

PAY & EMPLOYMENT RIGHTS SERVICE

PERS leaflet number 11

DISMISSAL

HOW DOES IT APPLY TO YOU?

What you need to know about:

DISMISSAL AND THE LAW
FAIR AND UNFAIR DISMISSAL
CONSTRUCTIVE DISMISSAL
EMPLOYMENT TRIBUNALS

*Community
Legal Service*



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WHAT IS DISMISSAL?

Dismissal is where your employer tells you that they no longer want you to work for them after a certain date. It is also classed as a dismissal if:

- You are on a **fixed term contract** that comes to an end and is not renewed.
- You are made **redundant** from your job.
- You have been on **maternity leave** and your employer refuses to let you return to work, even though you have the right to do so.
- Your employer changes the terms of your contract in a way that leaves you no choice but to resign. This is known as "**constructive dismissal**".
- You are **forced to resign**, because your employer would definitely dismiss you otherwise.
- **Retirement** can also count as a dismissal.

Being sacked is never a pleasant experience, but in certain situations you might be able to do something about it. This leaflet explains when and how you might be able to make a claim for unfair dismissal.

DISMISSAL - THE LAW

The **Employment Rights Act 1996** protects workers from 'unfair dismissal' in some circumstances. However it is important to realise that under employment law, 'fairness' has a specific meaning. It does not necessarily depend on the usual 'common sense' interpretation.

The law divides dismissals into various categories:

- Fair dismissal
- Automatically unfair dismissal
- Dismissal on grounds of unlawful discrimination
- Other unfair dismissals (including 'procedural' unfairness)
- Wrongful dismissal (when you are not given correct notice)

You need to look at your own situation under each of these headings.

NOTICE ENTITLEMENT

You have a legal right to a **minimum notice period** following dismissal if:

- a) you have worked for your employer for at least a month and
- b) you are not dismissed for 'gross misconduct'.

The minimum periods of paid notice are as follows:

- if you have worked for a month or more, you should be given at least one week's notice.
- if you have worked for two years or more, you should be given a minimum of one week's notice for every complete year you have worked, up to a maximum of 12 weeks (for instance, 5 weeks notice after 5 years service, but only 12 weeks notice after 15 years service).
- if your contract gives you a longer period of notice, then this will apply.
- you may be offered pay in lieu (instead) of your notice.

Your pay should be your normal weekly pay, even if you are off sick during your notice period.

WRONGFUL DISMISSAL (DISMISSAL WITHOUT PROPER NOTICE)

If you do not get the correct notice and/or notice pay, you can usually take a case to an Employment Tribunal (ET) or to a civil court for 'wrongful' dismissal. Wrongful dismissal is **different** from 'unfair' dismissal. It is a **breach of contract** and the reasons for the dismissal are usually irrelevant, unless you have been dismissed for alleged 'gross misconduct'. You might be able to claim for **both** wrongful dismissal and (if you qualify) for unfair dismissal. For more information see PERS Action Pack No 3 **Notice and Notice Pay**.

DO YOU QUALIFY TO TAKE A CASE?

Generally you will only qualify to take an unfair dismissal case (including constructive dismissal, unfair selection for redundancy and dismissal on the transfer of an undertaking) to Employment Tribunal if

- **you have worked for your employer continuously for at least one year** (the 'qualifying period'). **The qualifying period is very important.** Many workers find that they have been dismissed in very unsatisfactory circumstances but they can do nothing about it because they have worked for their employer for less than one year.
- you are an employee, even if you are part-time, temporary or casual. Home workers are often employees, though you may need to establish this in the tribunal first. Police and armed forces personnel may not take cases.
- you have a **legal** contract. You do not need to have a contract in writing, as you will have a verbal contract anyway. An example of an illegal contract is if you are knowingly 'working on the side' - that is not paying tax and national insurance when you know you should be.

You will usually qualify to take a case to Employment Tribunal (ET) for **automatically unfair dismissal** or **unlawful discrimination** (see below) **from day one of employment**.

If you are dismissed you should always contact the Pay & Employment Rights Service (PERS) or another advice agency to check your situation before you take any action.

FAIR DISMISSALS

Your dismissal is '**automatically fair**' if:

- you are dismissed during a **lock out, a strike or other industrial action**, providing all the workers have been treated the same.
- your dismissal is for the **purpose of safeguarding national security**.

Otherwise, for your dismissal to be fair, your employer must have a **valid reason** for sacking you and **act reasonably** when dismissing you for that reason. They must show that the reasons are genuine and that they believe that your behaviour justifies dismissal. You can argue against the dismissal if you do not agree with the reasons (see below).

Valid reasons for dismissal include:

- Not being **capable** of doing the job - this can include sickness dismissals.
- From 1st October 2006 - **retirement** – if this is the reason for dismissal whether the dismissal is fair or unfair will depend on whether the employer has complied with the special notice provisions and their duty to consider the employees request to continue

working beyond retirement. Contact the ACAS Helpline on 08457 47 47 47 or see the government website:

http://www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/DG_065115DTI for more information.

- **Misconduct** - including theft and dishonesty; violence and fighting; drug or alcohol abuse; absenteeism; abusive language; disloyalty; disobedience. If your misconduct is serious enough to be classed as '**gross misconduct**', you may be summarily (instantly) dismissed without notice.
- **Redundancy** - providing the selection for redundancy is fair. See PERS leaflet No. 6 **Redundancy** for more information.
- **A statutory restriction** which prevents you from doing the job - for instance, if you need to drive for your job and you lose your driving licence.
- '**Some other substantial reason**', including conduct which your contract says will result in dismissal.

'AUTOMATICALLY UNFAIR' DISMISSAL

In some very limited situations you do not have to have a year's continuous service in order to take a case to ET for unfair dismissal. These situations include most dismissals for 'automatically unfair' reasons, listed below, and dismissal on grounds of unlawful discrimination. Regardless of your length of service or the number of hours you work, it is '**automatically unfair**' to dismiss you:

- because of your **pregnancy** or any reason connected with it or for a reason connected with your right to maternity, paternity, parental or dependants' leave. See PERS leaflet No 5 **Maternity and Paternity Rights** for more information.
- for '**asserting a statutory employment right**'. This could include asking for a written statement of employment particulars, or for an itemised payslip, or for statutory holidays.
- for a reason connected with your right to receive the **national minimum wage**, or your rights to statutory **minimum hours, holidays and breaks**, or your right to receive **Tax Credits** from your employer.
- for taking action to **ensure the safety of the workplace** or to avoid danger.
- if you are a shop or betting worker who is dismissed, in certain circumstances, for **refusing to work on Sundays**.
- for **making a protected disclosure** - that is, **whistleblowing**.
- for a **trade union reason** e.g. if you join a union (or won't join one) or for taking part in union activities, or for activities as a pension scheme trustee or an employee representative. See PERS leaflet No 12 **Trade Unions**.

It is also **automatically unfair** to dismiss you if the firm you work for is sold (i.e., there is a '**transfer of an undertaking**') and the transfer is the principal reason for your dismissal. However, you must have worked for the relevant employer(s) for at least one year to claim unfair dismissal. The dismissal can sometimes be justified for 'economic, technical or organisational reasons'.

Throughout dismissal proceedings, an employer must follow ACAS guidelines. Contact the ACAS Helpline on 08457 47 47 47 or see

DISMISSAL ON GROUNDS OF UNLAWFUL DISCRIMINATION

If you are dismissed on grounds of race, sex, marriage, disability, religion, belief or sexual orientation, or your age you are entitled to complain of discrimination to an ET from day one of employment. See relevant PERS leaflets.

OTHER 'UNFAIR DISMISSALS'

If you think you have been unfairly dismissed for a reason other than those listed above, **and you have one year's continuous service**, the ET would consider the following aspects of your case:

'REASONABLENESS' OF THE DISMISSAL

First, they will try to establish whether the **grounds for your dismissal** were **'reasonable'**. Your employer must show that you were dismissed for one of the **'valid reasons'** mentioned above and that dismissal was justifiable in your particular circumstances.

PROCEDURAL UNFAIRNESS

Second, they will consider what happened before you were actually dismissed, to see if all the **procedures** were **fair**. Whatever the reason for your dismissal, your employer must follow reasonable procedures before dismissing you. **ACAS** (Advisory, Conciliation and Arbitration Service) produces a Code of Practice on disciplinary and grievance procedures which gives employers practical guidelines how to deal with disciplinary issues, and how to implement and operate these procedures. It sets out basic principles of fairness and transparency:-

...”prompt and consistent action, thorough investigations, informing the employee of the nature of the problem and allowing them time to prepare and put their case, their right to be accompanied and to an appeal...”.

This is used as a model for fair procedures by ETs.

GROSS MISCONDUCT

If the reason for your dismissal is gross misconduct, your employer does not need to give you notice or notice pay. You may be suspended immediately and asked to leave the workplace. However, your employer should still conduct an investigation and hold a disciplinary meeting where you have the chance to defend yourself. “Gross misconduct” can include things like theft or fraud, physical violence or bullying, serious insubordination, unlawful discrimination or harassment, a serious breach of health & safety rules, bringing the organisation into serious disrepute, serious damage to property. These will often be listed in the Disciplinary Rules of your workplace.

CONSTRUCTIVE DISMISSAL

If you are forced to resign because of a **fundamental breach of contract** by your employer, this is constructive dismissal. You have a contract of employment even if you have not been given one in writing. It consists of whatever has been agreed between you and your employer, and what you normally do. The following may amount to a fundamental breach of contract (unless your original contract allows for such changes):

- **A reduction in pay**
- **A change in working hours or place of work**
- **A change of job content or status.**

A fundamental breach of contract may also take place if:

- **Your health and safety is not 'reasonably' cared for**
- **Your employer insists on you doing something illegal as part of your job, such as driving a vehicle without insurance.**

In some cases, your employer is legally entitled to make changes to your contract that are necessary for the survival of the business, although those changes should be made with your consent. Please read PERS Action Pack No 1 **Changes to Employment Contracts** and then **get help from PERS or another advice agency BEFORE you make the decision to resign.**

NB. It is important to object to any changes in your contract in writing at the first available opportunity or the changes will be deemed to be accepted by you and you will then have little recourse in an ET.

If you feel you are forced to leave your job because of unpleasant or unreasonable behaviour by your employer or workmates, this is **not** normally seen as 'constructive dismissal'. This is because this does not usually amount to a 'fundamental breach of contract'. If you feel you have been severely bullied, you might be able to take a case for breach of the implied contractual term of 'trust and confidence'. This is not always easy - you need to get advice. However, if you are harassed on grounds of your race, sex, disability, religion, belief or sexual orientation you **may** be able to leave and claim discrimination.

WRITTEN REASONS FOR DISMISSAL

You are entitled to a **written statement of reasons for dismissal** provided you have one year's continuous service with your employer. Women who are dismissed whilst pregnant or on maternity leave have this right regardless of their length of service. This is an important document to have if you want to take an unfair dismissal case. If your employer refuses to give you written reasons, you can complain to an ET.

DATE OF DISMISSAL

It is important to know **exactly** when your job has ended - that is, the **Effective Date of Termination (EDT)**. This will normally be the date you stopped working. If you want to bring an unfair dismissal claim, you must register your application with the Employment Tribunal within 3 months of the EDT. You will not receive unemployment benefits until the end of your notice period but you should still 'sign on' as soon as possible after your EDT to ensure that you maintain your National Insurance credits.

TAKING ACTION AGAINST UNFAIR DISMISSAL

If you believe that you have been unfairly dismissed or unfairly selected for redundancy, and if you qualify (see above), you can take a case to an ET. ETs are **free**, but legal representation by a solicitor can be very expensive. As the procedures can be complex, please contact PERS for details of free or low cost agencies who may be able to help you take a case. To lodge a claim, you first fill in an **ET1 form** to register the case. This must be done within **three months of the EDT** - see above. Before the case comes before an ET, ACAS will try and help you and your employer come to a settlement. Alternatively, ACAS has set up an **arbitration scheme** which can make a judgment in some unfair dismissal disputes. Contact ACAS for more information on this scheme.

LEGAL REMEDIES

If the case comes before the Tribunal and they decide you have been unfairly dismissed, they can make one or more of the following orders:

Reinstatement, when your employer is told to give you your old job back.

Re-engagement, when you return to a similar job with your employer or an associated employer. Reinstatement and re-engagement orders have the advantage of retaining continuity of employment and may include a compensatory award for loss of earnings since the unfair dismissal occurred. However they are unusual.

Compensation (a money order), which is made up of two elements, a maximum basic award of up to £10,500, (this is calculated according to your age and the number of years of service you have) and a compensatory award of up to £66,200. These limits came into force from **1st February 2009**, and are increased annually. This award is made to compensate for financial losses suffered due to the dismissal.

Injury to feeling awards are only made in discrimination cases. These have no upper limit.

Since **April 2009**, Employment Tribunals are required to take the ACAS Code of Practice into account when awarding compensation. Such awards can be increased by 25% if an employer fails unreasonably to follow the code.

DISMISSAL AND YOUR RIGHT TO BENEFITS

If you are dismissed for misconduct or you resign from your job without good reason, you could be disqualified from benefit for up to 26 weeks. It is important to sign on as soon as you are dismissed as the Department of Work & Pensions (DWP) pays Jobseekers Allowance while the decision-maker investigates the termination. Any sanction will be imposed after this. You can appeal against sanctions, especially if you are making an unfair dismissal claim.

PAY & EMPLOYMENT RIGHTS SERVICE

**Unit 14 Batley Enterprise Centre • 513 Bradford Road
Batley • WF17 8LL**

01924 428030

www.pers.org.uk

Telephone advice is available from PERS at the following times:

Monday:	10am to 1pm
Tuesday:	10am to 4pm & 5.30pm to 7.30pm
Wednesday:	10am to 4pm
Thursday:	10am to 4pm
Friday:	10am to 1pm

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