

Definition of Dismissal

Definition of dismissal in unfair dismissal

To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. A contract of employment may terminate in a number of different ways but the circumstances in which an employee is treated as having been dismissed for the purposes of an unfair dismissal claim are limited to:

- o where the employee's contract of employment is terminated by the employer, whether with or without notice
References: ERA 1996, s 95(1)(a)
- o where the employer gives notice to terminate the contract and, within the notice period, the employee gives counter-notice that expires before the end of the original notice period
References: ERA 1996, s 95(2)
- o where the contract of employment is a limited-term contract and terminates on the happening of the limiting event
References: ERA 1996, s 95(1)(b)
- o where the employee terminates the contract by resigning, whether with or without notice, but in circumstances in which he is entitled to do so by reason of the employer's conduct (constructive dismissal)
References: ERA 1996, s 95(1)(c)

Dismissal does not include:

- o termination by mutual consent of the employer and employee, although an employment tribunal will scrutinise the arrangement to satisfy itself that the employee genuinely consented to the termination and was not effectively forced into it
- o termination by the employee in a situation not amounting to constructive dismissal, ie genuine voluntary resignation
- o termination by frustration, where continued performance of the contract becomes effectively impossible, although frustration arguments very rarely succeed in an employment context

Express dismissal

Where a contract of employment is brought to an end by the express act of the employer, this is clearly a dismissal whether the employer gave notice or terminated the contract with immediate effect.

References: ERA 1996, s 95(1)(a)

Notice of dismissal can only generally be effective if and when received by the employee.

References: *McMaster v Manchester Airport* [1998] IRLR 112

It is still a dismissal where the employer gives notice of dismissal to the employee, and the employee then gives counter-notice which brings forward the date of termination. The employer's original reason for giving notice is still treated as the reason for dismissal for the purposes of an unfair dismissal claim

It is a dismissal where an employee resigns on notice but, before the expiry of the notice period, the employer dismisses them with immediate effect.

References: *Harris & Russell v Slingsby* [1973] IRLR 221

It is a dismissal where an employee resigns because he has been told by his employer to resign or be dismissed.

References: *Jones v Mid-Glamorgan CC* [1997] IRLR 685

Sandhu v Jan de Rijk Transport [2007] IRLR 519

It may be a dismissal (followed by re-engagement) for the employer to impose a new contract on the employee with significantly different terms and conditions, even where the employee carries on working under

the new contract. Here, the employee would be able to bring unfair dismissal proceedings as a result of the termination of his original contract of employment.

References: *Alcan Extrusions v Yates* [1996] IRLR 327

It is a dismissal where the employer accepts a fundamental breach by the employee of his contract of employment. The termination will again be seen as being instigated by the employer, even if it was entirely justified.

References: *LTE v Clarke* [1981] IRLR 166

Limited-term contracts

It is a dismissal where a limited-term contract of employment terminates because the limiting event occurs.

References: ERA 1996, s 95(1)(b)

A limited-term contract is one that is not intended to be permanent and which includes provision that it will terminate by virtue of a 'limiting event'. A limiting event means:

References: ERA 1996, s 235(2A)

- o in the case of a fixed-term contract, the expiry of the term
- o in the case of a contract for the performance of a specific task, the performance of that task
- o in the case of a contract that provides for its termination on the happening of a particular event (or the failure of a particular event to happen), the happening or failure to happen of the particular event

Constructive dismissal

Constructive dismissal occurs where an employer's conduct is sufficiently bad that the employee is entitled to treat the contract as being at an end without following the termination provisions in the contract. In effect, although the contract is actually terminated by the employee's action in resigning, the law treats it as having been terminated by the employer's conduct forcing the employee to say 'enough is enough'.

To establish that he has been constructively dismissed, an employee must show that:

References: *Western Excavating v Sharp* [1978] IRLR 27

- o his employer has committed a fundamental or repudiatory breach of his contract of employment, ie a breach going to the root of the contract
- o he has left because of that breach
- o he has not affirmed the contract of employment by delaying for too long after the employer's breach or otherwise acting in a manner that is only consistent with him remaining in employment

Whether or not particular action by an employer amounts to a fundamental breach of contract depends on the facts of the specific case. For further information on what may amount to such a breach

An employee may sometimes rely on a series of actions by his employer that individually may not amount to fundamental breaches but do when taken together. This is sometimes referred to as the 'last straw' doctrine: in essence, the employee puts up with a series of actions by his employer but then resigns in response to the 'last straw'.

References: *Woods v WM Car Services* [1981] IRLR 347

Lewis v Motorworld [1985] IRLR 465

Relationship between constructive and unfair dismissal

In claims of constructive unfair dismissal, even where the tribunal finds that the employee has been constructively dismissed, it does not necessarily follow that that dismissal was unfair. Having found that an employee was constructively dismissed, the tribunal must go on to make explicit findings on:

References: Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166

- o the reason for the dismissal, and
References: ERA 1996, s 98(1)-(2)
- o whether the employer has acted reasonably in all the circumstances
References: ERA 1996, s 98(4)

Hence, where a constructive dismissal is established, it is open to the employer to show that such dismissal was for a potentially fair reason.

References: Bournemouth University Higher Education Corporation v Buckland [2009] IRLR 606, EAT

(subsequently endorsed by the CA: [2010] IRLR 445

In the context of constructive dismissal, where the employer is not in fact intending to dismiss at all, it is inevitably somewhat artificial to attribute a reason for the dismissal. Nevertheless, it is still for the employer to show that reason. It does this by showing the reasons it had for committing the conduct which entitled the employee to terminate the contract, giving rise to the deemed dismissal by the employer.

References: ERA 1996, s 98(1)

Delabole Slate v Berriman [1985] IRLR 305

Once those reasons are established, it can be seen whether they fell within the list of potentially fair reasons

References: ERA 1996, s 98(2)

If the employer does show that the dismissal was for a potentially fair reason, it will then be for the employment tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

References: ERA 1996, s 98(4)

Sainsbury's Supermarkets v Hitt [2003] IRLR 23

Bournemouth University Higher Education Corporation v Buckland [2009] IRLR 606, EAT

(subsequently endorsed by the CA: [2010] IRLR 445

Automatically unfair constructive dismissal

A dismissal will be automatically unfair if the reason or principal reason for dismissal is shown to be one of a number of impermissible reasons. The automatic unfairness provisions may also sometimes apply in the context of constructive dismissal.

Where, in a claim for constructive unfair dismissal, reliance is placed on one of the provisions regarding automatically unfair reasons, the claimant must demonstrate that the reason for the employer's conduct which caused him to resign was action by the claimant which, had he been dismissed for it, would have entitled him to claim automatically unfair dismissal. Once that has been shown, unfair dismissal is established without more; as with all automatically unfair dismissals, there is no need for any further consideration of:

References: KLT Water Engineering v (1) Irvine (2) Oliver (3) G and K Valve Services UKEATS/0005/09/BI

- o substantive or procedural fairness, or
- o whether dismissal fell within the range of reasonable responses