

## WHAT IS AN UNFAIR DISMISSAL?

It is usually possible for an employer to terminate an employment contract at common law by simply giving the appropriate period of notice to terminate. There does not have to be a good reason or any reason at all. Because of the potential unfairness of this position, legislation was introduced to allow most employees to apply to an Employment Tribunal on the basis that the dismissal is unfair. If an "unfair dismissal" is found to have occurred, the employee has certain rights of compensation or reinstatement.

In order to claim unfair dismissal, the employer must have terminated the contract of employment either orally, in writing or by conduct. If the employer has acted so unreasonably as to force the employee to resign, the employee can be deemed to be "constructively" dismissed. The employer would have to be shown to be in very serious breach of contract for this to be accepted. Examples may (but everything depends on the particular circumstances) include unilateral imposition of substantial revisions of pay, working hours and relocation. Even in these types of situation, the employee would be expected to have exhausted internal avenues of grievance and not to have resigned as a first option.

The right to claim unfair dismissal does not apply to certain categories of employee. This includes employees who have been in continuous employment for less than a year and employees over their normal retirement age

In order to justify a dismissal as "fair", the employer must positively show that dismissal was based on one of the following potentially fair reasons for dismissal:-

- capability or qualifications;
- conduct;
- redundancy;
- statutory requirements;
- retirement;

- some other substantial reason.

The onus is on the employer to show that in the circumstances, there are objectively justifiable reasons for termination of employment based on these grounds. It is for this reason, that an employer must have necessary documentation and follow requisite procedures if it is to successfully defend an unfair dismissal claim.

### **Grounds for Fair Dismissal**

"Capability and qualifications" refer to skill and performance requirements of the job, aptitude, physical and mental ability. Qualifications will refer to technical or professional qualifications relevant to the position. The employer will need to show that the absence of the capability or qualification significantly affects the ability to do the job.

"Conduct" or rather, misconduct, is a potentially fair reason for dismissal. Gross misconduct may be so serious as to justify immediate termination, provided the employee has an opportunity to defend his position against the allegation. Conduct could include "ordinary" misconduct such as persistent poor time keeping, persistent absenteeism, attitude problems, carelessness etc. Examples of gross misconduct would include theft, fraud, violence, damage, dishonesty, harassment, significant negligence, alcohol abuse, insubordination.

Ordinary mis-conduct will not generally bring a contract to the end. The employer must generally have followed the fair disciplinary procedure and given the employee a number of warnings. In practice, the Tribunal will look to see that the employer has followed the ACAS code of practice and disciplinary practice and procedures. This requires the employer to go through four stages before dismissing:-

- Verbal warning;
- First written warning;
- Final written warning;
- Dismissal

The employee should be given an opportunity to state his case before each stage of the procedure.

Redundancy is a potentially "fair" ground for dismissal. See our separate note in relation to redundancies.

The "statutory" ground for fair dismissal may apply where an employee cannot continue in a job because he would fall foul of some law. An example would be a van driver who has lost his licence for 12 months.

Some other "substantial reason" for fair dismissal is a catch all for any reasons which do not neatly fit in to the above circumstances but which in the circumstances justify the employer in dismissal. One example may be where an employer reorganises his business and there are necessary contract changes. It would fall short of a full redundancy but would be driven by economic factors. In this situation dismissal of an employee who refuses to accept changes could be potentially fair. However, everything would depend on the circumstances.

### **Automatic Unfair Grounds**

As in Ireland, there are certain circumstances where the grounds for dismissal is deemed automatically unfair. They include the following:-

- Trade union membership;
- Trade union activities;
- Closed shop dismissal i.e. dismissal for refusing to become a member of an independent trade union;
- Assertion of a statutory right;
- Pregnancy;
- Health and Safety related dismissal e.g. bringing a health and safety concern to light;
- Refusing to work because of well grounded health and safety reasons.

It is automatically unfair to dismiss certain shop workers who refuse to work on Sunday where they are either a "protected" or an "opt out" worker. A protected shop worker is one who before August 1994 was not employed to work on Sundays. Where an employee opts out in writing, he is no longer a protected shop worker. An opted out worker is one who is not protected but gives notice to an employer of his objection to work Sunday work.

Three month's notice is required to opt out. Every new employee has the right to receive an explanatory statement in relation to the opt in and opt out provisions. An employee who is asked to work Sundays and has no objection may by written notice opt in and is no longer protected. An opted out worker is one who is not protected but has given notice of objection.

A dismissal for taking part in an industrial action will be automatically unfair if it takes place in the first 8 weeks of participation. It would also be unfair after that period if the employer fails to take part in reasonable procedures to resolve the dispute. Unfairly dismissed strikers will be entitled to reinstatement after the strike is over.

In the case of unofficial disputes, the employer is given wider latitude and is allowed to select employees to dismiss and re-engage without penalties. Industrial action will not be considered unofficial where it is authorised or endorsed by a trade union.

It is automatically unfair to dismiss on the basis of not wishing to pay the National Minimum Wage. There is special legislation in the UK protecting employees who "blow the whistle" about wrongdoing. In these circumstances, employees are protected from unfair dismissal and detriment. The kind of disclosure which qualify for protection will include where the employee reasonably believes one or more of the following is happening or took place or is likely to take place:-

- criminal offence;
- breach of legal obligation;
- miscarriage of justice;
- danger to health and safety of individual;

- damage to the environment;
- covering up of information about the above.

It may subsequently be discovered that the employee was wrong in his reasonable belief. The employee would still be protected as long as he had a reasonable belief.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.