LAW PUNDITS

Who is entitled to Claim Unfair Dismissal

LP Learn Material

Entitlement to claim unfair dismissal

The right not to be unfairly dismissed is a purely statutory right arising under the Employment Rights Act 1996, s 94. There are a number of qualifying conditions and exceptions. The burden of proving that the relevant qualifying conditions are met generally falls on the claimant.
References: ERA 1996, s 94

An unfair dismissal claim is within the exclusive jurisdiction of the employment tribunal (ie it cannot be brought in the courts) and must generally be made within 3 months of the effective date of termination. The tribunal may, however, extend the time limit where it was not reasonably practicable to present the claim in time.
References: ERA 1996, s 111

Eligibility

The right not to be unfairly dismissed is only available to employees, defined as individuals who have entered into or work under a contract of employment (ie a contract of service or apprenticeship, whether express or implied and whether oral or in writing)
References: ERA 1996, ss 230(1)-(2)

Unfair dismissal requires that the employee has been dismissed. The circumstances in which an employee is treated as having been dismissed are set out in ERA 1996, s 95 and are discussed in Definition of dismissal in unfair dismissal.
References: ERA 1996, s 95

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. The qualification period is one year for those whose continuous employment started before that date. There are many exceptions to this requirement. The basic requirement and the exceptions to it are discussed in Qualifying period for unfair dismissal.
References: ERA 1996, s 108(1)

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

Particular types of employment

Statute expressly applies the unfair dismissal legislation to particular types of employment:

- Crown employees are generally covered (ie those employed under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision)
  References: ERA 1996, s 191
- members of the armed forces are covered by most of the unfair dismissal provisions but not, for example, those relating to dismissal on health and safety or flexible working grounds
  References: ERA 1996, s 192
- those employed in the Security Service, the Secret Intelligence Service or GCHQ are not covered
  References: ERA 1996, s 193
- House of Lords and House of Commons staff are generally covered
  References: ERA 1996, ss 194--195
- share fishermen are not covered
  References: ERA 1996, s 199(2)
- Police officers are generally not covered

References: ERA 1996, s 200

- the position of diplomatic and other foreign employees is complicated but, in general, an employer would be able to claim state immunity in relation to foreign diplomatic and related staff who have been posted to their country's embassy in Great Britain

Whether employee works in Great Britain

The right not to be unfairly dismissed generally applies to employees who are working in Great Britain *at the time of their dismissal*. There are other employees for whom the characteristics of their employment relationship are sufficiently exceptional that the right will also apply to them, for example:
References: Lawson v Serco [2006] IRLR 289

- sometimes it will be helpful to decide where the worker is based: for example, peripatetic workers, such as airline pilots, international management consultants and salesmen may well properly be seen as being based in Great Britain, and thus entitled to the protection of the ERA 1996. In deciding where the employee's base is, the terms of the contract are not always much help and what has to be looked at is the conduct of the parties and the way they have been operating the contract
  References: Lawson v Serco [2006] IRLR 289, paras 28-31

  Diggins v Condor Marine Crewing Services [2010] IRLR 119
- in other cases, the concept of base will not be helpful. In such cases, the test will involve a rather vaguer concept of whether, despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works. This would be the appropriate consideration in the case of various expatriate employees, eg:
  References: Lawson v Serco [2006] IRLR 289, para 36
  - those posted abroad by a British employer for the purposes of a business carried on in Great Britain, for example, a foreign correspondent on the staff of a British newspaper posted abroad who lives there for many years but remains nevertheless a permanent employee of the newspaper who could be posted to some other country
  - expatriate employees of a British employer operating within what is effectively an extra-territorial British enclave in a foreign country

Although there is conflicting caselaw on the point, Underhill P firmly emphasized in *MOD v Wallis and Grocott* that the collection of categories of 'exceptional' employee working outside Great Britain described by Lord Hoffman in *Serco* (set out above) is **not** intended to be an exhaustive list; they are merely 'illustrations of the operation of a principle which it was not possible to define with precision'.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 11

Ravat v Halliburton Manufacturing and Services [2010] IRLR 1053

Likewise, on appeal, Mummery LJ referred to Lord Hoffman's categories as '**examples** of classes of expatriate employees falling within the scope' of the Act. Elias LJ held that the connection of the claimants' employment with Great Britain was 'equally as strong' as if they had been posted abroad by a British employer or worked in a British enclave overseas; clearly implying that the categories of expatriate employee Lord Hoffman listed in *Serco* were merely examples rather than an exhaustive list.
References: MOD v Wallis and Grocott [2011] EWCA Civ 231

Employees working outside Great Britain who do not fall into one of these exceptional categories, and hence would not otherwise be covered by UK unfair dismissal law, cannot gain the right to bring a claim by virtue of a choice of law clause in their employment contract which asserts that UK law applies. Section 204 of the ERA 1996 makes it plain that the proper law of the contract is of no materiality when considering the reach of the statutory rights.
References: Bleuse v MBT Transport [2008] IRLR 264

Financial Times v Bishop (UKEAT/0147/03/ZT)

ERA 1996, s 204

Read more about this from Butterworths

Harvey DI[42]-[88] -- Exclusions from the right to claim

Dismissal in connection with a strike or lock-out

Whether or not an employee taking part in industrial action has any protection from unfair dismissal depends principally on two factors:

- whether or not the industrial action is 'protected industrial action'
- whether the dismissal takes place whilst the employee is still taking the action (eg is still on strike), or at some stage after he has ceased his involvement in it

Protected industrial action

'Protected industrial action' is action induced by an act that is subject to statutory immunity. Put broadly, this means that in order to qualify as protected industrial action, the action taken must:

- be done in contemplation or furtherance of a trade dispute, and
- have satisfied the statutory requirements in relation to how it was called and balloted, and how the employer was notified

Where the reason or principal reason for a dismissal is that an employee took protected industrial action, it will be automatically unfair in any of the following three circumstances:
References: TULR(C)A 1992, ss 238(2B), 238A(2)

- where the dismissal took place during 'the protected period'. This is a basic period of twelve weeks from the first day of the protected industrial action, which may be extended by the number of days:
  References: TULR(C)A 1992, s 238A(3), 238A(7A)-(7D)
  - over which the protected industrial action was taking place, or
  - during any part of which the employee was locked out by his employer
- where:
  References: TULR(C)A 1992, s 238A(4)
  - the dismissal took place after the end of 'the protected period', but
  - the employee had stopped taking protected industrial action before the end of that period
- where:
  References: TULR(C)A 1992, s 238A(5)
  - the dismissal took place after the end of 'the protected period', and
  - the employee had *not* stopped taking protected industrial action before the end of that period, but
  - the employer did not take such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the protected industrial action related. What steps would be reasonable does not depend on the merits of the dispute, but rather on what efforts have been made in relation to negotiation, conciliation, mediation, and the following of collectively agreed procedures

References: TULR(C)A 1992, s 238A(6)-(7)

Dismissal whilst taking part in industrial action

Where the industrial action is not 'protected', it can either be:
References: TULR(C)A 1992, s 237(2)

- action endorsed by a trade union, in which some members of that union are taking part, or
- unofficial industrial action

As regards action endorsed by a trade union, an employee who takes part in such action, and is dismissed whilst taking part in it, will generally (subject to various exceptions) have no right to complain of unfair dismissal unless:
References: TULR(C)A 1992, s 238

- one or more of the other employees at the employee's workplace who were taking part in the industrial action was not dismissed, or
- another employee at the employee's workplace who was taking part in the industrial action was also dismissed but, unlike the potential claimant employee, has been offered re-engagement within three months of the date of the potential claimant's dismissal

The effect of this provision is that the employer may not, whilst the action continues, selectively dismiss employees taking part in non-protected industrial action endorsed by a trade union, but may in some circumstances lawfully dismiss *all* of the employees taking part in such action.

In the case of unofficial industrial action, the right to claim unfair dismissal is excluded altogether if, at the time of dismissal, the employee was taking part in such action, unless the principal reason for the dismissing the employee or, in a redundancy case, for selecting the employee for dismissal was:
References: TULR(C)A 1992, s 237

- his being summoned for or absent because of jury service
  References: ERA 1996, s 98B
- health and safety related
  References: ERA 1996, s 100
- related to the activities of a workforce representative for working time workforce agreements
  References: ERA 1996, s 101A(1)(d)
- related to the activities of an 'employee representative', within the meaning of TULR(C)A 1992 or TUPE 2006
  References: ERA 1996, s 103
- whistleblowing
  References: ERA 1996, s 103A
- flexible working related
  References: ERA 1996, s 104C

Dismissal after industrial action has ceased

With some limited exceptions, these limitations on the right to claim unfair dismissal only apply to dismissals which take place whilst the employee concerned is actually engaged in industrial action. By contrast, if, at the point when the dismissal occurs, the employee is no longer participating in industrial action, the various restrictions on bringing unfair dismissal proceedings cease to apply.

As regards protected industrial action, such post-industrial-action dismissals will nonetheless be automatically unfair in certain specific circumstances, which are set out above.
References: TULR(C)A 1992, s 238A(2)-(7)

However, fairness will instead be determined according to normal s 98 ERA 1996 principles in any action for unfair dismissal arising out of such a post-industrial-action dismissal, if either:
References: ERA 1996, s 98

- the industrial action was protected, but the specific defined circumstances giving rise to automatic unfairness do not apply, or
- the industrial action was not protected

The EAT has given guidance on the application of s 98 of the ERA 1996 to dismissals on grounds of earlier participation in industrial action:
References: Sehmi and Sandhu v Gate Gourmet London [2009] IRLR 807

- at common law, an employer is entitled summarily to dismiss an employee who refuses to work, ie such a refusal amounts to a fundamental breach of contract constituting gross misconduct
  References: Simmons v Hoover [1976] IRLR 266
- however, in an action for unfair dismissal, the essential issue is not one of contract, though no doubt in most cases conduct which would justify summary dismissal would also justify dismissal for the purposes of s 98(4), and vice versa
  References: ERA 1996, s 98(4)
- properly stated, the question is whether it was within the range of reasonable responses for the company to dismiss the employee for taking part in the industrial action
- the withdrawal by an employee of his labour, even if it is in breach of contract, will not necessarily and in every conceivable circumstance justify the sanction of dismissal
- however, for example, in a case where large numbers of employees deliberately absent themselves from work, in a manner which is plainly liable to do serious damage to the employer's business, it is plain beyond argument that dismissal of those taking part in the action will be within the range of reasonable responses, even where the absence is not very prolonged

As regards whether, in the case of an employee returning to work after (alleged) participation in industrial action, it was *necessarily* unfair on ordinary s 98 ERA 1996 principles to proceed to dismissal without any form of hearing or any examination of the circumstances, the EAT has said:
References: Sehmi and Sandhu v Gate Gourmet London [2009] IRLR 807

- dismissal in such circumstances without any form of hearing or any examination of the circumstances would not necessarily be unfair
- there are circumstances -- albeit no doubt exceptional -- where dismissal on the spot may be justified. An example was given in *Bailey v BP Oil Kent Refinery* (approved in *Polkey*): if a worker was seen on the shop floor by the works manager and others to stab another man in the back with a knife, instant dismissal, without any opportunity for explanation being given, would be fair. The dismissal in such a case would not be any the less fair because the employers did not follow the requirements of a disciplinary procedure agreement
  References: Bailey v BP Oil Kent Refinery [1980] IRLR 287

  Polkey v Dayton [1987] IRLR 503
- the instant dismissal of an employee in the course of overt participation in industrial action could also similarly be fair (though the overlay of ss 237-238A of TULR(C)A 1992 means that the question would rarely fall for decision)
  References: TULR(C)A 1992, ss 237-238A
- in a case in which an employee is dismissed at the moment that, by presenting himself for work, he brought his participation to an end, that difference in timing would not necessarily make a decisive difference to the question of fairness
- the question whether fairness in such a case requires a hearing and possible further examination prior to dismissal is fact-sensitive
- in some cases it will be open to the employment tribunal to conclude that it was reasonable for the employer to do no more than dismiss summarily and offer an appeal, although this might not be adequate in every case

Illegality

Employees are not generally able to rely on contracts of employment which are tainted by illegality. Since a contract of employment is one of the qualifying conditions for bringing an unfair dismissal claim, any claim must fail if based on employment under an illegal contract. Typical examples of contracts of employment being tainted by illegality are:

- where an employer pays an employee in such a way as to avoid income tax and/or NI liabilities, or
- where an employee obtains employment without having permission to work in the UK because of their immigration status

Employees who were ignorant of the facts giving rise to the illegality may rely on the illegal contract. Employees who were aware of the facts but ignorant of the law giving rise to the illegality may not rely on the illegal contract. For example, an employee who is unaware that his employer is avoiding payment of NI in respect of his wages may be able to rely on his contract, but an employee who is aware of this but does not realise the illegality of this arrangement would probably not be able to rely on his contract.
References: Corby v Morrison [1980] IRLR 218

Newland v Simons and Willer [1981] IRLR 359

If the illegality relied on is in the performance of the contract, the employee is not affected unless they know of the facts which render the performance illegal and also participate actively and knowingly in the illegal performance.
References: Hall v Woolston Hall Leisure [2000] IRLR 578

There must be some form of misrepresentation, some attempt to conceal the true facts of the relationship, not just incorrect characterisation of the relationship by the parties, before a contract is rendered illegal. The mere fact that the arrangements have the *effect* of depriving HMRC of tax to which they were in law entitled does not render the contract unlawful.
References: Enfield Technical Services v Payne, BF Components v Grace [2008] IRLR 500 (CA)

Enfield Technical Services v Payne, Grace v BF Components [2007] IRLR 840 (EAT)

An employee who knows that his assertion to be self-employed is unsustainable and yet claims to HMRC to be self-employed, is misrepresenting his own understanding of the position. The contract with his employer will be illegal in its performance, and public policy will prevent him from bringing any claim based on the status of employee, for example unfair dismissal.
References: Connolly v Whitestone Solicitors (UKEAT/0445/10/ZT)

The defence of illegality constitutes the application of substantive law rather than a procedural bar. Therefore it does not offend against the right to a fair trial under Article 6 of the European Convention on Human Rights.

References: ECHR, Article 6

Soteriou v Ultrachem [2004] IRLR 870