

What you need to know about Unfair Dismissal

Employment law is constantly changing so please be aware that the information contained herein is subject to change.

If this raises any further questions, please contact Andrew Egan on (01793) 511055.

Accurate as at 8th April 2005

Summary of Costs Rules in the Tribunal

The rule in the Employment Tribunal, unlike the County Court, is that each party bears its own legal costs. However, there are some circumstances in which a Chairman may make a costs order of a specified sum not exceeding £10,000, a specified sum agreed by the parties, or an order that the whole or a specified part of the costs is to be determined by way of a detailed assessment in a County Court in accordance with the Civil Procedure Rules.

The circumstances in which these costs orders are made are where a hearing has to be postponed or adjourned because of a party's failure, or where the paying party has, in bringing the proceedings, or whose representatives have in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably or the paying party's case or conduct has been misconceived i.e. thought to have no reasonable prospect of success.

A wasted costs order is an order whereby a Tribunal may "disallow or order the representative of a party to meet the whole or part of any wasted costs of any party, including an Order that the representative re-pay to his client any costs which have already been paid" and may order the representative to pay to the Secretary of State any attendance allowance that has been paid by him to a party or witness.

Wasted costs are defined as any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any representative or which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect that party to pay. A representative means our firm. In the unlikely event that we advise you that we believe a course of conduct proposed by you should not be taken or that by following your instructions it might (on a balance of probabilities) lead to the awarding of a wasted costs order against us, we would talk this over with you but reserve the right to terminate our retainer with you at any time with immediate effect to avoid facing such an order.

Unfair dismissal Claim

In order to make a claim of unfair dismissal a person must be an employee and must have been dismissed. A person must not be in an excluded class and must be below the normal retiring age or the age of 65.

An employee must also have been continuously employed for a period of not less than 1 year.

Limitation Period

You will not be able to bring your claim unless it is issued within a certain period. This is three months from the date of dismissal for unfair dismissal but does vary for other claims. If an employee is successful in establishing a dismissal, the burden is on the employer as explained below:

The Employment Rights Act 1996 states that in determining whether a dismissal was fair or unfair it is for your employer to establish that the only/or principal reason for your dismissal was one of the following:

1. Relating to your performance i.e. capability or qualifications to do the work of the kind that you are employed to do, or
2. Relating to your conduct, or
3. That you are redundant, or
4. You could not continue in the position held without contravening some statutory provision, or
5. That there was some other substantial reason justifying your dismissal.

If your employer can show that the dismissal was for one of the above reasons then they have overcome the first hurdle. However, showing the reason does not itself make the dismissal fair. The Employment Tribunal still has to decide whether your former employer acted reasonably in dismissing you for that reason. They will look at whether how your employer acted was within a reasonable band of responses that a hypothetical employer in their situation could have taken.

Since 1st October 2004 you will have a case for **automatic unfair dismissal** if your employer failed to follow at least a statutory minimum disciplinary and dismissal procedure involving a step 1 letter being sent to you alleging the disciplinary failing, a

step 2 meeting taking place at which you have the right to be accompanied by a trade union representative or a colleague at which you are given the chance to respond, a decision must be given and a right of appeal. Finally you are entitled to attend a step 3 appeal meeting to discuss the points of appeal. If an employee wants to bring a claim for constructive unfair dismissal, they must raise it in writing and wait 28 days before issuing a Tribunal claim. At all times the ACAS code of reasonable behaviour by both parties applies to both procedures.

Uplift on Damages

If the dismissal is found to be automatically unfair and this is wholly or mainly attributable to the failure of your employer your compensation can be increased. It must be increased by 10% and may, if the Tribunal considers it just and equitable be increased by up to 50%. There are exceptional circumstances in which the Tribunal is not obliged to make any uplift.

Compensation

i) Basic award

The basic award is calculated by applying the same formula as that for the statutory redundancy payment of age factor, length of service and 1 weeks pay.

ii) Compensatory award

Unlike the basic award, which is based on a formula, the compensatory award is designed to compensate an employee for the loss they have suffered. The compensatory award is subject to a maximum of £56,800. Compensation is limited to financial loss and will usually be assessed under the following main heads:

1. Immediate loss of net earnings from the date of dismissal to the date of hearing or until the employee finds a new job.
2. Further loss of net earnings to which an employee is entitled from the date of the hearing until the employee obtains new employment.
3. Loss of pension rights and other fringe benefits.
4. Loss of statutory rights.
5. Expenses in looking for work..

Please note that where you are entitled to compensation for other claims you will not be awarded money twice to cover the same loss.

Duty to Mitigate

An employee is under a duty to mitigate their loss by taking reasonable steps to obtain alternative employment. In practice, therefore, you must keep records of job applications and any responses you might receive from prospective employers to show the Tribunal that you have tried to mitigate your loss. Failure to mitigate could reduce a compensatory award but not a basic award.

Fixed Conciliation Period

Following 1st October 2004 there is a fixed conciliation period of 13 weeks in unfair dismissal claims. This means that ACAS have a duty during this time to try to facilitate a settlement of your claim.

How does an Employment Tribunal work?

The Employment Tribunal is constituted of a Chairman with legal knowledge and two lay members. Traditionally one has a background in approaching matters from the employer's perspective and the other looks at things from the employee's perspective. On arriving at the Tribunal you will report to reception. Generally in an unfair dismissal case the Respondent will give evidence and call any witnesses first.

There is no absolute rule as to which side starts and this will be discussed with you before the Hearing begins. After the Respondent has presented their case you will do the same and the procedure described now is also the procedure the Respondent will have followed. You and your witnesses will have to give evidence on oath or affirmation. You will then give evidence in chief by reading your witness statement out, or this may be taken as read by the Tribunal. You or your witnesses can then be asked questions by the other side. This is called cross examination. You or your witnesses can then give further evidence to clarify matters which came up when being asked questions by the other side. This is called re-examination.

Finally the Chairman and lay members may ask some questions. Once all the evidence has been heard, both sides can sum up before the Tribunal retires to consider their judgment. Unless a Tribunal "reserves" its judgment, the Chairman will announce judgment and the reason for it at the end of the hearing. If your claim is successful the Tribunal will normally expect to deal with compensation issues at the hearing. This is called a remedies Hearing and the time set aside for the hearing will usually include time for this.