

REDUNDANCY

Overview

Protection against unfair dismissal was originally introduced under the Industrial Relations Act 1971. The current provisions are contained in the Employment Rights Act 1996 (ERA 1996), which provide that the dismissal of a qualifying employee will be unfair unless:

- The employer can show that the reason (or principal reason) for the dismissal was a potentially fair reason (section 98(1) and (2), ERA 1996). There are five potentially fair reasons. AND
- 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 (section 98(4), ERA 1996). This has been interpreted by the courts and tribunals as meaning that the dismissal must be both "procedurally" and "substantively" fair.

The Acas Code of Practice on Disciplinary and Grievance Procedures (Acas Code) applies to dismissals for misconduct or poor performance, and must be taken into account by tribunals in deciding whether an employer has acted reasonably in relation to following a fair procedure and giving fair warnings prior to dismissal.

Generally, employees must have completed a qualifying period of service before they have the right not to be unfairly dismissed. The qualifying period is two years, or one year if employment started before 6 April 2012 (section 108, ERA 1996);

Dismissal for certain reasons is deemed automatically unfair and, in most such cases, employees do not need a qualifying period of employment.

If an employment tribunal finds that the dismissal is unfair, it can order the employer to re-engage or reinstate the employee or (as is more likely in practice) pay the employee compensation.

Redundancy

A dismissal on the grounds that "the employee was redundant" is potentially fair (section 98(2)(b), ERA 1996). This applies where the dismissal is "wholly or mainly attributable to" the employer either:

- Ceasing or intending to cease to carry on the business for the purposes of which the employee was employed by it (business closure).
- Ceasing or intending to cease to carry on that business in the place where the employee was so employed (workplace closure). Having a reduced requirement for employees to

carry out work of a particular kind or to carry out work of a particular kind at the place where the employee was employed to work (reduced requirement for employees).

In some circumstances, a dismissal on the grounds of a (genuine) redundancy will be automatically unfair, for example where the employee was selected for redundancy because they made a protected disclosure.

In other cases, the employer will have to establish that it acted reasonably in all the circumstances involved in dismissing the employee. This will involve carrying out a fair procedure and applying fair criteria for selecting redundant employees.

Procedural fairness

In applying and interpreting these statutory requirements as to reasonableness, the courts and tribunals developed a requirement that, in order to act reasonably, an employer had to follow a fair procedure when dismissing an employee. In relation to conduct and performance dismissals, this includes following the Acas Code.

The landmark case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 (HL) established the following principles:

- Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair (this rule is subject to a limited exception).
- Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair (known as a Polkey deduction).

Although the details of 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, and should be allowed to make representations (usually at a meeting or hearing). In some cases they should also be allowed a right of appeal.