



Dismissing an Employee Fairly



To dismiss an employee legally in the UK you must ensure you have a fair reason for doing so. You must also take care to follow a fair procedure. No employer wants to find themselves needing to dismiss someone, and if it's your first time doing so, the process can feel pretty daunting.



UK Employment law

In the UK, all employees have the right not to be unfairly dismissed when they have accrued 24 months continuous service with their employer.

In the event that an employer is judged to have unfairly dismissed an employee, the employee is entitled to issue a claim in an employment tribunal and can request re-engagement and/or request a compensation payment currently capped at £89,493, or 52 weeks gross pay if lower. The compensatory cap increases each year on 6 April.

Employers should also be aware that there are certain circumstances where employees do not require 24 months continuous service in order to bring a claim for unfair dismissal. These include dismissals for reasons connected to pregnancy or childbirth, health and safety activities, the exercise of various time off rights or asserting certain statutory rights under the Employment Rights Act 1996. Compensation in such circumstances may not be subject to the cap above and could be unlimited.

It is therefore vital that the employer, when considering dismissing (or even disciplining) an employee, guards against this possibility.

To fairly dismiss an employee an employer must:

1. Rely on a FAIR reason;
2. Follow a FAIR procedure; and
3. Act reasonably in treating that reason as sufficient for dismissal.

A FAIR REASON

The dismissal of an employee can only be for a fair reason if:

It relates to the employee's conduct

This could be a single sufficiently serious act of misconduct (usually referred to as gross misconduct) or a sequence of less serious acts. An example of conduct that might warrant a dismissal would be if it could be shown that an employee was stealing from the company/fellow colleagues.

It relates to the employee's capability or qualifications

This would be invoked where an employee is not competent or incapable of performing their job. This could be due to the fact the employee lacks the requisite skills or aptitude, or where, due to illness, the employee is incapable of performing the duties required in their role. It is important to note, however, that if an employee is suffering from a chronic illness they may be classed as having a disability, and the employer, mindful of disability discrimination, should therefore take legal advice before seeking to dismiss an employee for this reason.

It is because of redundancy

This would be the case where there is a closure of the business in which the employee was employed; a closure of the place of business where the employee was employed to work or if there is a reduced requirement for employees to carry out work of a particular kind.

Continuing to employ the employee would be illegal

For example, as a result of their immigration status, or health and safety issues.

It is for "some other substantial reason" (SOSR)

This is understood to be a fair reason that does not fall under the other categories. An example would be the dismissal of a temporary employee to allow for the return of an employee who has been on maternity leave, which is likely to be a dismissal for SOSR.

A dismissal for any other reason than those set out above would be unfair.

A FAIR PROCEDURE

Even if there is a potentially fair reason for dismissing an employee, an employer must still follow an appropriate fair procedure.

In cases of misconduct or poor performance, the employer should comply with its own procedures as well as the [Acas Code of Practice on Disciplinary and Grievance Procedures](#).

In advance of instigating a formal disciplinary procedure, it is necessary to investigate this "reason". This may be by means of a fact-finding exercise in cases of poor performance, or formal meetings in cases of misconduct. This investigation stage should be led by a different person than the individual who chairs any resulting disciplinary process.

Only once the investigatory stage has been completed can an employer proceed to instigate a formal disciplinary process. The employee should be formally invited to a disciplinary meeting and informed of their rights during the process, including their right to be accompanied at the meeting. Details of the reasoning for instigating disciplinary proceedings as well as the potential sanctions should also be explained to the employee in advance of the meeting. We recommend that this information is communicated to the employee in a formal written letter.

At the disciplinary meeting, the employer should set out its concerns and provide the employee with a reasonable opportunity to respond to each and every allegation. Following the meeting, the chosen sanction should be set out in writing and the employee should be informed of their right to appeal the decision. In the case of poor performance and misconduct, unless the circumstances or allegations are sufficiently serious, before the sanction of dismissal is invoked the employer should consider alternatives to dismissal, such as issuing warnings and/or enrolling employees on improvement plans. Failure to do so may lead to a finding of unfair dismissal and an Employment Tribunal may increase compensation by up to 25% if the failure is judged 'unreasonable'.

For other types of dismissal, there is still a requirement to follow a fair procedure, and it remains important to give an employee sufficient information about the reasons for their possible dismissal and the opportunity to respond at a hearing or meeting. For example, where an employee is dismissed by reason of redundancy, in order to be fair, the employer must carry out a genuine information and consultation procedure including, where relevant, the provision of a selection matrix and scoring exercise before reaching a final decision.

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Disclaimer: This note does not contain a full statement of the law and it does not constitute legal advice. Please contact us if you have any questions about the information set out above.

The employer must act "reasonably"

Even if there is a potentially fair reason for the dismissal, and the employer seeks to dismiss an employee following what would be regarded as a fair procedure, the employer must be able to show that it acted reasonably in dismissing the employee for that reason. This will involve taking into consideration different factors, depending on the reason for dismissal. All the circumstances, including the size and resources of the employer, will be relevant when determining whether it acted reasonably.

For example, where an employee is being dismissed because they are not capable of doing the job, an employer will usually have to give the employee a chance to improve, and an employer is likely to have acted unreasonably by dismissing an employee without doing so.

With the exception of cases of gross misconduct, (i.e. extremely serious acts of misconduct (e.g. theft)), employees have a right to work a period of notice. Depending on the terms of their employment contract, it might be possible to terminate an employee's employment immediately and make a payment in lieu of notice. It is usual for the notice period to be set out in the contract. If this is not the case the statutory notice period or a "reasonable" notice period will be implied. An employer's failure to give adequate notice or payment in lieu before dismissing an employee is likely to result in a wrongful dismissal finding, for which the employee can claim loss of earnings and benefits to which they would have been entitled during their notice period.