
Capital

**Employment Law
MA/PGDip in Strategic
People Management
—Level 7**



**Capital
Law**

© 2021 Capital Law Limited

1

Capital

Employment Law

Unfair dismissal, wrongful dismissal, settlement
agreements and protected conversations

14.02.2024

Lewis Kerr
Solicitor
Employment
Capital Law

© 2021 Capital Law Limited

2

Agenda

01 Unfair dismissal

- Who can claim?
- Has there been a dismissal?
- Potentially fair reason for dismissal
- Reasonableness of dismissal
- Automatic unfair dismissals
- Bringing a claim
- Remedies

02 Wrongful dismissals

- What is a wrongful dismissal
- Types of wrongful dismissal claims
- Effect of wrongful dismissals
- Bringing a claim
- Remedies

03 Settlement agreements

- What are they?
- Requirements
- Benefits
- What claims can/cannot be waived

04 Protected conversations

- What are they ?
- When they should be used
- Limitations on protection
- How to handle conversations – top tips!

© 2021 Capital Law Limited

Capital

Unfair Dismissal

Who can claim?

- **Employees**

- In law, an employee is *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*
- A contract of employment is a *"contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"*

- **Qualifying period**

- must have at least two years' service on the effective date of termination
- NB: a number of unfair dismissal claims do not require a minimum qualifying period of service

© 2021 Capital Law Limited

5

Has there been a dismissal?

In order to bring a claim, an employee must have been "dismissed"

3 categories of dismissal:

1. termination by the employer
2. expiry of a limited-term contract
3. constructive dismissal.

© 2021 Capital Law Limited

6

Effective date of termination (EDT)

If either the employer or employee gives notice to terminate the employment

- EDT is the date on which the notice expires

If the employment terminates summarily (that is, without notice)

- EDT is the date on which that termination takes effect

If the employee is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract

- EDT is the date on which the termination takes effect

© 2021 Capital Law Limited

7

What is a fair dismissal?

A dismissal will be held to be fair if:

- 1) the employer shows that the reason (or principal reason) for the dismissal was one of the five potentially fair reasons for dismissal; and
- 2) the tribunal finds that, in all the circumstances (including the employer's size and administrative resources) the employer acted reasonably in treating that reason as a sufficient reason for dismissal

© 2021 Capital Law Limited

8

Potentially fair reasons for dismissal

1. Capability or qualifications
2. Conduct
3. Redundancy
4. Statutory restriction
5. Some other substantial reason (“SOSR”)

© 2021 Capital Law Limited

9

Reasonableness of the dismissal

Once the employer has established a potentially fair reason for the dismissal, the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

This aspect of fairness is usually divided into two parts:

1. Did the employer follow a fair procedure?
(Procedural Fairness)
2. Did the employer act reasonably in treating the reason as a sufficient reason for dismissal?
(Substantive Fairness – “range of reasonable responses test”)

© 2021 Capital Law Limited

10

Procedural fairness

Procedural fairness

- In order to act reasonably, an employer must follow a fair procedure when dismissing an employee
- Includes following the ACAS Code of Practice on disciplinary and grievance procedures
- The procedure to be followed will depend on the reason why the employer is considering dismissal, there are some principles of procedural fairness that would apply to most cases:
 - the employee should know that they are at risk of dismissal, and why
 - they should be allowed to make representations (usually at a meeting or hearing)
 - in some cases they should also be allowed a right of appeal.

© 2021 Capital Law Limited

11

Range of reasonable responses test

Substantive fairness “range of reasonable responses” test

- Objective test
- Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted
- Tribunal must not "substitute its view" for that of the employer i.e. what would they have done
- Test applies both to the decision to dismiss and to the investigation which led to that decision

© 2021 Capital Law Limited

12

Range of reasonable responses test

Reasonableness of capability or qualifications dismissals

- ✓ Whether the employee knew what was required of them.
- ✓ Whether the employer took steps to minimise the risk of poor performance.
- ✓ Whether there was a proper appraisal of the employee and the problem was identified.
- ✓ Whether the employer provided training, supervision and encouragement.
- ✓ Whether the employer warned the employee of the consequences of failing to improve.
- ✓ Whether the employer gave the employee a chance to improve.
- ✓ In some cases, whether the employer considered alternative employment.

© 2021 Capital Law Limited

13

Range of reasonable responses test

Reasonableness of conduct dismissals

A dismissal on the grounds of conduct will only be fair in the following circumstances:

- ✓ At the time of dismissal, the employer believed the employee to be guilty of misconduct.
- ✓ At the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- ✓ At the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

(commonly known as the Burchell test, taken from the EAT decision in *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT).)

© 2021 Capital Law Limited

14

Range of reasonable responses test

Reasonableness of redundancy dismissals

An employer will normally not act reasonably unless it:

- ✓ Warns and consults any affected employees (or their representatives).
- ✓ Adopts a fair basis on which to select for redundancy.
- ✓ Takes such steps as may be reasonable to avoid or minimise redundancy by redeploying potentially redundant employees within its own organisation.

(Polkey v A E Dayton Services Ltd [1987] UKHL 8)

© 2021 Capital Law Limited

15

Range of reasonable responses test

Reasonableness of dismissals for breach of a statutory restriction

This would involve considering:

- ✓ The extent of the statutory restriction and the extent to which it affects the employee's ability to do their job.
- ✓ The duration of the statutory restriction.
- ✓ Any alternatives to dismissal, for example adjustments to the job or alternative employment.

© 2021 Capital Law Limited

16

Range of reasonable responses test

Reasonableness of dismissals for SOSR

This will depend on the circumstances of the case, but could involve the employer:

- ✓ Investigating the situation.
- ✓ Consulting with the employee.
- ✓ Warning the employee of the risk of dismissal.
- ✓ Giving the employee an opportunity to state their case.
- ✓ Exploring alternatives to dismissal.
- ✓ Balancing the needs of the employer and employee.
- ✓ Considering compliance with any policies of the employer.

© 2021 Capital Law Limited

17

Automatically unfair dismissals

In certain circumstances, a dismissal is deemed automatically unfair.

These include dismissals for reasons connected to:

- pregnancy or childbirth
- health and safety activities
- whistleblowing
- exercising various time off rights
- asserting a statutory right
- No qualifying period
- Compensation cap:
 - No cap - in cases where the claimant was dismissed (or selected for redundancy) for carrying out health and safety activities or for whistleblowing
 - Subject to cap - in all other cases

© 2021 Capital Law Limited

18

Bringing a Claim

Time limits

- Three months (less a day) from effective date of termination - subject to extension of time for EC

Acas Early Conciliation (EC) process

- Need for EC Certificate number before bringing claim
- Effect on time limits

Burden of proof

- *Employee* burden – to show that employer dismissed them and that they have the requisite qualifying period of service.
- *Employer* burden – to show the reason for dismissal and the reason was one of five potentially fair reasons
- Neutral burden – whether dismissal was fair (tribunal to consider)

© 2021 Capital Law Limited

19

Remedies

Tribunals will consider (in this order)

- 1) reinstatement
- 2) reengagement
- 3) Compensation

Compensation usually consists of:

1. a basic award
2. a compensatory award

© 2021 Capital Law Limited

20

Remedies

Basic award:

- Similar to a statutory redundancy payment
- Based on a formula that takes account of age, length of service and the amount of a week's pay

Compensatory award:

- Such amount as the tribunal believes is just and equitable based on the financial loss caused to the employee by the unfair dismissal
- Employee has duty to take reasonable steps to mitigate their loss
- Tribunal can reduce award to take into account:
 - the employee's failure to mitigate their loss
 - the likelihood that the claimant would have been fairly dismissed if a proper procedure had been followed

© 2021 Capital Law Limited

21

Remedies

- the likelihood that the claimant would have been fairly dismissed in any event at a later date
- and any conduct by the employee that has contributed to the dismissal ("contributory fault").
- Adjustments for breach of ACAS Code
- Statutory cap
 - Cap doesn't apply in relation to dismissals that are automatically unfair for whistleblowing or health and safety reasons
 - Maximum compensatory award is lower of:
 - 52 weeks' pay; or
 - a numerical figure (changes in line with inflation on 6 April each year) –for period 6 April 2021 – 5 April 2022 it is currently £89,493

© 2021 Capital Law Limited

22

Capital

Wrongful Dismissal

23

Wrongful Dismissal

What is wrongful dismissal?

- Wrongful dismissal is a dismissal in breach of contract
- Not concerned with whether there was a fair reason for dismissal or whether fair procedures were followed
- Only relevant considerations for a court/tribunal will be the contractual obligations of the employer

© 2021 Capital Law Limited

24

Wrongful Dismissal

- Types of wrongful dismissal claim:
 - breach of a notice term, whether express or implied
 - termination of a fixed-term contract or a "specific task" contract before its expiry
 - breach of a contractual disciplinary or redundancy procedure
- When is an employer entitled to dismiss without notice?
 - where there is a payment in lieu of notice (PILON) clause
 - where employee commits repudiatory breach
- What is the effect of wrongful dismissal on:
 - restrictive covenants
 - confidentiality obligations

© 2021 Capital Law Limited

25

Wrong Dismissal

Bringing a claim for wrongful dismissal

- No length of service requirement for breach of contract claim
- County court/High Court
 - ✓ 6 year time limit
 - ✓ no cap on damages recoverable
- Employment tribunal:
 - ✓ where the claim arises out of or is outstanding on termination of employment
 - ✓ value does not exceed £25,000
 - ✓ must bring claim within 3 months (minus 1 day) of their effective date of termination
- Damages

© 2021 Capital Law Limited

26

Capital

Settlement Agreements

27

Settlement agreements

What are settlement agreements?

- Legally binding contracts
- End the employment relationship on agreed terms
- Employee waives right to make a claim on the matters that are specifically covered in the agreement
- Usually include some form of payment and/or reference
- Voluntary and are agreed through a period of negotiation

© 2021 Capital Law Limited

28

Settlement agreements

Requirements for an agreement to be binding

1. It must be in writing.
2. It must relate to a particular complaint or proceedings.
3. The employee must have received advice from a relevant independent adviser, such as a lawyer or a certified and authorised member of a trade union.
4. The independent adviser must have a current contract of insurance or professional indemnity covering the risk of a claim by the employee in respect of loss arising from the advice.
5. It must identify the adviser.
6. It must state that the applicable statutory conditions regulating the settlement agreement have been met.

(ACAS Code of Practice on settlement agreements)

© 2021 Capital Law Limited

29

Settlement agreements

Benefits to employee

- ✓ Speed of payment
- ✓ Hassle-free – avoids stress and strain of litigation
- ✓ Certainty – don't have risk of claim being dismissed with no award made.
- ✓ Tax benefits
- ✓ Reference

Benefits to employer

- ✓ Certainty – tribunal claims can be unpredictable and process is not quick
- ✓ Peace of mind
- ✓ Cost
- ✓ Confidentiality

© 2021 Capital Law Limited

30

Settlement agreements

What claims can be waived?

- ✓ Claims arising under the contract of employment
- ✓ Certain statutory claims, such as:
 - ✓ redundancy pay
 - ✓ unfair dismissal
 - ✓ unlawful deductions from wages
 - ✓ all claims relating to discrimination, equal pay and family leave rights
 - ✓ any rights under collective consultation laws and TUPE Regulations that can lawfully be waived
 - ✓ claims relating to working time, rest breaks or leave, or statutory holiday pay

© 2021 Capital Law Limited

31

Settlement agreements

What claims cannot be waived?

- ✓ Claims to enforce the terms of the settlement agreement
- ✓ Claims in respect of accrued pension rights
- ✓ Personal injury claims that have not yet arisen
- ✓ Claims for failure to inform and consult with appropriate representatives on collective redundancies or on the transfer of an undertaking under TUPE
- ✓ Claims for the right to statutory maternity, paternity, adoption or shared parental pay.
- ✓ Settling future claims (*Bathgate v Technip Singapore PTE Limited*[2023] CSIH 48)

© 2021 Capital Law Limited

32

Capital

Protected Conversations

33

Protected conversations

What are they and when should they be used?

- Provide an “*off the record*” forum for confidential discussions to explore the possibility of parting ways on mutually agreeable terms
- Evidence relating to protected conversations will be inadmissible in unfair dismissal proceedings before employment tribunals.
- No need for a dispute
- Terms of departure should usually be recorded in a formal settlement agreement

© 2021 Capital Law Limited

34

Protected conversations

Limitations on protection

- Exceptions to protected conversation regime:
 - Automatic unfair dismissal claims (such as whistleblowing etc)
 - Discrimination claims
 - Breach of contract or wrongful dismissal claim
- Improper behaviour
 - Examples – see Acas Code of Practice on Settlement Agreements
 - Anything said or done in negotiations will only be admissible as evidence to the extent the tribunal considers it just

© 2021 Capital Law Limited

35

Protected conversations

Examples of improper behaviour

- a) All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
- b) Physical assault or the threat of physical assault and other criminal behaviour.
- c) All forms of victimisation.
- d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.
 - Putting undue pressure on a party, e.g.
 - not giving reasonable time for consideration.
 - threats of dismissal if a settlement proposal is rejected
 - an employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement

© 2021 Capital Law Limited

36

Protected conversations

Handling protected conversations – top tips!

- ✓ Start off with your open position first
- ✓ Test the water
- ✓ Allow employee to be accompanied
- ✓ Take notes
- ✓ Cover both bases - state that the meeting is being conducted pursuant to section 111A Employment Rights Act 1996 and on a without prejudice basis
- ✓ Allow employee adequate opportunity to consider proposals
- ✓ Don't allude to the likely outcome of the "open process" or present any next steps as a foregone conclusion
- ✓ Avoid compelling employees to stay off work whilst they consider their position
- ✓ Do not implement terminal measures
- ✓ If deadline for response passes, get employee back into work and continue with the open process

© 2021 Capital Law Limited

37

Capital

Thank you for listening,
any questions?

© 2020 Capital Law Limited

38