dismissal in connection with carrying out jury service.	Yes
Unfair dismissal for reasons connected with pregnancy, childbirth, statutory maternity paternity, adoption, shared parental, parental or parental bereavement leave, time off for attending antenatal and adoption appointments or time off for dependants.	Yes
Unfair dismissal for a health and safety reason.	**No**
Unfair dismissal of a shop or betting worker for refusing to work on a Sunday.	Yes
Unfair dismissal for a reason connected with rights under the Working Time Regulations 1998.	Yes
Unfair dismissal for performing functions as an occupational pensions trustee.	Yes
Unfair dismissal for performing functions as an employee representative on a TUPE transfer or collective redundancy.	Yes
Unfair dismissal for whistleblowing.	**No**
Unfair dismissal for asserting a statutory right listed in section 104(4) of the ERA 1996.	Yes
Unfair dismissal related to the national minimum wage	Yes
Unfair dismissal for enforcing rights in relation to working tax credit.	Yes
Unfair dismissal in connection with an application for flexible working.	Yes
Unfair dismissal of a jobholder if the reason for dismissal was the employer's duties under the auto-enrolment regime or its contravention of those duties.	Yes
Unfair dismissal in connection with time off for study and training request rights.	Yes
Unfair dismissal in connection with a prohibited list under the	Yes

Reason for dismissal	Compensatory award capped?
Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493).	
Unfair dismissal for refusing to accept an offer to become an employee shareholder.	Yes
Unfair dismissal in connection with European works council activities.	Yes
Unfair dismissal related to status as a part-time worker.	Yes
Unfair dismissal related to status as a fixed-term employee.	Yes
Unfair dismissal in connection with information and consultation agreement activities.	Yes
Unfair dismissal in connection with carrying out functions as an employee representative under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349).	Yes
Unfair dismissal in connection with performing functions under the European Cooperative Society (Involvement of Employees) Regulations 2006 (SI 2006/2059).	Yes
Unfair dismissal in connection with performing functions under the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401).	Yes
Unfair dismissal in connection with exercising prescribed rights as an agency worker.	Yes
Unfair dismissal for a reason relating to the employee's political opinions or affiliation.	Yes
Unfair dismissal in connection with the employee's membership of a reserve force.	Yes
Unfair dismissal in connection with trade union recognition.	Yes
Union membership and activities. Unfair dismissal for trade union membership or non-membership, or participation in trade union activities.	Yes
Unfair dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing.	Yes
Unfair dismissal for taking part in protected industrial action.	Yes
Unfair dismissal in connection with the breach of an exclusivity term in a	Yes

Reason for dismissal	Compensatory award capped?
zero hours contract.	
Unfair dismissal following selection for redundancy on certain of the grounds listed above.	Yes (unless selected because of whistleblowing or a health and safety reason)

Reasons for which 2-year qualifying period is required

Reason for dismissal	Compensatory award capped?
Dismissal because of a spent conviction.	Yes
Dismissal where the sole or principal reason for the dismissal is a TUPE transfer itself, unless it is an ETO reason entailing changes in the workforce.	Yes
Unfair dismissal in connection with exercising prescribed rights in relation to the removal of the Swedish derogation.	Yes