

Wrongful Dismissal



Overview

Wrongful dismissal is dismissal in breach of contract. It is not the same as unfair dismissal, which looks at the reason and process involved in the dismissal. In wrongful dismissal, we look at the employment contract, which is made up of the physical paper contract, (where one exists), but also the terms of the contract that are implied into the relationship by statute and case law.

The right not to be dismissed unfairly is a statutory rather than a contractual right. An employee must have a minimum of two years' continuous service to qualify for the right to bring a claim of unfair dismissal, which can be brought to an Employment Tribunal only. Please refer to our factsheet on '**Unfair Dismissal**' for more information.

There is no length of service required for a wrongful dismissal claim, which can be brought either to the County Court or High Court, or, where its value does not exceed £25,000, to an Employment Tribunal (see further below).

Wrongful dismissal occurs most commonly where an employer dismisses an employee without notice (also known as summary dismissal), with insufficient notice under their contract of employment or before a fixed term contract is due to expire, or in breach of contractual disciplinary procedures (see more below). Damages awarded usually equate to the value of the employee's pay and benefits during the period of notice that the employee would have been given, had the contract been terminated lawfully or until the end of the contract's fixed term.

An employee cannot, generally, claim damages for the loss of a chance to remain employed had a contractual disciplinary procedure

been followed properly, but may be able to claim for losses during the period it would have taken to complete the procedure. However, this area of law is a complex one and often changing. Moreover, from our experience most employers do not have contractual internal policies. Those employed by the NHS may find that internal policies are sometimes contractual so should take advice promptly about this.

It is also not generally possible to claim damages for the manner in which the dismissal is carried out.

Finding new work

Any wrongfully dismissed employee is under a duty to mitigate their loss (in other words look for work) and give credit for sums earned in a new job during the notice period or during the remainder of the contract's fixed term. The burden is on the employer to prove a failure to mitigate.

If you fail to comply with this duty a Court or Tribunal may consider that your losses arise from that failure rather than the original contractual breach and reduce the damages recoverable accordingly.

However, you need only do what is reasonable to mitigate — you need not take the first job that comes along and you may continue to search for the right job for a reasonable period. If you are

offered your old job back, you will fail to mitigate if you turn down that offer where it would have been reasonable to accept.

If you do secure a new job and start earning an income, an employer cannot make deductions from a payment made pursuant to an express contractual right to pay in lieu of notice, or where the contract entitles an employee to liquidated damages in the event of a dismissal in breach of contract.

Benefits in kind

Wrongfully dismissed employees are entitled to compensation for non-cash benefits as well as compensation. Benefits such as insurance, company car, travel allowances and share options are more difficult to value but, in general, the proper measure is the cost to the employee of replacing the lost benefit for the relevant period. Common insurance schemes include medical expenses insurance, permanent health insurance and death-in-service life assurance. It is likely that it will cost an employee more to replace such cover than the original cover cost the employer.

With car and other travel benefits the important distinction is between work and personal use: if only business use of a car was allowed,

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no benefit was provided to the dismissed employee, whereas a contractual right to personal use of a car must be compensated.

Share options that the employee would have been able to exercise had they not been dismissed may be recoverable depending upon the terms of the share scheme and perhaps of the employment contract.

Interest

When damages are awarded for wrongful dismissal, they will be compensating the employee for some sums which would normally have been received earlier had the contract not been breached (e.g. lost instalments of salary for a notice period in the past).

Interest can therefore be applied to compensate for late receipt of the payment.

Accelerated receipt

Damages awarded for wrongful dismissal will also be compensating the employee for some sums that would normally have been received later (e.g. lost share options that would have been exercisable at some future date).

Deductions for accelerated receipt must be made where sums are received early.

Gross Misconduct

An employee who is guilty of gross misconduct may lawfully be dismissed without notice and will not be wrongfully dismissed.

However, for the purpose of a wrongful dismissal claim it is not enough that the employer reasonably suspects that the employee committed an act of misconduct (as it would be in an unfair dismissal claim). Rather, the employer must prove on the balance of probabilities that the employee actually did it.



It does not matter that the employer cannot prove, at the time of summary dismissal, that the misconduct was committed. If the employer is able to prove, on a date subsequent to dismissal, that the employee had, as at the time he was dismissed, already committed gross misconduct that will provide a defence at the trial of a wrongful dismissal claim, even if the employer did not even know about that misconduct at the point of dismissal.

Senior Executives

Summary (instant) dismissal is relatively rare in the case of senior executives. Only where there is clear evidence of serious or gross misconduct, dishonesty or an act or omission amounting to a repudiatory breach of an express or implied term of the service contract would it be appropriate for a senior executive's employment to be terminated 'for cause' with immediate effect without notice or any payment in lieu of notice.

The service contract may provide for summary termination in other instances, e.g. disqualification from acting as a director. Payment in lieu of statutory notice may still be required in such circumstances.

Most wrongful dismissal claims are brought by senior employees where the amount claimed, whether notice period, bonus, share options or other benefits is substantial. In this sense and because most wrongful dismissal claims are made in the County Court or High Court and not the Employment Tribunal (due to the £25,000 cap), they are higher risk and similar to commercial disputes.

Relationship between Wrongful Dismissal and Post Termination Restrictive Covenants

A successful wrongful dismissal claim will establish that the employer has breached the contract of employment. If that contract included restrictive covenants – contractual terms which, for example, prevent the employee from working for a competitor after their employment under the contract ends – then the effect of the employer's breach may be to render the restrictive covenants unenforceable. An employer cannot rely on the terms of a contract it has breached.

However, this is often a complex area, and until a Court or Tribunal has ruled that an employer has in fact breached a contract, it may be sensible for an employee to treat any restrictive covenants as remaining in force, even if the employee believes the contract has been breached and that there has been a wrongful dismissal.

Please refer to our factsheet on '**Post Termination Restrictive Covenants**'.

High Court and County Court employment claims

Most employment rights arise from statute and disputes relating to them are generally within the exclusive jurisdiction of the Employment Tribunal. However, a claimant may in certain circumstances (and provided they are not the same claim) bring proceedings in both the Employment Tribunal and civil court simultaneously, for example where a highly-paid employee brings both unfair dismissal proceedings in the Tribunal and a claim for damages for wrongful dismissal in the High Court.

Contract claims in the Employment Tribunal

If a claimant brings a wrongful dismissal claim in the Employment Tribunal then the maximum they are entitled to recover for that claim

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before the Tribunal is £25,000 and they will be barred from then seeking any further damages in excess of £25,000 in the High Court (even if they purport to reserve their right to do so in their claim to the Tribunal)

In many cases, a wrongful dismissal claim or other claim arising out of an alleged breach of a contract of employment may potentially give rise to damages in excess of £25,000. This may be the case with a high-earning employee or one with a long notice period.

In such circumstances, it will probably be advisable to bring the claim in the Courts rather than the Employment Tribunal.

When should you bring a claim?

You should make a claim for wrongful dismissal in the Employment Tribunal within 3 months less one day from the date of termination of employment, and within 6 years if the claim is being made through the Courts.

It is important to take advice on which forum is appropriate for your claim. There are different costs rules applicable to different forums.

Mandatory ACAS Early Conciliation

If you are thinking about making an Employment Tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month, or six weeks if an extension is agreed. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if

the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in Employment Tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk.



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