

# Qualifying period for Unfair dismissal

## Qualifying period for unfair dismissal

For employees starting fresh employment on or after 6 April 2012, the right not to be unfairly dismissed generally only arises when the employee, by the effective date of termination of their employment, has been continuously employed for a period of at least two years.

References: ERA 1996, s 108(1)

Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012/989, art 3

Employees whose current period of continuous employment commenced before 6 April 2012 will:

References: Variation of Qualifying Period Order 2012, SI 2012/989, art 4

- o retain their unfair dismissal rights if they have already been continuously employed for one year or more as at 6 April 2012 (even if they have been employed for less than two years), or
- o gain unfair dismissal rights after being continuously employed for one year

The effective date of termination of employment will depend on the circumstances of the dismissal

Where an employee is dismissed without being given the statutory minimum notice, his employment is generally treated as though it had been extended by the statutory minimum notice for the purposes of determining whether he has the required qualifying period of employment. In other words, the minimum statutory notice is effectively added to the period of employment to see whether the required qualification period is reached. For further discussion.

References: ERA 1996, s 97(2)

It now seems clear that, where an employee is wrongfully dismissed without being given contractual notice and that contractual notice would, if given, have taken his continuous employment over the required qualification period so as to be able to claim unfair dismissal, he will nevertheless **not** be entitled to recover damages in a wrongful dismissal claim for the lost chance of bringing unfair dismissal proceedings.

References: Harper v Virgin Net [2004] IRLR 390

Where an employer, having given an employee notice of dismissal, subsequently changes his mind and summarily dismisses the employee prior to the end of the notice period, the effect of this is to shorten the notice period and change the effective date of termination to the earlier date of dismissal. This is the case even if, as a consequence of the earlier effective date of termination, the employee no longer has sufficient continuity of service to claim 'ordinary' unfair dismissal (ie unfair dismissal where a qualifying period of employment is required to bring an unfair dismissal claim).

References: M-Choice UK v Aalders UKEAT/0227/11/DA

This discussion relates solely to the qualifying period of employment in the context of the unfair dismissal provisions of the Employment Rights Act 1996. Qualifying periods of employment are also relevant in other contexts, including entitlement to a written statement of reasons for dismissal.

## Exceptions

The qualifying period of employment is reduced to one month where an employee is dismissed by reason of a requirement imposed under a number of specified health and safety provisions or a recommendation in a relevant health and safety code of practice.

References: ERA 1996, ss 108(2), 64(2)

No qualifying period of employment at all is required where the reason of principal reason for dismissal was one of a number of specified reasons. These include various reasons which make a dismissal automati-

cally unfair, the rationale apparently being that, where an employee is dismissed for one of a number of impermissible reasons, he should have the right to bring a claim of unfair dismissal right from the start of his employment. The reasons for dismissal where there is no required qualifying period include reasons relating to:

- o jury service, with certain exceptions  
References: ERA 1996, s 108(3)(aa)
  - o leave for family reasons (eg maternity, parental leave)  
References: ERA 1996, s 108(3)(b)
  - o flexible working  
References: ERA 1996, s 108(3)(gi)
  - o health and safety  
References: ERA 1996, s 108(3)(c)
  - o refusal by shop or betting workers to work on Sundays  
References: ERA 1996, s 108(3)(d)
  - o working time  
References: ERA 1996, s 108(3)(dd)
  - o the performance of functions as the trustee of an occupational pension scheme  
References: ERA 1996, s 108(3)(e)
  - o the performance of functions as an employee representative, or a candidate to be such a representative, in the context of collective redundancy, transfer of undertakings or statutory information and consultation provisions  
References: ERA 1996, ss 108(3)(f), 108(3)(hh), 108(3)(k), 108(3)(l)
  - o whistleblowing  
References: ERA 1996, s 108(3)(ff)
  - o assertion of a statutory right  
References: ERA 1996, s 108(3)(g)
  - o rights under the national minimum wage legislation  
References: ERA 1996, s 108(3)(gg)
  - o rights under the tax credits legislation  
References: ERA 1996, s 108(3)(gh)
  - o rights regarding requests to undertake study or training  
References: ERA 1996, s 108(3)(gk)
  - o selection for redundancy where the reason for selection would have rendered the dismissal automatically unfair if it had been the reason for dismissal  
References: ERA 1996, s 108(3)(h)
  - o rights under the part-time workers legislation  
References: ERA 1996, s 108(3)(i)
  - o rights under the fixed-term employees legislation  
References: ERA 1996, s 108(3)(j)
  - o the performance of functions as an employee representative, or a candidate to be such a representative, in the context of occupational or personal pension schemes  
References: ERA 1996, s 108(3)(m)
  - o union membership or activities, or relating to a prohibited list (ie, a 'blacklist') containing details of trade union members and activists whose purpose is to discriminate against workers on grounds of trade union membership or trade union activities  
References: TULR(C)A 1992, s 154
- ERA 1996, s 108(3)(gl)
- o union recognition or bargaining arrangements  
References: TULR(C)A 1992, Sch A1, Pt VIII
  - o taking part in 'protected' industrial action  
References: TULR(C)A 1992, s 238A
  - o the right to be accompanied at disciplinary or grievance hearings  
References: ERA 1999, ss 10, 12(3), 12(4)

- o exercising the right to be accompanied (or accompanying another employee) at meetings or appeals convened to consider a request to work beyond retirement. **NB** These provisions were repealed with effect from 6 April 2011, subject to transitional provisions  
References: Age Regs 2006, SI 2006/1031, Sch 6 para 13(5)  
  
ERA 1996, s 108(3)(n)
- o a reason connected with the assertion of rights under the Agency Workers Regulations 2010  
References: ERA 1996, s 108(3)(r)
- o (when these rights are in force) certain reasons connected with pension enrolment under the Pensions Act 2008  
References: ERA 1996, s 108(3)(gj)