



EMPLOYMENT LAW

# Introduction to Employment Law: Dismissal

*(adapted from a presentation prepared by Beverley Sunderland of Crossland Employment Solicitors for ELA)*

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# WHAT IS A DISMISSAL?

# What is a dismissal?

## **Section 95(1) of the Employment Rights Act 1996**

- Employment contract is terminated by the employer with or without notice
- Non-renewal of a fixed-term contract
- Constructive dismissal i.e. the employee terminates the employment contract (with or without notice) in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct

# What is not a dismissal?

- Resignations – unless:
  - A constructive dismissal
  - Employee resigns and is dismissed during the notice period
  - Employer gives notice and employee resigns during notice period
- Termination by agreement
- Termination by operation of law
- “Vanishing dismissals” (successful appeal against dismissal)

# What is a “constructive” dismissal?

- Fundamental breach of contract by employer
- Requires employee to resign
- Affirming the breach
- The sole reason for leaving?
- Can notice be given?
- Effect on restrictive covenants
- The *Norton Tool* principle
- Employers should plead a fair reason for dismissal

# Claims arising out of a dismissal

- **Wrongful dismissal – breach of contract**
  - Claims can be brought in Tribunal or Civil Courts
  - Financial limit in Tribunal (*£25,000*)
- **Unfair dismissal – statutory right**
  - Ordinary unfair, automatically unfair and constructive
  - Two years' continuous service usually needed
  - Financial limit in Tribunal (*currently £124,997 until 5 April 2024*)

# WRONGFUL DISMISSAL

# What is a wrongful dismissal?

- Dismissal without contractual notice if no PILON or PILON not exercised
- Early termination of a fixed-term contract
- Early termination of a contract for a specific task before task completed
- Dismissal in breach of a contractual disciplinary procedure
- Dismissal in breach of a contractual redundancy procedure
- Dismissal where the contract may only be terminated on certain specified grounds and the employer dismisses the employee on some other ground



# Wrongful dismissal in the Employment Tribunal

- Breach of contract – cap of £25k in Tribunal
- Employer can counterclaim
- No reasonableness test – Tribunal will want to hear evidence and decide for themselves
- *Norton Tool* principle – but not for constructive dismissal
- Repudiatory conduct which was not known about at the time can be considered for remedy (save for PILON)

# Wrongful dismissal in the Civil Courts

- High earners - a long notice period or long fixed-term contract
- Insufficient qualifying service/excluded category
- The dismissal is wrongful but fair
- Likelihood compensation for unfair dismissal would be substantially reduced because of the employee's contributory conduct
- Out of time for unfair dismissal claim
- Employee is seeking a remedy such as an injunction or declaration

# UNFAIR DISMISSAL

# What is a fair dismissal?

- Dismissal for one of **five fair reasons** set out in s98 of ERA
- The employer must have acted reasonably in dismissing the employee for that reason under s98(4) taking into account its administrative resources, size and the principles of equity and the substantial merits of the case
- The sanction must be within a “range of reasonable responses”
- Not for Tribunal to impose their own view – the question is what did the employer believe?

# Who can claim unfair dismissal?

- Employees (includes fixed-term employees)
- Two years' qualifying service needed (note the “automatically unfair” exceptions)
- Must have been “dismissed”
- Must be within the territorial scope of the ERA
- Must not be excluded from bringing a claim

# Calculating the length of service

- Include any previous employment as a 'temp' (where continuous)
- Add on statutory notice entitlement to work out if employed for two years
- Employee cannot argue that failure to give notice has deprived an employee of unfair dismissal claim

# What are the fair reasons for dismissal?

- Capability (covers performance and ill-health)
- Conduct
- Redundancy
- Illegality
- Some other substantial reason (“SOSR”)

# General points to note on the reason for dismissal

- Needs to be a fair reason
- Facts known at date of dismissal
- Employer giving the wrong handle
- Changing the reason
- Right to written reasons



# Reasonableness of dismissal and s.98(4), ERA

*"... 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."*

# Procedural fairness

- Precise process will depend on the reason for dismissal
- Some core principles that will apply in most cases: notifying the employee, allowing them to make representations at a hearing and offering a right of appeal
- If the process is unfair, but a fair process would have made no difference to the ultimate outcome, the dismissal will still be unfair but the Tribunal may reduce the compensation awarded to the employee – a ***“Polkey deduction”***

# The Acas Code of Practice on Disciplinary and Grievance Procedures (the “Code”)

- Statutory Code setting out the core principles of procedural fairness
- **When does it apply?**
  - **YES:** misconduct and poor performance dismissals
  - **NO:** redundancy dismissals and the non-renewal of a fixed-term contract
  - **MAYBE:** ill-health and SOSR dismissals – may be engaged where there is an element of culpability on the part of the employee

# Key principles of the Code

- Dealing promptly with issues
- Acting consistently
- Carrying out an appropriate level of investigation
- Properly informing employees of the basis of the concerns
- Giving an employee the opportunity to state their case
- Allowing employees to be accompanied at formal meetings
- Offering the right of appeal against formal decisions

# Impact of the Code

- Tribunals must take the Code principles into account when deciding if the employer has acted reasonably
- Code is supplemented by more detailed non-statutory guidance
- An unreasonable failure to comply with the Code principles may mean:
  - the dismissal is procedurally unfair; and
  - compensation is uplifted by up to 25%

# Substantive fairness: the “range of reasonableness responses”

- Did the decision fall within the range of reasonable responses open to the employer in those circumstances and in that business?
- Tribunal must only take into account the facts known to the decision-maker at the time of deciding to dismiss (but note the narrow exception identified in *Jhuti*)
- Tribunal must not substitute its own view on reasonableness

# “Automatically unfair” dismissals

- Dismissal for certain inadmissible reasons will be automatically unfair – means the reasonableness of the decision is irrelevant
  - **Impact on service:** the 2-year qualifying service requirement is disapplied in most categories of automatically unfair dismissal
  - **Impact on compensation:** the statutory cap on the compensatory award is lifted for health and safety and whistleblowing dismissals
  - **Availability of interim relief:** in a limited number of claims the claimant may be able to apply for continuation of employment / payment of salary pending the final hearing

# Remedies for unfair dismissal

- **Reinstatement / re-engagement** - additional award if employer refuses (26-52 weeks' capped pay) plus uncapped back pay
- **Basic award** - max award of £19,290; min award of £7,836 for certain types of automatically unfair dismissals
- **Compensatory award** - lower of 52 weeks' pay or £105,707 (uncapped for whistleblowing and health and safety dismissals)



# Remedies for unfair dismissal

- Don't forget:
  - Uplift to compensatory award of up to 25% for unreasonable failure to comply with Acas Code of Practice
  - Tribunal 'fine' of up to £20,000 for not respecting employment rights

# QUESTIONS

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