**Six potentially fair reasons for dismissal**

**Reasons:**

1. A reason related to your ***capability***or ***lack of qualifications*** to do the job properly

see ERA sub-section 98(2) (a).

1. A reason related to your ***conduct***

see ERA sub-section 98(2) (b).

1. Your ***redundancy***

see ERA sub-section 98(2) (c).

1. Some ***legal bar or requirement***means that you cannot continue in your position

see ERA sub-section 98(2) (d).

1. Your ***retiremen****t*

see ERA sub-section 98(2) (ba).

1. There was ***some other substantial reason*** that could justify the dismissal of an employee holding the position which you held

see ERA sub-section 98(1) (b).

**Scope of the six potentially fair reasons**

*1.* ***Incapability / lack of qualifications***

Under ERA sub-section 98(2) (a), your incapability or lack of qualifications must relate to the work you’re employed to do for it to qualify as a potentially fair reason for dismissal.

Moreover, before dismissing you your employer should normally meet with you, warn you about your standard of work and give you a chance to improve. This may mean your employer needs to give you more training (e.g., on how to use a recently introduced computerised system) or other support.

At a minimum, you have a right to be accompanied by a colleague or employee representative (e.g., a trade union official) at the meeting.

Your employer should also clearly set out in writing the problem, the degree of improvement required, the timescale for improvement, the support available, and a review date.

The review date should be set so that you have a reasonable opportunity to improve before any action is taken.

Interestingly, a potentially fair dismissal on the ground of incapability extends not only to incompetence and inherent inability to do the job but also to debilitating sickness and illness — even where it has been caused by the employer.

For a dismissal in this instance, however, your employer will need to tread very, very carefully. Your employer should allow a reasonable amount of time for you to recover from your illness. The actual amount will depend on things like:

* the nature and likely duration of your illness (with some conditions, like broken bones, it might be clear how long it will take but with something like stress it can be uncertain);
* whether your employer is responsible for the incapacity (in which case it may be expected to go the extra mile to find you alternative employment);
* how easy it is to get cover for your job;
* whether your job can be kept open;
* whether the illness could be classed as a ‘disability’ (in which case your employer has a legal duty under the Equality Act to make ‘reasonable adjustments’ to find a way round the problem).

*2.* ***Misconduct***

An employer may try to justify a misconduct dismissal under ERA sub-section 98(2) (b) on the basis that you’ve broken one or more terms of your employment contract.

Such misconduct may encompass abusive behaviour, dishonesty, fighting, sexual harassment, theft, bribery, sharing confidential information, tardiness, repeated absences without permission, or intoxication at work.

In all instances, your employer should follow a fair disciplinary procedure before dismissing you for misconduct.

Dismissal for misconduct outside of employment

In some cases, an employer may decide to dismiss an employee for his/her conduct *outside* of employment. For dismissal to be fair, however, the misconduct must affect the employment relationship.

This issue was addressed by the Court of Appeal in [X v. Y [2004] EWCA Civ 662](http://www.bailii.org/ew/cases/EWCA/Civ/2004/662.html), a case concerning the dismissal of a charity employee involved in the personal development of young offenders and those at risk of offending in the 16-26 age group.

The charity decided to dismiss the employee for gross misconduct after it learnt he had been arrested and cautioned for a sexual offence with another man in a motorway service station toilet. The incident had occurred while the man was off duty and well away from his workplace, so he decided to conceal the caution from the charity.

The caution came to light as a result of normal police checks made by the local Probation Service before providing further funding to the charity.

After being sacked, the man brought a claim for unfair dismissal, citing Article 8 of the European Convention on Human Rights (right to respect for private life) and Article 14 (prohibition of discrimination).

The Court of Appeal dismissed the claim. It found that Article 8 did not apply as the offence had not taken place in private, but in a transport café, and it should have been disclosed to his employer.

The Court also held that the offence was relevant to the man’s employment and that the charity was entitled to treat the caution as an acceptance that a criminal offence had been committed, which, in turn, amounted to gross misconduct within the terms of its disciplinary procedure.

As it was the man’s criminality and his lack of transparency, and not his sexuality, which were the grounds of the decision to dismiss him for misconduct, the Court ruled that Article 14 became irrelevant.

*3.* ***Redundancy***

Redundancy is another potentially fair reason for dismissal under ERA sub-section 98(2) (c). But, if an employer fails to handle a redundancy fairly, it may face liability for unfair dismissal. Read [Redundancy FAQs](http://findlaw.co.uk/law/employment/redundancy_rights/500168.html) to learn more.

*4.* ***Legal bar or requirements (‘illegality’)***

Under ERA sub-section 98(2) (d), it may be fair to dismiss someone if it would become illegal to continue to employ them. This might encompass for example the dismissal of a driver who loses their driving licence over drink driving.

Before deciding to dismiss the employee, however, the employer should consider whether it’s possible to redeploy them in another job. Continuing the example of the disqualified driver, it may be possible to redeploy them in a related job, like vehicle maintenance.

*5.* ***Retirement***

Under sub-section 98(3A), the fairness of a retirement dismissal is determined by ERA sub-sections 98ZA – 98ZH.

Currently, under the [Employment Equality (Age) Regulations 2006](http://www.opsi.gov.uk/si/si2006/20061031.htm#30), employers can require all staff to retire at 65, or the employer’s normal retirement age, regardless of their circumstances, so long as they follow the procedure set out in the statute. This procedure requires an employer to give an employee at least six months’ notice of retirement. If the employee serves notice that he or she wants to continue working past retirement, the employer must consider the application. Read ‘[Age discrimination](http://findlaw.co.uk/law/employment/discrimination/8501.html)’ to learn more.

[Note: Under government proposals revealed in July 2010, employers will no longer be able to issue any notifications for compulsory retirement using the DRA procedure from 6 April 2011 onwards. Employers will only be allowed to compulsorily retire employees if they notify affected staff before 6 April and set a retirement date before 1 October 2011. If employers wish to use retirement ages after 1 October 2011 they will have to demonstrate they are “objectively justified”. Examples could include air traffic controllers and police officers.]

*6.* ***Some other substantial reason justified dismissal***

ERA sub-section 98(1) (b) is essentially a catch-all provision and encompasses a wide variety of dismissals.

Emphasis should be placed on the word “substantial”, however; if the dismissal is “whimsical, unworthy or trivial”, it will not suffice.

It isn’t possible to provide a comprehensive list of reasons for dismissal under this sub-section, but here are a few that have been held potentially fair by the courts:

* unreasonably refusing to accept a reorganisation that changes employment terms (e.g., working hours);
* replacement by a better qualified employee;
* end of genuine temporary employment;
* dismissal because of an irresolvable personality clash with a co-worker;
* the relationship between an employee and someone working for a competitor, where there is a genuine risk of revealing trade secrets;
* refusal of employees to accept a new restraint of trade clause in their contracts.