



This Guidance Note is not a complete statement of the law. It is intended for general information only and is not a substitute for seeking specialist advice in particular circumstances. No responsibility for loss occasioned as a result of a person acting or refraining from acting in reliance on it, is accepted by the authors or by NYFVO.

Fair and Unfair Dismissal

There are 5 *potentially* fair reasons for dismissal contained in s98 of the ERA, which are (paraphrased)

- the employee is unable or unqualified to do their job in accordance with their job description;
- the employee's behaviour/conduct is unacceptable
- a legal requirement prevents the employee from doing their job (for example, a delivery driver losing their licence);
- the employee is made redundant in accordance with the correct procedures;
- some other substantial reason justifying the dismissal of an employee (the 'catch-all').

An employer defending a claim of unfair dismissal will have to show that his decision to dismiss was made for one (or more) of these 5 potentially fair reasons **and** that in the circumstances of the case (which include the size and administrative resources of the employer), the employer acted **reasonably** in treating that reason as sufficient reason to dismiss the employee.

There are two stages in deciding if a dismissal was fair, broadly speaking:

1. The Employment Tribunal will look at the *means* by which the employer came to his decision - did he follow proper procedures, including **Statutory Dismissal and Disciplinary Procedures (SDDP)** where appropriate (e.g. in disciplinary cases was there a full investigation, a fair hearing, a right to appeal ?)
2. Was the actual decision taken *reasonable* in all the circumstances ?

Generally, an employee needs at least 1 year's continuous service with the employer before he can bring a claim for unfair dismissal. However, dismissal

is **automatically unfair, and no qualifying period of service is required to bring a claim**, in certain special cases. These include cases where the reason for dismissal is because the employee is:

- or is not a trade union member, or takes part in such activities.
- pregnant or is taking maternity leave.
- taking action on health or safety grounds.
- attempting to enforce a statutory employment right.
- refusing in certain circumstances to work on a Sunday
- unlawfully discriminated against because of their sex or marital status
- a member of a particular race or of a particular ethnic or national origin.
- acting as an employee representative, or is a candidate for such a position.
- discovered to have previously been a convict and served a required period of rehabilitation.
- engaged in "whistle blowing".
- in certain circumstances, taking part in lawful strike action.

Unfair dismissal and the new SDDP

The position is somewhat confusing in the case of 'automatic unfair dismissal' where there has been a failure by the employer to follow the new statutory dismissal and disciplinary procedures. Although such a failure makes the dismissal 'automatically unfair', and no question of reasonableness applies, the requirement of 1 year's continuous service still applies. This seems to result in there effectively being two 'types' of automatically unfair dismissal - the old categories, no qualifying period needed, no questions asked, employers 'dead in the water', and automatically unfair dismissal in the case of failure to follow the SDDP where the employee still needs to pass the first hurdle of 1 year's continuous employment.

(Note – the employer's failure to follow his own more comprehensive disciplinary procedure will *not* automatically make the dismissal unfair, so long as he can show he would still have dismissed the employee had that procedure been followed – the rule in Polkey has been partially overturned).

N.B. failure to follow the SDDP also has the result of increasing the award of compensation to the employee by 10-50%.

Wrongful Dismissal

Wrongful dismissal is when an employer has not fulfilled its contractual obligations with regard to dismissal (i.e. proper notice or payment in lieu). Employees may claim damages if they can demonstrate that they have suffered a financial loss due to this breach of contract.

There is no qualifying length of service necessary to bring such a claim, and it can be made in the ET or the ordinary courts (A claim in the ET must be made within 3 months of the breach occurring, in ordinary courts within 6 years).

Constructive Dismissal

Constructive dismissal is when an employee believes that he/she has been put in a position where he/she has no option but to resign as a direct result of his/her employer acting in breach of the contract of employment. It is a very difficult claim to establish. Such a claim must be brought within three months of resignation.

[NYFVO/EA/ November 2005].