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Dismissing staff

1. Overview

Dismissal is when you end an employee's contract. When dismissing staff, you must do it fairly.

There are different types of dismissal:

- fair dismissal
- unfair dismissal
- constructive dismissal
- wrongful dismissal

If you've had to dismiss staff because of coronavirus (COVID-19), you might be able to re-employ them and pay their wages through the Coronavirus Job Retention Scheme (<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>).

Fair and unfair dismissal

A dismissal is fair (<https://www.gov.uk/dismiss-staff/fair-dismissals>) or unfair (<https://www.gov.uk/dismiss-staff/unfair-dismissals>) depending on:

- your reason for it
- how you act during the dismissal process

Constructive dismissal

This is when an employee resigns because you've breached their employment contract. This could be a single serious event or a series of less serious events.

An employee could claim constructive dismissal if you:

- cut their wages without agreement
- unlawfully demote them
- allow them to be harassed, bullied or discriminated against
- unfairly increase their workload
- change the location of their workplace at short notice
- make them work in dangerous conditions

A constructive dismissal is not necessarily unfair - but it would be difficult for you to show that a breach of contract was fair.

A constructive dismissal might lead to a claim for wrongful dismissal.

Wrongful dismissal

This is where you break the terms of an employee's contract in the dismissal process, for example dismissing someone without giving them proper notice.

Wrongful dismissal is not the same as unfair dismissal (<https://www.gov.uk/dismiss-staff/unfair-dismissals>).

If an employee thinks you've dismissed them unfairly, constructively or wrongfully, they might take you to an employment tribunal (<https://www.gov.uk/being-taken-to-employment-tribunal-by-employee/overview>).

2. Fair dismissals

You must have a valid reason for dismissing an employee. Valid reasons include:

- their capability or conduct (<https://www.gov.uk/dismiss-staff/dismissals-on-capability-or-conduct-grounds>)
- redundancy (<https://www.gov.uk/staff-redundant>)
- something that prevents them from legally being able to do their job, for example a driver losing their driving licence

There could be other fair reasons too - these are sometimes called 'other substantial reasons'.

Example:

You take on an employee to provide temporary maternity cover and dismiss them when the cover period ends.

The dismissal is fair if you made it clear at the start of their placement that the job was only temporary.

Acting reasonably

Even if you have a fair reason, the dismissal is only fair if you also act reasonably during the dismissal and disciplinary process (<https://www.gov.uk/taking-disciplinary-action/overview>).

There's no legal definition of 'reasonableness', but if you're taken to an employment or industrial tribunal they would consider whether you:

- genuinely believed that the reason was fair
- carried out proper investigations where appropriate
- followed the relevant procedures
- told the employee why they were being considered for dismissal and listened to their views (in Northern Ireland, the employer must do this in writing)
- allowed the employee to be accompanied at disciplinary/dismissal hearings
- gave the employee the chance to appeal

Reasonableness might also depend on whether the employee could be expected to understand the consequences of their behaviour.

Dismissal and disciplinary procedures

You must set out your dismissal and disciplinary rules and procedures (<https://www.gov.uk/taking-disciplinary-action/overview>) in writing - if you do not, a tribunal can order you to pay an employee compensation.

Summary dismissal

This is when you dismiss someone instantly without notice or pay in lieu of notice, usually because of gross misconduct (for example theft, fraud, violence).

Tribunals may rule a summary dismissal as 'procedurally unfair' - you can only suspend someone without pay if their contract says you can do this. If it does not, you should suspend the employee on full pay and investigate the circumstances.

If you feel summary dismissal's your only choice, you must still follow a fair procedure as you would do for any other disciplinary matter.

3. Unfair dismissals

Even if you think you've dismissed someone fairly, they could still claim unfair dismissal against you if they think that:

- the reason you gave for the dismissal was not the real one
- the reason was unfair
- you acted unreasonably, for example by failing to give them plenty of warning about their dismissal

Automatically unfair reasons for dismissal

Even if you've acted reasonably, some reasons for dismissal are classed automatically unfair. These are to do with the following areas:

- pregnancy, including all reasons relating to maternity
- family, including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependants
- acting as an employee representative
- acting as a trade union representative
- acting as an occupational pension scheme trustee
- joining or not joining a trade union
- being a part-time or fixed-term employee
- pay and working hours, including the Working Time Regulations, annual leave and the National Minimum Wage
- whistleblowing (<https://www.gov.uk/whistleblowing/dismissals-and-whistleblowing>)

Compulsory retirement on the grounds of age is unlawful unfair dismissal unless you can objectively justify it - but you could be challenged at a tribunal.

Industrial action

It's automatically unfair to dismiss someone for taking part in official ('lawful') industrial action:

- in the 12-week period from the day the industrial action starts
- if the action lasts longer than 12 weeks and you have not taken reasonable steps to resolve the dispute

Only an employment or industrial tribunal can decide whether or not you've taken reasonable steps to resolve a dispute.

If you 'lock out' employees taking industrial action, the days of the lock-out are not included in the calculation of the 12-week protected period.

A lock-out is where you prevent employees from getting to their workplace, for example by locking the doors.

Disability

If a disabled employee cannot do their job because there are no reasonable adjustments (<https://www.gov.uk/reasonable-adjustments-for-disabled-workers>) that can be made, it may be fair for you (<https://www.gov.uk/dismiss-staff/dismissals-due-to-illness>) to dismiss them.

Political beliefs and groups

It is not automatically unfair to dismiss someone because of their political beliefs or political groups they belong to, but a tribunal might find this unfair.

There's no longer a qualifying period for someone going to an employment tribunal if they've been dismissed because of political opinions or affiliation. This applies to anyone dismissed from 25 June 2013.

Penalties for unfair dismissals

If a tribunal finds that an employee has been unfairly dismissed, you might be ordered to:

- reinstate them (give them their job back)
- re-engage them (re-employ them in a different job)

You might also have to pay compensation, which depends on the employee's:

- age
- gross weekly pay
- length of service

You might have to pay extra compensation if you do not follow a tribunal's order to reinstate someone.

There's a limit on the amount a tribunal can award for unfair dismissal, apart from in cases relating to:

- health and safety (for example where you unfairly dismiss someone for taking action on health and safety grounds)
- whistleblowing

4. Eligibility to claim unfair dismissal

Employees can only claim unfair dismissal if they've worked for a qualifying period - unless they're claiming for an automatically unfair (<https://www.gov.uk/dismiss-staff/unfair-dismissals>) reason.

Date employment started	When the employee can claim
Before 6 April 2012	After first year of employment
After 6 April 2012	After 2 years of employment

Who cannot claim unfair dismissal

The right to complain to a tribunal about unfair dismissal is not available to:

- self-employed people
- independent contractors
- members of the armed forces
- employees who have reached a settlement with their employer through [Acas](#) (Advisory, Conciliation and Arbitration Service) or the Labour Relations Agency ([LRA](#)) in Northern Ireland

- employees who have reached a settlement with their employer through a 'settlement agreement' or 'compromise agreement' (<http://www.acas.org.uk/index.aspx?articleid=4395>) after taking legal advice
- employees employed under an illegal contract, for example a barman under the age of 18
- employees covered by a dismissal procedure agreement that's been legally exempted from the unfair dismissal rules
- employees taking part in unofficial industrial action (unless the dismissal is for an automatically unfair (<https://www.gov.uk/dismiss-staff/unfair-dismissals>) reason)
- police officers (unless the dismissal relates to health and safety or whistleblowing (<https://www.gov.uk/whistleblowing/overview>))
- those working on a fishing vessel and paid by a share in the profits or gross earnings of the vessel

5. Dismissals for conduct or performance reasons

You can dismiss an employee if:

- they're incapable of doing their job to the required standard
- they're capable, but unwilling to do their job properly
- they've committed some form of misconduct

If you want to dismiss someone, there's no specific process you must go through by law - as long as you do it fairly.

If a capability issue is linked to someone's health, you should try as many ways as possible to help them do their job (<https://www.gov.uk/dismiss-staff/dismissals-due-to-illness>) before dismissing them.

Disciplinary procedures

You should include examples of what you consider to be misconduct in your disciplinary rules.

Different disciplinary procedures (<https://www.gov.uk/taking-disciplinary-action>) are appropriate for different circumstances.

Employees have the right to be accompanied to all disciplinary meetings and to appeal to a manager. Keep notes of all meetings and give copies to the employee.

Misconduct

Misconduct can include things like persistent lateness or unauthorised absence from work.

To make sure the dismissal is fair when misconduct is not 'serious' or 'gross':

1. Arrange a meeting with the employee, telling them the reason for it. At the meeting, give them a chance to explain and issue a first written warning if you're not satisfied with their reasons. In the warning, tell them how you expect them to improve and over what period - warn them that if they do not improve enough, you'll give them a final written warning.
2. Hold a second meeting if their performance or behaviour has not improved enough by the deadline - give them a chance to explain and issue a final written warning if you're not satisfied with their reasons. Revise the action plan with timescales for improvement and warn them that you'll consider dismissal if there's no improvement.
3. Hold a third meeting if their performance or behaviour is still not up to standard by these new deadlines. Warn them that dismissal is now possible. After the meeting - or appeal if there is one - decide whether to give the employee a further chance to improve, or dismiss them. You must tell the employee of your final decision, whatever it is.

Serious misconduct

You can issue a single 'first and final' written warning if the misconduct or underperformance is serious enough. Explain that not improving could lead to dismissal. 'Serious enough' includes if it's likely to or has caused serious harm to the organisation itself.

Gross misconduct

Gross misconduct can include things like theft, physical violence, gross negligence or serious insubordination.

With gross misconduct, you can dismiss the employee immediately as long as you follow a fair procedure. You should investigate the incident and give the employee a chance to respond before deciding to dismiss them.

One-off incidents

An informal discussion may be enough to resolve the issue if the misconduct or underperformance was a one-off and the employee has a good disciplinary record.

6. Dismissals due to illness

Sometimes an employee may have to stop working because of long-term ill health. They may resign, or you may have to consider dismissing them.

Considering dismissing an employee

Dismissal is a last resort and you should consider as many ways as possible to help the employee back to work, including:

- getting a medical report from their GP with the employee's permission - they have the right to see the report before you do
- arranging an occupational health assessment
- work out whether or not they're disabled (<https://www.gov.uk/definition-of-disability-under-equality-act-2010>) and make any reasonable adjustments (<https://www.gov.uk/reasonable-adjustments-for-disabled-workers>) to help them do their job

If the employee cannot do their job because there are no reasonable adjustments that can be made, it may be fair for you to dismiss them, even if they're disabled.

7. How to dismiss someone

During the dismissal procedure, make sure you act fairly and reasonably. You must treat the employee with sensitivity.

Your procedure should follow the advice set out in the [Acas](#) (Advisory, Conciliation and Arbitration Service) code of practice, or the Labour Relations Agency ([LRA](#)) code of practice for Northern Ireland.

Download 'Acas code of practice for disciplinary and grievance procedures' (PDF, 341KB)
(https://www.acas.org.uk/media/1047/Acas-Code-of-Practice-on-Discipline-and-Grievance/pdf/11287_CoP1_Disciplinary_Procedures_v1__Accessible.pdf)

Download 'LRA code of practice for disciplinary and grievance procedures' (PDF, 1.36MB)
(<https://www.lra.org.uk/sites/default/files/2019-05/Code%20of%20Practice%20on%20Disciplinary%20and%20Grievance%20Procedures%20-%203rd%20April%202011.pdf>)

If you do not follow the code and are taken to an employment or industrial tribunal, you may have to pay compensation.

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