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EMPLOYMENT MASTERCLASS

Automatic Unfair Dismissal

GUIDE

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WHAT IS *“AUTOMATIC UNFAIR DISMISSAL”?*

Introduction

Every employee has the right not to be unfairly dismissed. Where the employee does not have adequate service to bring an unfair dismissal claim they may still be entitled to bring a claim if they rely upon one of the automatically unfair reasons, since there is generally no requirement for the employee to have been in continuous employment for any particular qualifying period before the right to bring such a claim arises.

Qualifying Period

For employees, the right not to be unfairly dismissed generally only arises when the employee has been continuously employed for a period of **at least 12 months**.

Claims of unfair dismissal may only be brought in an employment tribunal within **three months** of the **effective date of termination** of employment (subject to any extension for early conciliation). The tribunal may consider a claim which is out of time if “*in all the circumstances of the case it considers that it is just and equitable to do so*”. This is strictly observed.[1]

What is unfair dismissal?

To succeed in a claim there must be a termination either by the employer or the employee (the latter known as constructive dismissal). A premature unfair dismissal application to a tribunal will be dismissed if there is no termination by either party and such an error cannot be fixed.

In a contested tribunal hearing, the employer will be required to go first with his witnesses to show to the tribunal the reason or principal reason for dismissal was one of a list of potentially fair reasons, which include conduct, capability and redundancy and what is known as SOSR (some other substantial reason).There are certain cases where an employer cannot use the catch all SOSR defence where dismissal for any reason would be deemed as automatically unfair.

[1] *Beasley v National Grid* [2008] EWCA Civ 742

Whether the dismissal is fair or unfair will be assessed 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 is determined in accordance with equity and the substantial merits of the case.

A failure to follow a fair process in line with LRA guidance may render a dismissal unfair.

Unfair dismissal also includes ***"constructive dismissal".*** This occurs where the employer behaves in such a way as to entitle the employee to resign and to claim that he or she has effectively been dismissed as a result of the employer's bad conduct. This requires amongst other conditions a fundamental breach of contract by the employer that goes to the root of the contract so as to be sufficiently serious to justify the employee's resignation.

Automatically Unfair Dismissals

It is not always necessary for an employee to have the minimum 12 months service if alleging unfair dismissal as some dismissals don't require a qualifying period if they are "*automatically unfair dismissals*". These include most notably the "*whistleblowing*" legislation. An employee is regarded as unfairly dismissed *if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*[2]

No 12 Month Qualification Period

There are a large number of circumstances in which a dismissal is automatically unfair and for which the 12 month qualifying period is not required. These include where the reason or principal reason for the dismissal is one of the following

- Pregnancy, childbirth or maternity,
- Time off to accompany to an ante-natal or adoption appointment,
- Assertion of a statutory right (this could include asking for a contract of employment or unauthorised deduction of wages),
- Unfair selection for redundancy,

[2] Article 103A, Ibid.

- Breaches of the Working Time Regulation (for example, where the employee refuses to forgo a legal right conferred by the Regulations, such as seeking time off on leave),
- Breaches of the National Minimum Wage legislation,
- Flexible working request,
- Breaches of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000,
- Making a protected disclosure (or "*whistle blowing*"),
- Participating in trade union activities,
- Leave for family reasons (which includes shared parental and parental bereavement leave),
- Spent convictions[3],
- Health and safety cases (relating to being a workplace health and safety representative or-where none exists- the employee brought to his employer's attention "*circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety*"),
- Dismissal relating to Jury service,
- TUPE transfer- any dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer. [4]
- Discrimination cases do not require a qualifying period, which includes dismissal on the grounds of pregnancy and disability discrimination.

Some Examples of Automatic Unfair Dismissals

Assertion of a Statutory Right

An employee is regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee brought legal proceedings to enforce a statutory right, or alleged that the employer had infringed the right. One of the best examples is the right to receive a written statement of employment particulars or an itemised pay statement.

These rights include those under TUPE, seeking payment of the national minimum wage and the various rights an employee is entitle to under the Working Time Regulations (Northern Ireland) 2016.

[3] Rehabilitation of Offenders (Northern Ireland) Order 1978. (An Access NI basic check doesn't include spent convictions).

5. "*Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated ..as unfairly dismissed if the sole or principal reason for his dismissal is the transfer itself; or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce* -see R7 (1), Transfer of Undertakings (Protection of Employment) Regulations 2006

Some examples of this in practice:

A taxi driver refused to sign a contract the day after he started work. This contained an agreement to opt out of the 48 hour limit on the working week (ie, the Working Time Regulations). He was told he would be dismissed if he refused to sign and left. He successfully claimed that he had in effect been dismissed for asserting a statutory right.[5]

In *Albion Hotel Limited v Silva* (UKEAT, 2002) a dispute arose over the payment of an annual bonus which had not been paid. The employees continued to demand the payment, but they were dismissed for "*poor management*". The tribunal found that the reason for the dismissal was because the employer had infringed a statutory right-viz, the right not to have an unlawful deduction of wages.

A bar worker was asked to work beyond her usual finishing time and a dispute occurred because the employer would not pay her. She left and was dismissed and succeeded in her tribunal claim that her dismissal was because of her refusal to work extra hours without pay, and that the failure to pay amounted to an unlawful deduction of wages.[6]

Whistleblowing Dismissals

This refers to legal protections to protect those who identify, and report alleged wrongdoing in the workplace. There is no qualifying period in terms of length of employment required, nor is there a limit on the amount a tribunal may award. There is no requirement that the disclosure be in writing and all that is required is that the employee communicates the information to his employer.

To amount to a **"*qualifying disclosure*"** this must refer to for example concerns that a criminal offence is being committed, that a person is failing to comply with a legal obligation, a miscarriage of justice has occurred, or that there is a health or safety issue. Legal obligations could include those contained in a contract of employment. If the employer reacts in a hostile way to the complaint, this could justify a resignation and claim of constructive dismissal.

Constructive Dismissal Cases

One example of this in the automatic unfair dismissal context is in the health and safety area, where an employee's concern about the condition of ropes used to secure pallets were ignored by the employer leading a tribunal to conclude that the employer had breached an implied term to ensure health and safety of an employee, which was

[5] *Callaghan v McDougall* (unreported, ET)
[6] *Hutton v Wright* (ET, 2013491/00)

fundamental and amounted to constructive dismissal.[7] Similarly the employee whose manager required him to drive a truck under protest with no near side mirror.[8]

- ### Rehabilitation of Offenders

Under the Rehabilitation of Offenders (Northern Ireland) Order 1978 a dismissal for failure to disclose a spent conviction is not a proper ground for dismissal. An employment tribunal is entitled to conclude that where there was no obligation to answer a question so as to make any reference to a spent conviction, dismissal based on a conviction that was spent must be unfair - see *Property Guards Ltd v Taylor and Kershaw* (1982)IRLR 175.

The "3 Step Procedure"

This process was abolished in the rest of the UK, but retained here in a revised form. Failure to follow it amounts to automatic unfair dismissal, subject to the qualifying period.

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

a) *one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,*
b) *the procedure has not been completed, and*
c) *the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements."*[9]

Although it contains a standard and a "*modified*" procedure, the latter is generally not used except in extreme cases where instant dismissal is justified (such as where there is incontrovertible evidence of theft or violence in the workplace). The "*modified*" procedure is simpler and allows for an appeal after an instant dismissal, but the process that should be used in most cases is the standard one.

[7] *Teasdale v Walker* (unreported, ET)
[8] *Skelton v Artel Services Limited* (unreported, ET)
[9] 130A (1), ERO

The 3 step process is as follows:

The Letter: This is sent to the employee identifying the conduct, characteristics or other circumstances on which the employer is taking or contemplating disciplinary action. [10]Importantly the employee is allowed " *a reasonable opportunity to consider his response*" to the letter. If the employee faces the possibility of dismissal, the letter must make this clear. Failure to set out such consequences will result in a failure to follow the process and automatic unfair dismissal. In *Zimmer Limited v Brezan* (UKEAT 0294), the court said:

"*Unless the employee is enabled to understand from the step 1 letter that he is at risk of dismissal, in our judgment the purpose of the Step 1 letter in a dismissal case cannot be properly achieved. The employee is plainly entitled to have some idea what type of sanction is in the mind of the employer or, at least, in a dismissal case, that dismissal is in the mind of the employer, so that he knows the potential extent of what it is that he may be facing".*

The Meeting: *The employer should state their case, let the employee respond and then, after the meeting, give the employee the decision.*[11] The employee must take all reasonable steps to attend the arranged meeting, after which the employer writes out with his decision and confirmation that he has a right to appeal.

The Appeal: If the employee wishes to appeal he must advise his employer, following which an appeal hearing must be arranged. [12]

Although the LRA Code states that "*It is useful to set a time limit for an employee to ask for an appeal – five working days is usually enough"* it is important to recognise that the legislation does not itself set a time limit within which an appeal must be taken.[13]

Refusal of an appeal because some arbitrary time limit has not been met will amount to an automatic unfair dismissal.

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[10] The letter contains an invitation to a meeting and advises of right to have a workplace companion or trade union official in attendance.

[11] Labour Relations Agency Guidance on Dismissals.

[12] Importantly there is no prerequisite that the employee must seek his appeal within a prescribed time limit, though this must be reasonable.

[13] "*If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting",* see Schedule 1 Part 1, the Employment (Northern Ireland) Order 2003.

What if the outcome would have been the same even if a fair process had been followed?

An employee who is unfairly dismissed if any one of the 3 step procedures have not been complied with and "*the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements*".

There is a significant exemption: failure by an employer to follow the procedure in relation to the dismissal

"….*is not regarded as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."*[14]

What difference does it make if there is a finding of automatic unfair dismissal?

The difference is financial in that Industrial Tribunals may increase any award for failure to follow the 3 step procedure or for a failure by either party to follow the relevant steps set out in the Labour Relations Agency's Code of Practice on Disciplinary and Grievance procedures as the Code makes clear:

"A failure to follow any part of this Code does not, in itself, make a person or organisation liable to proceedings. However, industrial tribunals shall take this Code into account when considering relevant cases."

[14] Ibid, 130 A (2).

How are unfair dismissal cases compensated?

The Basic Award: This is a set amount calculated by reference to the amount of time that the employee has been in *'continuous employment'* and is equivalent to the calculation for a redundancy payment.

The Compensatory Award: This is intended to compensate the employee for any financial losses arising from dismissal. This does not follow a set formula and will be *'such amount as the tribunal considers just and equitable in all the circumstances'.* This is subject to what is known as the statutory "*cap"* - or limit on the amount that can be awarded by a tribunal.

The cap rises from £94,063 to £105,915 next month . The maximum amount of '*a week's pay'* for the purpose of calculating redundancy payments rises from £594 to £669.[15] This cap does not apply where discrimination is established.

The compensatory award is not a fine or penalty award. It must reflect the loss that the employee has or will suffer as a result of the dismissal. *'It should not over compensate the claiman*t'.[16]Compensation might also include other losses such as pensions.

Future Loss Award: This will apply if the tribunal concludes that the employee is continuing to sustain an ongoing financial loss. However, the tribunal will veery carefully review the employee's efforts to find alternative employment after his or her dismissal and is unlikely to award a future loss if the employee has failed to mitigate his loss in being seen to take active steps to find work.

Tribunal Uplift: Unless employers follow the statutory procedure, an employment Tribunal will find dismissals automatically unfair. The Tribunal may also adjust any award of compensation up or down by 50% for failure by either party to follow the relevant steps set out in the LRA's Code of Practice.

The "recoupment provisions "apply where a tribunal has made an award which is sent to the social security authorities to identify whether any benefit was paid which is deductible against the award.

[15] The Employment Rights (Increase of Limits) Order (Northern Ireland) 2023
[16] *Optimum Group Services Plc v Muir* [2012] UKEATS/0036/12