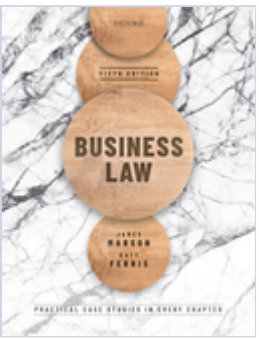

Business Law (6th edn)
James Marson and Katy Ferris

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21. Statutory Regulation of Dismissals

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Abstract

This chapter considers the termination of employment, and how it is governed by statutory measures—in cases of unfair dismissal—and the common law—in cases of wrongful dismissal. Each of these provisions outline important factors when the contract is to be ended. Being aware of the procedures involved in each of these areas of law will ensure terminations can take effect without unnecessary recourse to court or tribunal action, saving time and money. In dismissing an employee, the law provides for the correct procedure to be adopted, the potentially fair reasons that justify a dismissal, along with automatically unfair reasons to dismiss an employee. Disregarding these may lead to claims for unfair dismissal, the defence of which can be expensive for employers.

Keywords: termination of employment, statutory measures, unfair dismissal, common law, wrongful dismissal

Whilst there are numerous potentially fair reasons for an employer to bring an employment relationship to an end, it is possible that an employer may dismiss a qualifying employee in a way the law holds unfair. Such dismissals may be unfair because of the reason used by an employer (substantially unfair) and/or the dismissal may have been handled contrary to legal requirements and hence the employer has failed to follow the correct procedure (procedurally unfair). It is also possible that the employer may fundamentally breach the contract of employment. Where the employee accepts the breach, they may resign and claim unfair dismissal (even though the employee has not been ‘dismissed’ by the employer). Defending unfair dismissal actions can be expensive for employers, as can be the awards of compensation to the employee. This chapter identifies the correct methods for (fairly) dismissing an employee.

Business Scenario 21

Arjun is the manager of a clothing manufacturer 'Fancy Pants plc'. He learns from the firm's computer records that there have been a number of unauthorized searches of the computer files overnight. There are six employees working the nightshift who have had access to the computer and Arjun believes that at least one of them must have made the searches. None of the six have had legitimate reasons to use the computer, and importantly to Arjun, the files searched contained confidential company information regarding both commercial and personnel details.

The computer system and its files are password protected and none of the six should have known about the password. Company security is very important to Arjun and he views unauthorized access as very serious. Arjun interviews the six, but each deny responsibility and knowledge of who may have accessed the computer. Arjun suspects that these workers are lying, and further that some or all of them must have seen or heard something.

The six have worked for the firm for 10 years and one of them, Paul, has recently been promoted because of his exemplary service. During his enquiries into the unauthorized computer access Arjun discovers that another of the six, John, lives with Mana the daytime computer operator. Mana is currently working under a 36-month fixed-term contract, of which she has completed two years, and Arjun believes that she may have provided John with the password. On this belief, Arjun dismisses Mana immediately.

Arjun seeks your advice as he wishes to dismiss everyone except Paul, and he is particularly suspicious of John. Arjun also brings along a copy of Mana's contract which does not contain any provision for early termination.

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Learning Outcomes

- Explain what is meant by the term 'unfair dismissal' (**21.2**)
- Apply the tests for qualification for protection against unfair dismissal (**21.2.2–21.2.2.4**)
- Explain the potentially fair reasons to justify dismissal under the Employment Rights Act 1996 (**21.2.3–21.2.3.5**)
- Identify the automatically unfair reasons to dismiss an employee (**21.2.4**)
- Explain the use and application of the ACAS Code on dismissal and grievance procedures (**21.2.5.2**)
- Determine how a tribunal assesses the reasonableness of an employer's decision to dismiss (**21.2.6**)
- Explain the concept of constructive unfair dismissal (**21.3**)
- Identify and apply the remedies of compensation, reinstatement, and re-engagement following a successful unfair dismissal claim (**21.4–21.4.3.3**).

21.1 Introduction

Having identified the tests adopted by the courts and tribunals to establish employment status, and having considered the common law rights when an employment relationship is ended, this chapter continues by considering the termination of employment. Termination of employment is governed by statutory measures (**unfair dismissal**) and the common law (wrongful dismissal), and each of these provisions outline important factors when the contract is to be ended. Being aware of the procedures involved in each of these areas of law will ensure terminations can take effect without unnecessary recourse to court/tribunal action, saving time and money.

21.2 Unfair dismissal (the statutory route)

Before 1971 there was no statutory right to protection against unfair dismissal. In 1971 the Industrial Relations Act was enacted, and before then an employer could dismiss an individual for any reason and the only protections available were those established in the contract and enforced through the common law. Unlike wrongful dismissal claims that are predominately heard in the courts, unfair dismissal claims are heard exclusively in Employment Tribunals. However, Employment Tribunals may also hear wrongful dismissal actions involving claims of up to £25,000 in compensation (Employment Tribunals Act 1996, s. 3).

Unfair dismissal is largely governed by the Employment Rights Act 1996 (ERA), and specifically under this Act, s. 94(1) provides the right not to be unfairly dismissed. ERA 1996 establishes the qualifications that the individual must satisfy before they have the right to protection under the Act; the 'potentially fair' reasons to justify a dismissal; the **'automatically unfair' reasons to dismiss**; and how awards are to be assessed following a successful claim for unfair dismissal. A flow chart of the process of unfair dismissal claims is
p. 540 contained in **Figure 21.1**. ↵

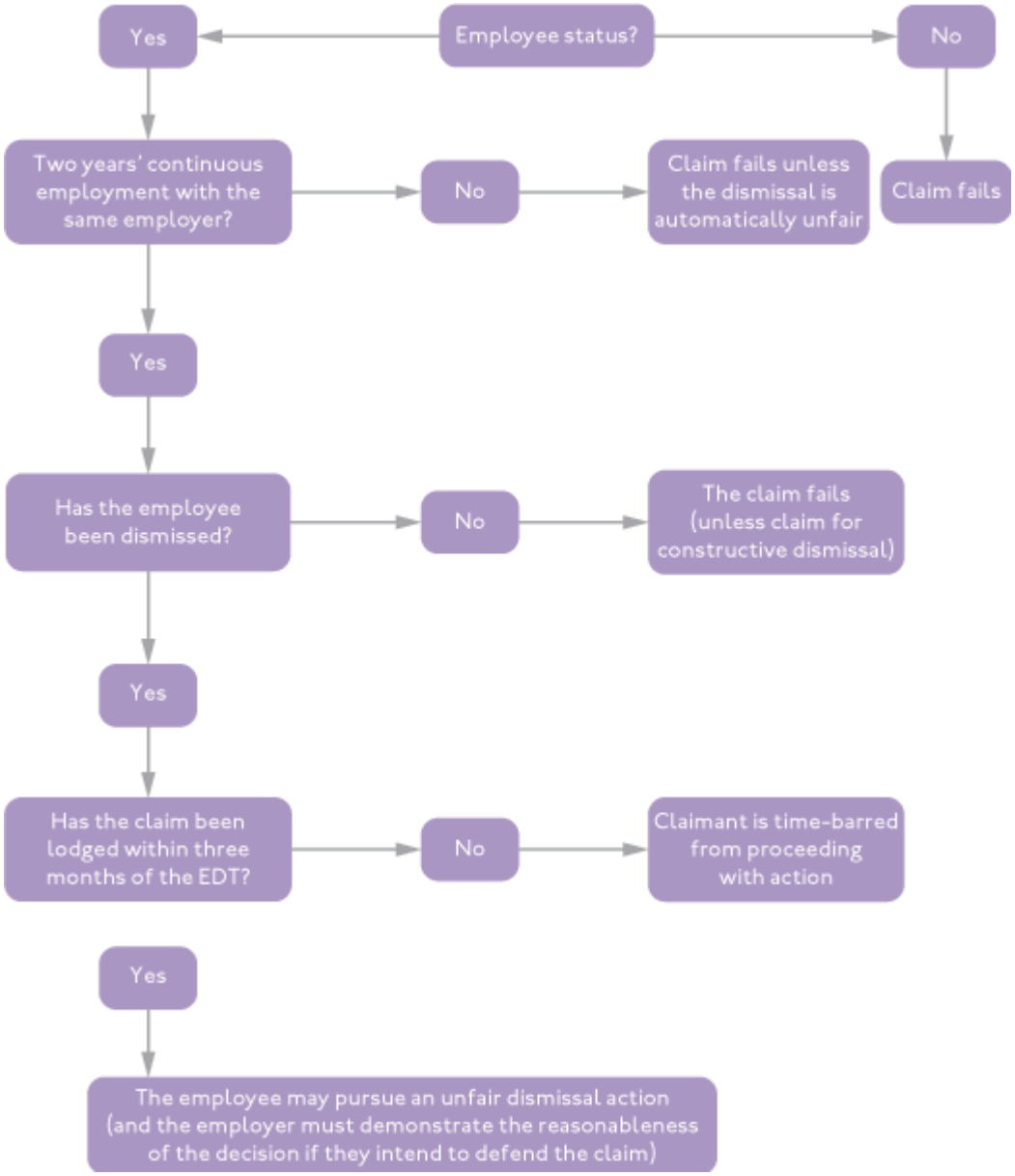

Figure 21.1 Process of unfair dismissal claims

21.2.1 Excluded Groups from Unfair Dismissal Protection

Only an individual with 'employee' status is entitled to bring a claim for unfair dismissal. Those without this status (such as independent contractors), but whose contract of employment has been terminated may (if the contract has been breached) pursue a claim for wrongful dismissal. There are also groups of individuals who are not entitled to claim, and these include share fishermen (s. 199(2)); employees in the police service (s. 200); and persons excluded for reasons of national security (s. 193—see *Council of Civil Service Unions v Minister for the Civil Service* regarding the right to join a trade union).

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21.2.2 Qualifications for Protection under Unfair Dismissal

ERA 1996 establishes who qualifies for protection under the Act. These qualifications have to be strictly adhered to and are only removed in situations involving 'automatically' unfair reasons to dismiss. If the individual does not qualify then there is no point in pursuing a claim under unfair dismissal:

1. the individual must have 'employee' status;
2. they must have been continuously employed by the same employer for at least two years;
3. they must have been dismissed (unfairly);
4. the claim must be submitted to a tribunal within three months of the **Effective Date of Termination**.

It should also be noted that, as part of the Government's initiative towards alternative forms of dispute resolution, the case may be heard by an arbitrator under the ACAS Arbitration Scheme, as opposed to the case proceeding to a tribunal.

21.2.2.1 Employee status

If there is no disagreement between the individual and the employer that the individual is an employee, then this test is satisfied and the issue of qualification continues to the next stage. If, however, there is disagreement, then **Chapter 19** demonstrates the methods used to determine employment status.

21.2.2.2 Continuously employed for at least two years

ERA 1996 identifies what will amount to 'continuous' service, and under s. 212(1): 'Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.' If the employee fails to work for the employer for at least one week or more, then the period of continuous service is broken. There are, however, exceptions to this rule. If the individual is absent due wholly or partially to childbirth or pregnancy and she later returns to work, these weeks count towards continuous employment (s. 212(2)); if the individual is incapable of work as a consequence of illness or injury (s. 212(3)(a)—to a maximum of 26 weeks), if they are absent due to a temporary cessation of work (s. 212(3)(b)), and if they are absent in circumstances that, by arrangement or custom, are regarded as continuing in the employment of the employer, then these weeks will also contribute to 'continuous employment'.

The employee does not have to work at the same physical location or necessarily in the same capacity throughout this period; the test is that there is a continuous contract of employment between the parties.

21.2.2.3 The employee must have been dismissed

The law requires that for a successful claim of unfair dismissal, it is the duty of the employee to demonstrate they have been dismissed. Under ERA 1996, s. 95, dismissal occurs in the following circumstances: the contract of employment is terminated (with or without notice) ((1)(a)); a fixed-term contract has expired and not been renewed ((1)(b)); or the employee ends the contract due to an act of **constructive dismissal** by the

employer ((1)(c)). In *Futty v Brekkes* the employer told his employee to 'fuck off' which the employee interpreted
p. 542 as his notice of dismissal. Generally, the words used to constitute a dismissal ↵ will be interpreted as how a 'reasonable employee' would have understood them—see *Tanner v Kean* for a discussion of this point.

21.2.2.4 The effective date of termination

Determining the Effective Date of Termination (EDT) of the contract, which is clearly applicable to the rule that claims must be submitted to the tribunal within three months of this date, is outlined in s. 97 of ERA 1996. An extension to this time limit may be granted where the tribunal decides it was not 'reasonably practicable' for the claim to be submitted on time and the subsequent delay was 'reasonable.' These matters are determined on the basis of the facts of each case, not an application of legal principle.

There is nothing wrong in principle in a claimant waiting until the last moment before submitting their claim (see the Court of Appeal in *Consignia plc v Sealy*), but there may be a risk in doing so, especially where delays in technology may impact on the application process.

Miller v Community Links Trust Ltd (2007)

Facts:

Mr Miller was submitting his claim for unfair dismissal and did so via the Employment Tribunal Service website. A disclaimer on the website identified that only where a receipt email is received would the ET1 claim form be considered as 'submitted'. Miller's claim was sent at 23:59:59 on the final day of the three-month limit and the confirmation email was received at 00:00:08 the next day.

Authority for:

The employer argued the claimant was time-barred from having the claim heard and the tribunal agreed. The submission was nine seconds late and as it was reasonably practicable for the submission to be sent on time, there was no justification for extending the period. The EAT agreed with the tribunal. Allowing the claim to be heard in these circumstances would cause delay and prejudice, and there was a public interest in conducting cases expeditiously.

If the claimant argues that they could not submit their claim within the time limit due to illness, details of the illness and its duration, supported where possible by medical evidence, and the effect that the illness had on the claimant should be provided. Note that certain reasons for non-submission within the three-month deadline will not be accepted. These include a delay in the claim due entirely to the fault of the claimant's representatives (*Pora v Cape Industrial Services Ltd*—here the claimant would have an action against the representatives in negligence).

The date of dismissal is assessed objectively on the facts of the case, and it is not permissible for the parties to reach an agreement between themselves as to the date (*Fitzgerald v University of Kent at Canterbury*). If a period of notice is given, the EDT will take effect when the notice period ends, not when the notice was given ((1)(a)). If no notice is provided, the EDT takes effect from the date on which termination was effective ((1)(b)); and for
p. 543 those employed under a fixed-term contract, if this is not renewed, the EDT is effective ↵ from the date on which the term expires (1(c)). Where the contract expressly allows for a payment in lieu of notice, the EDT will be considered to be effective from the last day worked (*Leech v Preston BC*).

21.2.3 Justification for Dismissal: Potentially Fair Reasons to Dismiss

Having established that the employee qualifies for protection under the Act, s. 98 of ERA 1996 outlines the reasons in which it may be acceptable, if reasonable on the facts, for the employer to dismiss the employee. The employer may explain the decision for dismissal as being potentially fair if the reason or, on the basis of more than one reason being presented the principal reason, is due to:

- the capability or qualifications of the employee (s. 98(2)(a));
- the conduct of the employee (s. 98(2)(b));
- that the employee was made redundant (s. 98(2)(c));
- that to continue the employment would amount to a contravention of a statute (s. 98(2)(d));
- some other substantial reason of a kind to justify dismissal (s. 98(1)(b));

Section 92 of ERA 1996 provides that a dismissed employee may request for the reason for the dismissal to be provided in writing. This will assist the employee in attempting to establish a defence based on the employer's assertion under s. 98. If the employer refuses, or fails to respond, then the tribunal may award the employee two weeks' pay. The employer may select as many of the reasons under s. 98 as they wish. However, the more that are chosen, the more evidence that will have to be provided to ensure the dismissal is fair. Indeed, in *Smith v City of Glasgow Council*, the employer offered three reasons for the employee's dismissal due to incapability, but as one of them could not be proven, the House of Lords held that the employee was unfairly dismissed. It was not possible for the court to distinguish if this reason was any less or more serious than the other two submitted.

21.2.3.1 Capability/qualifications

ERA 1996 identifies that the issue of capability should have regard to 'skill, aptitude, health or any other physical or mental quality' (s. 98(3)), and qualifications are '& any degree, diploma or other academic, technical or professional qualification relevant to the position held'. It is necessary to look to the contract of employment and to what tasks the employee actually performed at work, and then consider the general standard of performance required, whether that standard was being met, and if not, how similar employees were treated.

Capability, as a reason for dismissal, generally focuses on whether the employee becomes ill and cannot perform their tasks, or if the employee is incompetent (or 'becomes' incompetent—perhaps by being promoted to a management position and not having the skills to adequately perform the job). Care needs to be taken when dismissing an employee due to their ill health. The EAT has held there is an implied term that an employer will not dismiss an employee for incapability if that would prevent entitlement to long-term disability benefits. This limits the express contractual right to terminate on notice if it would frustrate the contractual entitlement to long-term disability benefits (*Awan v ICTS UK Ltd*).

p. 544 ↵ Dismissal on the grounds of capability involves the employer's belief of incapability rather than proof—per Denning LJ: 'Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.'

Alidair Ltd v Taylor (1978)

Facts:

Taylor was engaged as a pilot for the airline. On landing, he forgot to lower the landing gear and this caused the plane to crash. The employer dismissed him on the grounds of capability.

Authority for:

The Court of Appeal held that although this was one offence committed by the pilot who had an otherwise unblemished career, this 'spectacular' error was sufficiently serious to justify a dismissal.

Importantly, when considering the fairness of a dismissal, the tribunal will be looking at whether the employer raised any complaints or concerns with the employee to enable them to either change their practices or identify problems they had. The use of warnings, following consultation regarding areas of difficulty, enables the employee to take appropriate action, but also ensures good industrial relations. It enables the employee to be aware of the employer's concern without simply being called into a disciplinary/dismissal meeting. Such discussions may be useful to identify a lack of appropriate skill or merely a lack of effort, and all alternatives to a dismissal should be explored.

Consider

Arjun suspects that one of the six members of staff have accessed the computer system. He has no proof of this, therefore he suspects one or more of them is guilty of misconduct. In the next section, consider how the law will allow Arjun to fairly investigate his suspicions.

21.2.3.2 Conduct

Here the issue is the misconduct of the employee and it can pose many problems for an employer in determining the facts surrounding the incident, and deciding how to react to it. Typical examples include fighting, stealing, misuse of company property (examples of *gross* misconduct), and poor timekeeping, unauthorized absences from work, or general disregard for instructions given fairly and lawfully by the employer (misconduct). Gross misconduct generally refers to a one-off serious offence that may of itself justify a dismissal, whereas misconduct may be a 'lesser' offence when considered in isolation, but when this
p. 545 culminates over a period of time it becomes sufficiently serious to (potentially) ↵ justify a termination of the contract. Do note though, in *Quintiles Commercial v Barongo* the EAT held that misconduct does not have to be gross to allow for a fair dismissal without prior warnings. Gross misconduct may be closely aligned with gross negligence and can involve inaction as well as conduct itself.

Adesokan v Sainsbury's Supermarkets Ltd (2017)

Facts:

The claimant was a regional manager for Sainsbury's. He received information that a manager in the organization's human resources department had issued an email with the intention of negatively interfering with a significant management consultation. Whilst he knew of the email, he took no action. As a result, and following a disciplinary hearing, his (in)action was considered to be grossly negligent, and was 'tantamount to gross misconduct'. As such, he was dismissed.

Authority for:

In an action for breach of contract the Court of Appeal agreed with the assessment in the High Court that although this was a case of inaction, it was so serious as to breach the trust and confidence between the parties. The Court of Appeal continued that whilst courts should not easily conclude that a failure to act will establish gross misconduct, the facts here were of a person in a senior position and this justified a dismissal.

To ensure that the employer conducts meetings and disciplinary hearings in a correct manner and in a way that is likely to be accepted by the tribunal, it is wise to follow the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2009). This is not 'law', but tribunals refer to it and it is good industrial practice to follow the guidance. If the employer identifies that the procedures as set out in the Code will be followed in circumstances involving dismissal/disciplinary action, and this is made clear to the workforce and any representative organizations, then concerns and ill-feeling may be avoided. The Code states that disciplinary procedures should be provided in writing and made available to the workforce (perhaps in a works handbook, human resources department accessible by the workers, and so on); it should clearly identify to whom the procedures apply and what sanctions are available to the employer; it should identify who in the organization is competent to decide and apply any sanctions; it should identify the investigatory procedures to be adopted in misconduct cases; it should ensure the employee is aware of their right to attend a disciplinary meeting and

to be accompanied (Employment Relations Act 1999, s. 10); and it should enable an employee to appeal against decisions. These steps are not particularly onerous, and by following them all parties are aware of how a situation/allegation of misconduct will be investigated and how any decision will be determined.

Under the common law, a gross misconduct justifies a summary dismissal, but it is perhaps advisable for an employer to investigate the incident, follow ACAS and contractual procedures, and then conclude with a decision as to dismissal or disciplinary action short of dismissal. This process may not take as long as it may be thought, and it ensures that all available evidence is gathered and the relevant investigation is conducted. Further, it ensures that the employer has proof of their reasonable belief that led to the action against an
p. 546 employee. This is a particularly important aspect of misconduct. ↵

Consider

The employer need not *prove* that the employee is guilty of the alleged misconduct, but rather the employer need only demonstrate that they had reasonable grounds on which to hold/maintain belief of misconduct. Insofar as Arjun follows the rules laid down in *BHS v Burchell*, he does not require actual proof of the employees committing the unauthorized access.

British Home Stores v Burchell (1978)

Facts:

The case involved an employee who had been dismissed on the employer's suspicion that theft from the store had been taken place. There was a lack of firm evidence of the theft and the tribunal found for the claimant, who was then reinstated. The employer appealed against the finding and the **Employment Appeal Tribunal (EAT)** established the points that became known as the 'Burchell principles'.

Authority for:

The Burchell principles provide that due to the nature of employment relationships and the trust necessary between the parties, an employer need not necessarily have concrete evidence of an employee's alleged wrongdoing to justify a dismissal, but rather reasonable grounds for holding the belief.

As such, to ensure the employer can demonstrate that they did hold reasonable grounds for honestly believing the employee was guilty of the alleged offence they must:

1. honestly believe the employee is guilty;

2. have reasonable grounds on which to hold this belief;
3. have carried out as much investigation into the matter as was reasonable in all the circumstances of the case (per Arnold J in *BHS v Burchell*).

These tests are particularly apt in cases involving an allegation of misconduct such as in *Burchell*, but may be less strictly adhered to when the facts of the issue are not in dispute.

Reilly v Sandwell Metropolitan Borough Council (2018)

Facts:

The claimant was head teacher of a school. It was discovered that she had a close relationship with a man who had been convicted for making indecent images of children and had never informed the school or board of governors. The head teacher was subsequently dismissed for failing to disclose these details and she appealed, arguing she had no duty to disclose the relationship. The appeal progressed to the Supreme Court.

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Authority for:

The Supreme Court upheld the tribunal's decision that the dismissal for the non-disclosure was fair. Of interest in the case was the judgment of Baroness Hale who questioned the authority of the *Burchell* principles:

1. it should be questioned whether a dismissal could be fair where the alleged misconduct was not, itself, in breach of contract; and
2. the *Burchell* test when determining fairness in misconduct cases should be revisited as, as raised by Lord Wilson, the test concerned the reason for the dismissal rather than the issue of reasonableness itself.

What is the situation where more than one employee may have been involved in a misconduct? The following cases demonstrate the options available to an employer with guidance from the courts.

Monie v Coral Racing Ltd (1980)

Facts:

The claimant worked as an area manager of 19 betting shops owned by the employer. Only the manager and his assistant had access to the company's safe, which held considerable amounts of money. The manager was on annual leave when his assistant discovered there was a substantial sum of money missing. The employer conducted an investigation revealing no evidence of a break-in to the

property or that the safe had been forcibly opened (indicative of theft). Therefore, as neither the manager nor his assistant accepted responsibility or could be identified as the perpetrator of the offence, it was held that both could be dismissed for misconduct.

Authority for:

It was reasonable for an employer to dismiss two workers for suspicion of theft where there existed solid and sensible grounds on which the employer could reasonably suspect dishonesty; and the employer did not attempt to subsequently rely on a different reason for the dismissal.

Consider

There exist situations, as with Arjun's staff, where a group of employees may be considered to have been involved in misconduct. In cases where it is reasonable for the employer to assume that all or one of them were involved, yet following an investigation identification of the actual perpetrator(s) cannot be achieved, all of the group may be dismissed. Arjun would, following *Parr v Whitbread*, be able to dismiss all six employees given the circumstances presented in the scenario. ↵

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Parr v Whitbread (1990)

Facts:

Parr was employed as a branch manager of the firm and was dismissed, along with three other employees, when £4,600 was stolen from the employer's shop. It was concluded from an investigation that the theft indicated an 'inside job' and all of the employees were interviewed. They were given the opportunity to admit the offence, but declined to do so, and hence, by being unable to identify the actual culprit (indeed if there was just one), the employer decided to dismiss all four. The EAT held that the dismissals were fair as the act of theft amounted to a gross misconduct.

Authority for:

Where a group of employees could have a committed a particular offence, the tribunal will find the dismissal of all the group fair where:

1. a dismissal for that offence would have been justified;
2. the employer conducted a reasonable investigation and held a proper procedure;
3. the employer reasonably believed the offence could have been committed by more than one person;
4. the employer has reasonably identified those who could have committed the act;

5. the employer cannot reasonably identify the perpetrator.

Note that potential problems may exist where an employer cannot identify which of the employees has committed an offence, but decides to dismiss members of the group selectively. When one or more of the employees in the group are retained or re-hired despite the investigation not identifying the employee(s) responsible, there must exist solid and sensible grounds for the retention or re-hiring of certain members.

What will amount to a reasonable investigation will depend on the individual circumstances of the case, but factors such as the interviewing of any identifiable witnesses; the collation of documents and their assessment; and providing the employee with an opportunity to answer any charges put to them, and to genuinely consider their responses before any decision is made, will point towards a reasonable investigation. Of course, in situations involving theft or other activities with a criminal element, the tribunals have held that the employer may treat a guilty verdict in a court as proof that the employee did commit the offence (*P v Nottinghamshire CC*).

21.2.3.3 Redundancy

Redundancy, whilst covered under its own legislation, is included in ERA 1996, s. 98 as another form of dismissal. It enables a claim under unfair dismissal legislation where the employee considers that they have been unfairly selected for redundancy; where no warning or consultation had taken place; or where redeployment had not been considered. Unfair selection may occur where one or more employees have been selected for redundancy in breach of a customary or agreed procedure (e.g. an agreement between an
p. 549 employer and trade union to use a selection process such as 'last ↵ in, first out'; voluntary agreements, and so on); or if the employee was selected in connection with trade union membership. When choosing the employees for redundancy without the cessation of the business, the employer is strongly advised to draw up objective criteria to be applied and which could be used to defend a claim of unfair selection.

21.2.3.4 Contravention of a statute

A further potentially fair reason to dismiss is where to continue to employ the employee would be to break the law. In such a situation, the contract could be frustrated due to a subsequent law (such as the enactment of legislation prohibiting the employment of foreign nationals) or a change in the employee's situation that makes continued employment in the same capacity contrary to legislation.

Four Seasons Healthcare Ltd v Maughan (2005)

Facts:

A care home nurse was suspended regarding an alleged assault on a resident.

Authority for:

The EAT held that under the circumstances, the employer had the option to dismiss the employee for gross misconduct. It chose not to and decided instead to suspend them while on bail. Employers in this situation could select to suspend or dismiss because of reg. 19 of the Care Homes Regulations 2001 where either the employer or a criminal court held the employee not to be 'fit to work'. When suspending an employee pending criminal investigation, wages had to be paid.

Dismissal may be more likely to be due to some action by the employee rather than legislative changes. There are many situations that could lead to this potentially fair reason to dismiss, but a common example is where the employee has a driving element as part of their duties and they receive a driving ban. As such, to allow the employee to drive without a licence on the employer's engagement would be to contravene the law.

21.2.3.5 Some other substantial reason

In the absence of a reason fitting into one of the previous categories, s. 98 provides for 'some other substantial reason [(SOSR)] of a kind such as to justify the dismissal of an employee holding the position which the employee held' to be forwarded as a reason for the dismissal. There has been a very wide interpretation of the concept of what would amount to SOSR. In the past, tribunals have held that an employee whose spouse was an employee of one of the employer's competitors permitted a dismissal; a homosexual man was dismissed from his job at a residential holiday camp due to a potentially negative reaction from parents on discovering his sexuality (*Saunders v Scottish National Camps Association*); and an employee's refusal to agree to the
p. 550 inclusion of a restraint of trade clause in his employment contract was deemed SOSR. ↵

RS Components v Irwin (1973)

Facts:

Mr Irwin was an electronic component salesman who was asked to agree to a new contract which included a restrictive covenant. Irwin was threatened with dismissal if he refused to agree to the new term. Following his dismissal, Irwin claimed this was unfair.

Authority for:

The employer argued the dismissal was fair for 'some other substantial reason' and this was accepted at appeal. The employer had been subject to several ex-employees leaving the business with valuable proprietary information and they were entitled to protect this through a reasonable restrictive covenant (also referred to as a restraint of trade clause).

In *Scott v Richardson* the EAT held that the tribunal did not have to be satisfied that the commercial decision of the employer was sound, but rather the test was whether the employer believed it to be so.

SOSR may also amount to a situation where an employee is dismissed because their attitude at work is sufficiently unpleasant and disruptive that it breaches the implied duty of trust and confidence (*Perkin v St George's Healthcare NHS Trust*). As noted earlier, non-renewal of a fixed-term contract will be deemed a dismissal for the purposes of ERA 1996. However, such a non-renewal may be justified on the basis of SOSR if the employer can demonstrate (e.g.) a business reason for the non-renewal, and that they acted fairly in the circumstances (*Terry v East Sussex CC*).

21.2.4 Automatically Unfair Reasons to Dismiss

The qualification of two years' continuous service to gain access to unfair dismissal protection is removed in certain circumstances that the legislators considered should be protected from the moment the employee begins work. Whilst this is not an exhaustive list (if for no other reason than the list changes depending on the public policy rationale of the Government) some of the most significant include:

- dismissals due to the pregnancy of the worker or any related illness (ERA 1996, s. 99);
- dismissals due to a spent conviction under the Rehabilitation of Offenders Act 1974;
- dismissals due to trade union membership or activities (TULRCA 1992, s. 238A(2));
- dismissal on transfer of an undertaking (TUPE 2006, reg. 7);
- dismissal because the employee took steps to avert danger to health and safety at work (ERA 1996, s. 100);
- dismissal through an unfair selection for redundancy (ERA 1996, s. 105);
- dismissal in connection with the employee asserting a statutory right (ERA 1996, s. 104);
- dismissals where the employee has made a protected public interest disclosure (ERA 1996, s. 103A), as provided through the Public Interest Disclosure Act 1998.

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21.2.5 The Procedures for a Fair and Reasonable Dismissal

The above sections outline the issues relating to the substance of the reason for a dismissal. Remember, those are the 'potentially' fair reasons for dismissal as the employer is still required to adopt a fair procedure for any dismissal and the decision must be reasonable.

Unfair dismissal legislation outlines the procedures that have to be followed in order to enable a 'fair' dismissal. The legislators did not want, and realistically could not create, a situation where an employer had to continue employing an individual against their will. The legislation provides for a series of reasons (potentially fair reasons to dismiss) that the employer can utilize in deciding when to dismiss (substantially fair reasons). The legislation, through increasing intervention by Parliament, has provided for the use of correct procedures that will promote fairness and 'natural justice', and lead to the resolution of disputes in the

workplace with recourse to tribunals. An employer that fails to follow these procedures may have to pay compensation (unnecessarily) to the employee, or it may even lead to a successful claim against them for dismissal (procedurally unfair reasons).

Consider

Has Arjun followed the correct procedure when investigating the incident of unauthorized computer access? A dismissal can be either (or indeed both) substantially unfair or procedurally unfair. Therefore Arjun needs to follow the ACAS procedural rules and to recognize the employee's right to be accompanied at a disciplinary/dismissal meeting.

21.2.5.1 The right to be accompanied at grievance and disciplinary hearings

On the basis of an allegation against the employee that may lead to disciplinary action or a dismissal (in a matter in which there is duty by the employer in relation to the worker—s. 13(5)), the employer is required to investigate the facts before taking action. A disciplinary hearing is defined under s. 13(4) as (a) the administration of a formal warning to a worker by his employer; (b) the taking of some other action in respect of a worker by his employer; or (c) the confirmation of a warning issued or some other action taken. Part of this action may involve interviewing the employee to ascertain the facts surrounding the incident in question. If this is part of a fact-finding exercise, then the employer can request the employee to attend alone. However, the legislative provisions apply when the situation escalates to the possibility of issuing a warning or some other form of discipline.

London Underground Ltd v Ferenc-Batchelor (2003)

Facts:

Ms Ferenc-Batchelor alleged a failure by the employer to allow her to be accompanied to a disciplinary hearing which could have led to an informal oral warning. She had been involved in an incident where she had incorrectly allowed a train into a station after going ↵ through a red light. When she asked to be allowed to be accompanied at the meeting, Ferenc-Batchelor was told that 'trade union representation was not allowed at this level'.

p. 552

Authority for:

The nature of the 'informal oral warning' hearing was not in reality anything other than a formal warning hearing. The findings of it would be confirmed in writing and have effect on an employee's record for 12 months. As such, the employer breached the Employment Relations Act 1999 when denying the employee the right to be accompanied.

The Employment Relations Act 1999, ss. 10–13, as amended, introduced the right of a 'worker' to be accompanied to such meetings by a colleague (s. 10(3)(c)) or a trades union official (even if they are not employed by the same employer as the interviewee—10(3)(a) and (b)). This colleague or trades union official has increased rights to represent the employee, such as establishing the employee's case and presenting points, but is restricted from answering direct questions to the employee (10(2)(b)), who must address these questions personally. However, despite a narrow interpretation of this requirement, the ability to have a colleague or trades union official accompany the worker is a minimum, not an exhaustive list. There may be advantages for an employer, when requesting an individual to attend a disciplinary meeting, to allow that individual to be accompanied by, for example, their parent or a friend. Following an employer's failure (or threat of failure) to comply with the requirement for the individual to be accompanied, a tribunal may award up to two weeks' pay as compensation (£1050 (6 April 2019)—s. 11(3)).

21.2.5.2 The ACAS code on disciplinary and dismissal procedures

ACAS, the Advisory, Conciliation and Arbitration Service, produced a code of practice and procedural fairness (Code of Practice 1—Disciplinary and Grievance Procedures) identifying how the employer and employee should conduct themselves during grievance/disciplinary matters. The code is not law, but it is referred to by tribunals when assessing the reasonableness of an employer's decision to dismiss.

Features to be considered by the parties in the event of disciplinary/grievance matters are:

- The parties should raise issues quickly and these should be dealt with in a prompt manner—with no unreasonable delays.
- The employer should carry out a reasonable investigation to ascertain the facts.
- The employer should present their concerns to the employee and give them an opportunity to respond before a decision is made.
- The employer should follow the Employment Relations Act 1999, ss. 10–13 regarding the right of the employee to be accompanied at formal disciplinary/grievance meetings by a colleague/trades union official.
- An appeal against the decision of the employer should be offered to the affected employee.

In certain circumstances it may be considered reasonable for an employer to choose to dismiss an employee without holding an investigation meeting, but it will be an unfair dismissal if in those circumstances the employer does not offer an appeal (see *Radia v Jeffries International*).

p. 553

21.2.5.3 Failure to follow the code

The tribunal will consider whether the parties followed the code in determining the reasonableness of any action taken in such proceedings. The tribunal will be able to raise or lower any award by up to 25 per cent for an unreasonable failure to follow the code. The procedures apply to situations involving disciplinary measures and dismissals, and as such, if the employee unreasonably failed to participate in the proceedings, and they are held to have been unfairly dismissed, any award of compensation may be reduced by 25 per cent.

The early conciliation process

The early conciliation process was established to enable the parties to avoid the costs and associated expenses of taking the issue to an employment tribunal through establishing a settlement agreement (The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014 (S.I. No. 847)). Available since 6 April 2014, and mandatory (ACAS must be notified of the dispute before a claim is lodged at a tribunal), it has become a legal requirement that the employee and employer attempt to resolve the matter which has led to the dismissal through conciliation before allowing the employee to lodge the claim at an employment tribunal. On the basis that:

- the employee refuses to enter into conciliation; or
- the employee wishes to enter into conciliation but the employer refuses;
- the employee and employer cannot reach an agreement; or
- the employer is insolvent

the employee is required to obtain a certificate from ACAS to enable the employee to lodge the claim at an employment tribunal.

Both parties, initially, have a period of up to one calendar month to explore a resolution to the dispute with the aid of an ACAS conciliator who attempts to assist the parties in reaching an amicable resolution to the dispute. It is important to note that where there exists more than one respondent, the claimant employee is required only to submit one early conciliation form naming one respondent. Additional respondents may be added later without the requirement to submit another form(s).

Employees may be concerned that time spent involved with conciliation will affect the three months' time limit for the employee to lodge their claim at the employment tribunal following the dismissal. However, this time limit is suspended during the conciliation process and indeed the employee may contact ACAS to begin the conciliation process at any time following the dismissal until the point where the case is heard at the tribunal. The service is independent, free, and applies to many employment disputes including unfair dismissal, discrimination and equal pay, redundancy, and associated selection procedures.

21.2.6 Reasonableness of a Dismissal

The employer may present a potentially fair reason, as outlined in s. 98 of ERA 1996, to justify the dismissal. However, it is necessary for the employer to demonstrate that they acted fairly in deciding to dismiss the employee. This burden of demonstrating reasonableness is neutral between the parties and, under s. 98(4) ERA 1996, the tribunal will hear the evidence and determine, taking into account all relevant circumstances, the issue of reasonableness. In *JP Morgan v Ktorza* the EAT confirmed that when dismissing an employee for the reason of their conduct, the tribunal is merely concerned, in the first instance, with whether this is the principal reason for the dismissal. Once this is satisfied, it will then consider the issue of the employee's culpability and determine that question in accordance to the fairness and reasonableness of the decision.

p. 554 ↵

Reasonableness will include aspects such as the size of the business and the employer's access to assistance in the administration of discipline and investigations. It is absolutely essential to remember that in determining reasonableness, the tribunal must not consider what action it would have taken, and if the employer's action fell outside of this, subsequently to hold it as unreasonable. Hence the tribunal will assess the evidence forwarded by the employer and consider the employer's response to this and whether their action fell into the **band of reasonable responses**.

Iceland Frozen Foods Ltd v Jones (1982)

Facts:

Mr Jones, a nightshift foreman, was dismissed for failing to operate the company's security system and for attempting to deceive the company into making additional overtime payments.

Authority for:

The EAT identified the correct test of the reasonableness of an employer's decision to dismiss. It is whether the decision is within the band of reasonable responses to the employee's conduct which a reasonable employer would adopt.

The employer's disciplinary procedures are important as they enable the parties to have an awareness of how decisions will be taken in the event of the employer considering the dismissal of an employee. This sometimes caused problems when the procedure was not used (even before the advent of the Employment Act 2002), even though ACAS has frequently produced codes of practice that tribunals used in their deliberations on the reasonableness of an employer's actions. The EAT considered that in cases where following the procedure would have made no material difference to the decision of the employer in dismissing an employee, a failure to follow the procedure would not necessarily render the dismissal unfair. However, this has been changed following the House of Lord's judgment in the seminal case of *Polkey v AE Dayton Services*.

Polkey v AE Dayton Services Ltd (1987)

Facts:

Dayton Services decided to make three of its four van drivers redundant and informed Mr Polkey he was one of the three. Polkey complained of unfair dismissal as the employers had failed in their duty to consult before making the decision.

p. 555

Authority for:

The House of Lords considered that the key issue is the employer's reason for the dismissal and whether this was sufficient to justify a dismissal. This was an unfair dismissal because of the (procedural) failures, but a reduction in the compensatory award would be made if the employer's decision would not have altered had the correct procedures been followed.

The Lords decided that whether the employer had acted reasonably should be determined on the facts that they had available when the decision was made—assuming, of course, that the employer had conducted a reasonable investigation and attempted to gather all the facts surrounding the issue. Without the procedure being followed, the facts would probably be incomplete and the decision of the employer would be flawed.

Consider

Imagine that Arjun, following a further period of investigation, discovers that Mana did give the password to John to access the computer system. As this occurred after the termination of her contract, how does the law of unfair dismissal affect Mana's claim?

21.2.7 After Discovered Reasons

When an employee is dismissed, and claims that the dismissal was unfair under the relevant legislation, the employer has to identify what evidence they possessed at the time of making the decision that would enable one of the potentially fair reasons under s. 98 of ERA 1996 to be invoked. The employer will, however, only be able to produce the evidence they had at the time of deciding to dismiss that can justify the decision and enable it to fall into one of the bands of reasonable responses. Facts that surface after the decision *cannot* be used in justification. These are often referred to as after discovered reasons and whilst, if presented at the tribunal, may lead to a reduction in any damages awarded, they cannot make an unfair dismissal fair.

W Devis & Sons Ltd v Atkins (1977)

Facts:

Mr Atkins was the manager at the employer's abattoir and was dismissed for failing to observe their purchasing policy. He was offered a £6,000 ex gratia payment but before he could accept, it was withdrawn. The employer informed Atkins that they became aware of his misconduct (of which they were unaware prior to their dismissal of him).

p. 556

Authority for:

The House of Lords held that an employer may not justify misconduct of an employee which is only identified after the decision to dismiss is made. However, it would be relevant when the tribunal assesses the compensatory amount.

21.3 Constructive unfair dismissal

Consider

Arjun is considering dismissing all the staff who were working the nightshift and who could have accessed the computer system. However, if his actions were procedurally unfair and if this amounted to a fundamental breach of the contract of employment, the affected employees are allowed to treat the breach as a repudiation, resign, and claim constructive unfair dismissal without an actual 'dismissal' having taken place. Constructive dismissal further applies to situations of employers unilaterally changing a contract of employment or affecting terms and conditions.

It should be borne in mind that constructive dismissal is a mechanism that enables a claim under unfair dismissal (see **Figure 21.2** for a flow chart of the process of a claim). As noted earlier, one of the qualifications to claim under the statutory protection of unfair dismissal is for the claimant to demonstrate that they were dismissed (and unfairly). The drafters of the legislation recognized that a tactic by recalcitrant employers would be to 'coerce' employees to resign by, for example, making their job unreasonably unpleasant or onerous. The test established in *Malik v Bank of Credit and Commerce International* (see **19.6.2**) from the House of Lords was whether the employer's action was to destroy or very likely severely damage the relationship between the employee and employer. If the individual resigned, there would be no dismissal and therefore no right to claim unfair dismissal—hence the legislation would have been circumvented. Constructive dismissal allows an employee to accept the employer's repudiation of the contract and claim unfair dismissal (ss. 95(1)(c) and 136(1)(c) of ERA 1996).

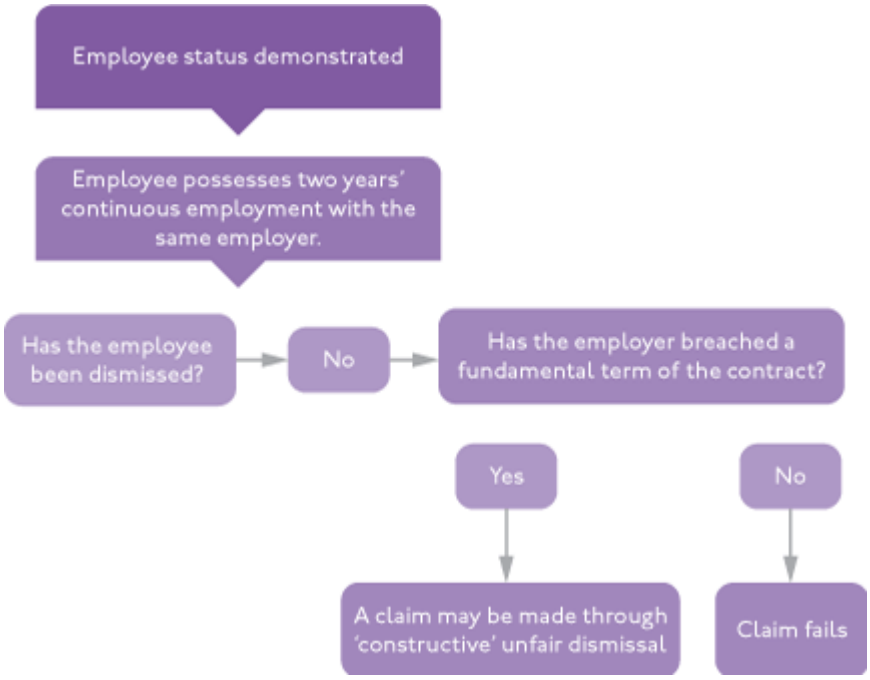

Figure 21.2 Process of a claim

Section 95(1)(c) outlines the right to claim constructive dismissal:

> For the purposes of this Part an employee is dismissed by his employer if—(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Examples of situations where an essential/fundamental term of the contract was breached include unilaterally reducing an employee's pay (*Industrial Rubber Products v Gillon*), and a failure to provide a safe and suitable working environment (*Waltons and Morse v Dorrington*). Breaches enabling a constructive dismissal claim
p. 557 have extended to a failure to adequately investigate allegations of sexual harassment. ↵

Bracebridge Engineering Ltd v Darby (1990)

Facts:

Ms Darby made a complaint to her office manager that she had been a victim of a sexual assault committed by two colleagues. The manager took no action and Darby resigned.

Authority for:

The EAT held that as the actions occurred in the context of Darby's employment, the employer's failure to investigate and take seriously the allegations, and to take action was a fundamental breach of the contract. This justified Darby's claim of constructive dismissal.

Whilst in *Bracebridge* the breach was of a statutory right (the Sex Discrimination Act 1975), if the action of the employer was to breach a fundamental implied term in the contract, such as mutual trust and confidence, then this may also give the employee a right to resign and claim. This could include an unreasonable accusation of theft (*Robinson v Crompton Parkinson*) and may even lead to claims in an area which is forming an increasing number of claims for unfair dismissal (and other actions such as sex discrimination)—the harassment and bullying of workers (*Reed v Stedman*). Further, if the employer imposes a disciplinary penalty out of proportion to the offence that had been committed, the employee would be able to accept this as a
p. 558 breach of such significance that it would enable a constructive dismissal action. ↵

BBC v Beckett (1983)

Facts:

Mr Beckett was a scenic carpenter. His employer informed him that he had left his working area in a dangerous condition and that due to this, he was given notice of his dismissal although he could appeal the decision. Beckett appealed and the employer offered him alternative employment (which was a demotion).

Authority for:

The EAT held that whilst Beckett's contract allowed for the employer's action, the demotion was sufficiently severe given Beckett's actions to amount to a fundamental breach.

It must also be considered that whilst the examples above demonstrate a serious (or gross) breach of the contract, relatively minor breaches of the contract, such as in the case of harassment, may cumulate into a 'last straw' action that enables the employee to accept the repudiation and claim constructive dismissal (*Woods v WM Car Services*). However, the underlying principle is that there was a breach of a fundamental term of the contract that enables a constructive dismissal claim.

Western Excavating v Sharp (1978)

Facts:

Mr Sharp had taken unofficial leave from work and his employer responded by suspending him from work for five days. This led to Sharp having lost his income and he approached his employer for either a loan or an advance on his holiday pay. The employer refused both requests and Sharp, considering this a breach of his contract, resigned and claimed constructive dismissal.

Authority for:

The Court of Appeal held there was no contractual obligation (either express or implied) for the employer to make a loan or to advance wages to an employee. It further identified the criteria by which constructive dismissal would be assessed. These were:

- the employer must have breached a term (express or implied), or had clearly established that they would not be bound by the contract;
- the term breached must have been an essential or fundamental term;
- the employee must have accepted the breach of the contract by the employer and acted to end the employment within a reasonable time.

In relation to suspending employees, it is accepted practice that suspension is not considered a neutral act and may indeed lead to the employer breaching the mutual trust and confidence between the parties. The Court of
p. 559 Appeal held in *Agoreyo v London Borough of* ↵ *Lambeth* that suspension, at least in the context of a qualified professional in a vocation (here the claimant was a teacher), must not be a default position adopted by an employer. Whilst it was reasonable in the circumstances of the case, the Court explained that suspension must only happen when the employer has a reasonable and proper cause for doing so.

21.3.1 Affirming the Breach

There is a requirement for the employee to make some outward sign that they do not accept the breach by the employer. If the employee says nothing in dispute to the employer's action, then it may be considered that they have waived the right to claim by 'affirming' the change in contract and will have lost their right to bring an action against it. Insofar as they make an outward sign of not accepting the variation, they may continue to work under the new conditions, until, for example, alternative employment is secured, and then they may leave and claim constructive dismissal. This is known as 'working under protest'. However, once the employee has agreed to work to the changed contract 'under protest', an employee who subsequently refuses to work under the new conditions may be dismissed as refusing to obey lawful and reasonable instructions (*Robinson v Tescom Corp.*). Under constructive dismissal, the employee has to claim within a reasonable time, having informed the employer that they were leaving *because* of the employer's action.

Holland v Glendale Industries Ltd (1998)

Facts:

Mr Holland had been engaged as a parks foreman by the local authority for approximately 11 years. At this point the parks and gardens operation was contracted to an outside agency and Holland remained in employment for a further five years. A new employer took over and Holland was informed that he would no longer receive the additional payments that had previously been made to him and that his

job was being offered to ‘a younger man’. Sometime later Holland was subject to a staff assessment and consequently informed the employer he was leaving and retiring early. However, he claimed constructive dismissal.

Authority for:

The EAT held that the ordinary contractual principles applied to constructive dismissal and where a party repudiated the contract, and the other party wished to rely on this and to accept it, this must be clear by words or action. (Essentially, Holland should have told Glendale he was leaving because of the alleged breach of contract.) As he had not done so, his claim for constructive dismissal could not succeed.

21.4 Remedies for unfair dismissal

Where an employee has been unfairly dismissed, the tribunal has to assess how to compensate the dismissed employee. The three remedies available are reinstatement; re-engagement; and compensation (ERA 1996, s.
p. 560 112). These remedies are initially ↵ explained to the claimant and the tribunal identifies whether the employee wishes to be reinstated to their previous job. At this stage the employer has no say in what should happen next, and it is the tribunal’s decision, having considered the case, the relationship between the parties, and what is in the best interests of the employee. It is important to note that if the employee does not wish to return to the employment then this would not be ordered, but if the tribunal considers that re-engagement may be available and the employee unreasonably refuses to accept this, then the award of compensation may be reduced. Employees who have, however, been somewhat at fault in the dismissal will not ordinarily be awarded reinstatement or re-engagement.

21.4.1 Reinstatement

This remedy is provided at the discretion of the tribunal where the dismissed employee is reinstated to their previous job. Both the employer and employee must agree to this remedy, and as can be imagined, it is quite rarely complied with. In such an instance where the employer refuses to reinstate the employee, the tribunal will increase the damages awarded to the employee, but it cannot compel the employer to restore the employee to their previous job as specific performance will not be awarded in cases involving contracts of personal service.

21.4.2 Re-engagement

As there may be several months (at least) from when the employee is dismissed to when a tribunal may have heard the case and provided its award, the employee’s previous position with the employer may have been taken by another individual. Instead of ordering reinstatement, due to the practical problems that this may cause, ERA 1996 provides for the employee to return to the employment as close to the same job (in terms of pay, requirements, seniority, and responsibility) as is possible.

21.4.3 Compensation

Compensation is provided by the tribunal on the basis of two elements—a basic award and a compensatory award. Under this section the tribunal will award a conventional sum of £250 as way of compensation for loss of a statutory right (ERA 1996, s. 123(1)).

21.4.3.1 The basic award

ERA 1996 provides for the method of calculation of this element of the remedy. The current rate of a week's pay is established at a maximum of £525 and the age of the claimant and their length of continuous service governs the level of the award provided. It is the element of the award that is designed to reflect the employee's loss of pay between the time of the dismissal and the date of the tribunal's decision.

The calculation is based on the *Employee's Age* × the *Length of Service* × the *Weekly Gross Pay* (to the relevant maximum).

This calculation is further subject to a multiplier based on the employee's age. Where the employee is below the age of 22, any period of service is multiplied by .5; between the age of 22 and 41 the figure is multiplied by 1; and for workers over the age of 41 the figure is multiplied by 1.5.

p. 561 ↵ The maximum amount provided under the basic award is £15,750—applicable 6 April 2019. The level of compensation may be reduced if the employee contributed to the dismissal through their conduct; if they received any redundancy payment; or if they unreasonably refused reinstatement.

21.4.3.2 The compensatory award

This element of the award is not calculated to a strict formula as is the case with the basic element and the tribunal has wide scope for assessing what is just and equitable in the circumstances. The maximum award under the compensatory element is the lower of £86,444—applicable 6 April 2019—(although, of course, the majority of cases do not reach this figure) or 12 months' gross pay (which figure excludes pension contributions, benefits paid by the employer, and any discretionary bonuses. Where the employee has been dismissed for whistle blowing, some health and safety related reasons or where the dismissal is due to unlawful discrimination, the compensation remains uncapped). The award includes compensation for losses of overtime payments, tips, future losses, loss of accrued rights, and so on.

The ERA 1996, s. 123 restricts a tribunal to award financial losses only. The award may not include damages for 'distress, humiliation, and damage to reputation in the community or to family life'.

Dunnachie v Kingston upon Hull City Council (2004)

Facts:

Mr Dunnachie had been employed as an Environmental Health Officer and, the tribunal found, had been driven from his employment due to a campaign of workplace bullying. This action involved Dunnachie's manager who also failed to take appropriate action when a complaint was made. As a result, Dunnachie left the employment and obtained another (lower paid) job.

Authority for:

The House of Lords agreed that Dunnachie had been constructively dismissed, but confirmed that damages for his non-economic losses (the stress, humiliation, and so on) were not recoverable in an unfair dismissal claim.

Tribunals were provided with guidance as to how to assess this element of damages in *Norton Tool Co. Ltd v Tewson* so as to include: any immediate loss of earnings; any calculation of future losses; the figure to include a loss of a statutory right; any losses of rights under a pension; and any expenses incurred in obtaining another job. Future loses cannot be too remote and may identify losses attributed to the employee gaining alternative employment. It will also impact on an employee who had already obtained another job at a similar rate of pay or better pay than had been provided by the employer subject to the claim.

As with the basic award, the compensation may be reduced where there was a contributory fault by the employee, or where the employee failed to mitigate their losses.

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21.4.3.3 The additional award

ERA 1996, s. 117 provides for the additional compensation where the tribunal has ordered reinstatement or re-engagement and the employer has unreasonably refused to agree to the order. This award will be based on between 26 and 52 weeks' pay (at the tribunal's discretion). The rates applicable from 6 April 2019 are: a minimum of £13,650 and a maximum of £27,300.

Based on the calculations as noted earlier, the maximum award that is available under compensation for unfair dismissal is, from 6 April 2019, £102,194 (i.e. £86,444 plus 30 x £525).

Conclusion

The chapter has aimed to demonstrate the nature of unfair dismissal legislation: who qualifies for the right; the procedures that the parties are required to follow; and the remedies available. It also identified where the statutory protection is available for dismissals that are considered automatically unfair.

The unfair dismissal legislation provides a greater range of protection to those who qualify than does the common law remedy of wrongful dismissal. Claims may be made under both sources of law, but any remedy received in one claim would be off-set in a remedy under the other jurisdiction.

Summary of main points

Unfair dismissal

- Unfair dismissal is governed by statute law and most of the rules applicable to this jurisdiction of law are contained in the Employment Rights Act (ERA) 1996.
- To qualify the individual must have employee status; have been continuously employed with the employer for at least two years; must have been dismissed (and unfairly); and must have submitted their claim to an employment tribunal within three months of the Effective Date of Termination (EDT).
- The employer must allow the employee to be accompanied at grievance and disciplinary hearings.
- The tribunal will assess the reasonableness of an employer's decision to dismiss based on their reasonable grounds for holding a belief/suspicion; the investigations into the matter that were conducted; and whether another 'reasonable employer' would have acted in the same way.
- There are five potentially fair reasons to dismiss an employee. These are the capability/qualifications of the employee; conduct; redundancy; contravention of a statute; and some other substantial reason.
- There exist automatically unfair reasons to dismiss an employee (which results in the requirement for two year's continuous employment being dispensed with). These include dismissals on the grounds of pregnancy; membership of a trade union or trade union activities; dismissal for asserting a statutory right; and so on.

Constructive dismissal

- Constructive unfair dismissal enables an employee to claim unfair dismissal even where they have not been 'dismissed'. The employer must have breached a fundamental term of the contract and the employee must have accepted this repudiation.

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- A fundamental term includes actions such as a unilateral reduction in pay and failure to provide a safe system of work or suitable working environment.
- The employee must claim within 'a reasonable time' of the breach to gain protection from constructive dismissal or they run the risk of having affirmed the contractual change.
- The affected employee must inform the employer of their non-acceptance of the contractual change before resigning and claiming constructive dismissal.

Remedies

- There are three remedies available to a tribunal when an employee has been unfairly dismissed. These are reinstatement, re-engagement, and compensation.

Summary questions

Essay questions

1. The potentially fair reasons to dismiss under the Employment Rights Act 1996 are far too broad and enable an employer to dismiss an employee very easily. They should be narrowed and the test of reasonableness of an employer's action made more robust if the legislation is to have any impact on the abusive exercise of managerial prerogative.

Discuss.

2. The statutory dismissal procedures, intended to resolve employment disputes 'in-house' without recourse to tribunal, were replaced in April 2009 with a system based on alternative forms of dispute resolution. Why did these statutory procedures fail and what is the likely success of the ACAS Code reducing such action? What lessons can be learned from the Gibbons review?

Problem questions

1. Kate runs a clothing manufacturing firm employing several workers. One day Kate comes into work and sees what she thinks is a fight between John and Tom. Therefore Kate sacks both of them on the spot. What has really happened is that Tom has been attacked by John because John has never liked Tom due to his exemplary service and being a 'goody two shoes'.

   Tom was actually working on a fixed-term contract, which he had worked for two years out of a three-year contract. Tom's contract does not state anything about early termination and he earns £20,000 per year.

   Kate later appoints Sarah on maternity leave cover for an eight-month contract. Once appointed, Sarah announces that she is pregnant, and Kate is disgusted by this revelation and immediately dismisses Sarah due to her pregnant status.

   Advise the parties of the legal issues and their rights.

   (Visit the online resources where there are completed claim (ET1) and answer (ET3) forms relating to this question, and a completed employment contract to demonstrate the reality of this dismissal scenario.)

2. Calvin is a designer working for a large fashion house. Calvin is an employee at the firm and has worked there for four years. His employer Donna arrives at work on Monday morning and finds Calvin acting suspiciously. Donna checks the petty cash box and discovers that £100 is missing. Despite the fact that four other employees

were in the vicinity at the time Donna came into the room she dismisses Calvin without any notice saying she 'would not have a thief like Calvin working there any more'.

p. 564 ↵ Advise Calvin of any rights under unfair dismissal and wrongful dismissal protections.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-21-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Brodie, D. (2002) 'Fair Dealing and the Dismissal Process' *Industrial Law Journal*, Vol. 31, No. 3, p. 294.

Davidov, G. and Eshet, E. (2015) 'Intermediate Approaches to Unfair Dismissal Protection' *Industrial Law Journal*, Vol. 44, No. 2, p. 167.

Learmond-Criqui, J. and Costly, J. (2001) 'Arbitration in Employment Disputes' *Business Law Review*, October, p. 222.

Marson, J. (2013) 'The End of the Opportunistic Breach of Contract! The Elective Theory of Repudiatory Breach Prevails: Societe Generale, London Branch v Geys [2012] UKSC 63' *European Journal of Current Legal Issues*, Vol. 19, No. 2.

Parrott, G. and Potbury, T. (2007) 'Unfair Dismissal: The Polkey Principle Laid Bare' *Employment Law Journal*, Vol. 79, April, p. 5.

Websites, Twitter, and YouTube channels

http://www.acas.org.uk *<http://www.acas.org.uk>*

@acasorguk

http://www.youtube.com/user/acasorguk *<http://www.youtube.com/user/acasorguk>*

The Advisory, Conciliation and Arbitration Service provides a wealth of practical information for employers and workers on their rights and responsibilities at work.

https://www.gov.uk/browse/working/redundancies-dismissals *<https://www.gov.uk/browse/working/redundancies-dismissals>*

Information from Direct Gov, an organization established to provide information and guidance from various government agencies and departments. It offers practical advice on, amongst other things, employment and termination matters.

https://www.citizensadvice.org.uk/work/leaving-a-job/dismissal/check-if-your-dismissal-is-fair/ *<https://www.citizensadvice.org.uk/work/leaving-a-job/dismissal/check-if-your-dismissal-is-fair/>*

@CitizensAdvice

http://www.youtube.com/user/CitizensAdvice <http://www.youtube.com/user/CitizensAdvice>

The Citizens Advice Bureau website provides information on rights at work, making claims, and so on.

http://www.justice.gov.uk/tribunals/employment <http://www.justice.gov.uk/tribunals/employment>

Employment Tribunals.

http://www.legislation.gov.uk/ukpga/1996/18/contents <http://www.legislation.gov.uk/ukpga/1996/18/contents>

The Employment Rights Act 1996.

Online Resources

Visit the online resources <https://oup-arc.com/access/marson6e-student-resources#tag_chapter-21> for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

Related Links

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