



## Dismissals: HR guide

### Description

## Introduction

When considering **dismissals** there are many pitfalls. Employers need to be aware of the legal framework to ensure that they are not exposed to employment tribunal claims.

### Dismissals and probationary periods

If employees are **dismissed** during or at the end of their probationary periods, employers can usually terminate their employment – provided appropriate notice is served. Some contracts of employment allow employers an option to extend probation if needed.

### Dismissing employees under the two year mark

Generally, employees need to have at least two years' continuous service to bring an **unfair dismissal** claim (though there are some exceptions). The new government is proposing that employees will have unfair dismissal rights from day one of their employment.

Currently, therefore, employers do have more scope to **dismiss** employees before they reach two years' continuous service and you would normally be able to **dismiss** the employee as long as the right notice is given.



But be warned, an employee could bring claims, such as for [discrimination](#) or [whistleblowing](#), which have no length of service requirement. It is therefore advisable to follow a fair process wherever possible (including when the employee is on probation) – so you can account for your decisions.

Also be aware that employees can take minimum statutory notice into account in getting up to the two year mark unless the employee is guilty of misconduct entitling the employer to terminate immediately. This notice is one week for continuous service of less than two years but one month or over. So if you **dismiss** an employee a few days before their two years' service without serving them notice, an extra week can be added for the purpose of calculating the two year period.



## Unfair dismissal

Generally, employees who have at least two years' continuous service with the employer have the right not to be unfairly dismissed, although there are a few exceptions.

An employer can defend a claim by showing that the reason (or principal reason) for the **dismissal** was one of the potentially fair reasons for **dismissal** such as conduct, [capability](#), [redundancy](#), contravention of a statutory restriction (for example that continued employment would breach immigration rules) or some other substantial reason (for example pressure from a client to dismiss.) Once the employer has established a potential fair reason for **dismissal** the employment tribunal must

then decide if the employer acted reasonably in **dismissing** the employee for that reason.

In misconduct cases to satisfy the reasonableness (fairness) test: at the time of **dismissal** the employer must have had an honest belief that the employee was guilty of the misconduct; at the time of the **dismissal** the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and at the time that the employer formed that belief it had carried out as much investigation as was reasonable in the circumstances. The employment tribunal must also consider whether in **dismissing** the employee the employer acted within the band or range of reasonable responses open to the employer.

In [capability](#) cases when determining fairness relevant factors could include: whether the employer explained the employee's shortcomings; whether the employee had been given a sufficient opportunity to improve; whether training and supervision had been provided; whether warnings were issued; whether the employee had been given an opportunity to put forward their case; and whether alternatives to **dismissal** were considered.

In [redundancy](#) cases when determining fairness relevant factors could include: whether individual consultation (and in some cases collective consultation) had been carried out; whether, in appropriate cases, there had been an objective selection process; and whether the employer searched for suitable alternative roles within the organisation and, possibly, other group companies.

In cases of **dismissals** for breach of a statutory restriction relevant factors for determining fairness could include the extent of the restriction, the duration of the restriction and whether alternatives to **dismissal** had been considered.

In cases of **dismissals** for some other substantial reason, relevant factors for determining fairness could be whether there had been an adequate investigation, whether the employee had had an opportunity to put forward their case, whether the employer had consulted with the employee and whether alternatives to **dismissal** had been considered.

Employers need to be aware that employees with the requisite service could, in certain circumstances, resign and claim constructive **unfair dismissal**. The employee would need to resign swiftly as a result of a fundamental breach of the employment contract (such as breach of a key express term or implied term including trust and confidence).

Also, a **dismissal** could include the non-renewal of a fixed-term contract.



## The Acas code

Employers should be aware of the Acas Code of Practice on Disciplinary and Grievance Procedures ([Code](#)). Employment tribunals must take the Code into account when considering whether an employer has acted reasonably or not. If an employee wins an **unfair dismissal** claim employment tribunals are also able to adjust awards up or down by 25 percent for unreasonable failure to comply with any part of the Code by the employer or the employee.

## Reaching a deal

Even if there is no actual dispute with the employee, the employer may still be able to have an [off-the-record conversation](#) with the employee and try and reach a deal for their employment to end. As long as there is no improper behaviour, such as blackmail, this “protected conversation” would be inadmissible in any general **unfair dismissal** proceedings. When a deal is reached the parties would usually enter into a [settlement agreement](#).



However, employers do need to be careful. There are some exceptions for **unfair dismissal** including where the **dismissal** relates to pregnancy, where you do not get protection. Also other claims such as discrimination are not protected. It is therefore sensible to speak to your lawyer before having those discussions.

This guide is intended for guidance only and should not be relied upon for specific advice.

If you need advice on **dismissals** or have queries relating to other employment law issues please do not hesitate to [contact](#) me on [020 3797 1264](tel:02037971264).

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