

# 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.

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## UK Employment law

Unlike many European jurisdictions, UK employment law allows employers greater flexibility to dismiss employees provided they consider the steps outlined below and seek appropriate legal advice.

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 basic award (calculation based on length of service, age, a gross weekly pay (capped)) and a compensation payment currently capped at £93,878, 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 the reason as a sufficient reason 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 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**. What makes a

procedure fair will vary depending on the reason for dismissal.

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](#). 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'.

Although the details of the procedure to be followed will vary depending on the reason for dismissal, the following principles of procedural fairness 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 most cases they should also be allowed a right of appeal.

### **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**.

By way of example;

- In cases of misconduct, employees may be instantly dismissed for a single act of gross misconduct, but in less serious cases it would be unreasonable to dismiss instantly and a series of formal warnings (e.g. first written warning, final written warning, etc.) should be followed.
- In performance cases, it is relatively rare that poor performance will be so grave as to justify instant dismissal for a single act of incompetence. Employers are expected to investigate and offer support to facilitate improved performance before they can reasonably contemplate dismissal. This will involve issuing a series of formal warnings with an opportunity to improve performance over a reasonable timeframe.

# Let us Introduce Ourselves



**Email:** [contact@ouryclark.com](mailto:contact@ouryclark.com)

**Oury Clark London:**  
10 John Street, London WC1N 2EB

**Tel: +44 (0) 20 7067 4300**

**Oury Clark Slough:**  
Herschel House, 58 Herschel Street  
Slough SL1 1PG

**Tel: +44 (0) 1753 551111**



**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.

- When 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.

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 of notice before dismissing an employee is likely to result in a wrongful dismissal finding, for which the employee can claim loss of earnings and benefits that they otherwise would have been entitled to during their notice period.

There are of course alternative more "commercial" routes such as entering into settlement agreements with an employee and the employer should carefully consider their options before "pulling the trigger" on an employee.