

## UNFAIR DISMISSAL - MISCONDUCT

Dismissal for misconduct is a potentially fair reason for dismissal. This fact sheet explains the factors an employment tribunal will be looking at to determine whether a dismissal for misconduct is fair or unfair.

The Law Centre recommends that all employees should be a member of a trade union. Employees should always take advice from their trade union before commencing proceedings for unfair dismissal.

### Do I qualify to claim?

To be entitled to bring a claim for unfair dismissal you must have been continuously employed by the same or an 'associated' employer for a period of one year at the date of dismissal. If you are dismissed without notice during your first year, unless you are guilty of gross misconduct, you can add to your continuous service a period of one week's statutory notice. So, if you are dismissed after fifty one and a half weeks, without notice, you can add one week to give you one year and half a week's service, and will be able to claim unfair dismissal.

### Time limit for claiming

You must submit your claim to an Employment Tribunal within **three months** of the date of **dismissal**. If you have appealed against dismissal and the appeal process is still continuing at the end of the time limit for submitting a claim to employment tribunal, the time limit will be extended by a further 3 months. Don't leave it to the last minute! E.g. If the date of dismissal is 23/2/08, the time limit is 22/5/08 and the application must be **received** at the tribunal office on or preferably before this date. If you are outside of the time limit you should seek legal advice immediately on whether or not a claim is likely to be allowed to proceed out of time.

### Should you follow an internal appeal procedure?

Before making a claim in the tribunal you should consider whether to appeal the employer's decision to dismiss. Failure to take up the opportunity to follow an internal appeal may result in a tribunal reducing any unfair dismissal compensatory award by 10% to 50% should you take a successful claim (EA 2002 s31(2) (c) (ii) unless there are exceptional circumstances. However, if as a result of the internal appeal, the employer decides to reinstate you then the dismissal will be treated as though it never happened and you will not be able to pursue a claim for unfair dismissal. This means that if you don't want your job back you will need to think carefully about whether it is a good idea to appeal or not.

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### What is misconduct?

If you have a written disciplinary procedure this will often list the activities that an employer considers to be misconduct. Examples might be disobedience, breach of trust, dishonesty, bad timekeeping, being under the influence of drink or drugs, and swearing.

### Gross misconduct

Some acts of misconduct amount to gross misconduct. If you are guilty of gross misconduct this allows your employer to dismiss without notice and without any prior warnings. Examples of conduct that have been treated as gross misconduct include fighting, theft, fraud, bringing the company into disrepute, failure to follow cash handling procedures.

### Does the employee admit the alleged misconduct?

Often an employee will deny they have been guilty of the misconduct. In these circumstances, in order to dismiss fairly, the employer must:-

- a) genuinely believe that the worker is guilty;
- b) hold that belief on reasonable grounds;
- c) at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case

If an employment tribunal is to find this aspect of a dismissal unfair it will only do so if it believes that all reasonable employers would have carried out further investigation or that no reasonable employer would genuinely believe in the guilt of the employee on the outcome of the investigation which the employer undertook.

A lot of workers think that an employment tribunal is a place to clear their name. This is not the case. An employment tribunal, hearing an unfair dismissal claim, is not considering whether the worker committed the misconduct or not but whether, in the circumstances, *the employer had reasonable grounds for believing the employee was guilty* even if, by the time of the tribunal, new information has come to light to show the employee wasn't guilty! (Unless of course the employer should have discovered the information as part of the investigation).

### Further matters the employment tribunal will take in to account

If the employee admits the misconduct or if the employer reasonably believes the employee is guilty there are further matters which the tribunal will look at in deciding whether the dismissal was fair,

#### a) *Disciplinary procedure*

On the 1<sup>st</sup> October 2004, new regulations were introduced that set out minimum procedures that must be followed by an employer when

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contemplating disciplinary action or dismissal. These procedures are contained in the Employment Act 2002 (Dispute Resolution) Regulations 2004. In the event that an employer doesn't follow these minimum requirements, a dismissal will be automatically unfair providing the employee has a minimum of one year's service. However, please bear in mind that if the employer can show that a procedural failing made no difference to the decision to dismiss (in the sense that the likelihood that the employee would have been dismissed anyway was 51% or more) then that failing will not of itself make the dismissal unfair, but could lead to a reduction in any compensatory award (loss of earnings) - but not a basic award; by up to 100% to reflect this.

The requirements of the statutory dismissal procedures are as follows:-

### Step 1.

The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances which led him to contemplate dismissing or taking disciplinary action against the employee.

The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

### Step 2.

The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension [with pay]

The meeting must not take place unless

- e)* the employer has informed the employee what the basis was for including in the statement under Step 1 the ground or grounds given in it, and
- f)* the employee has had a reasonable opportunity to consider his or her response to that information.

The employee must take all reasonable steps to attend the meeting

After the meeting the employer must inform the employee of his decision and notify the employee of the right to appeal against the decision if he or she is not satisfied with it.

### Step 3.

If the employee does wish to appeal, he must inform the employer.

If the employee informs the employer of his or her wish to appeal, the employer must invite the employee to attend a further meeting.

The employee must take all reasonable steps to attend the meeting

The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

After the appeal meeting the employer must inform the employee of his final decision.

In certain very limited circumstances a simpler modified statutory procedure will apply whereby the employer can dismiss the employee before holding the meeting, which in effect is simply an appeal hearing. The circumstances where the modified procedure may apply are where

- e)* The employee is guilty of gross misconduct.
- f)* The employer dismissed at the time of the misconduct or immediately after

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- g) It was reasonable for the employer to dismiss without enquiring further into the circumstances.

Employers may still have contractual procedures in place that offer greater protection to an employee during the disciplinary or dismissal process. If this is the case, these procedures should be followed in conducting the investigation and disciplining the worker. Where the statutory procedure is followed but additional contractual procedures are not, a tribunal may still find a dismissal fair if it finds that to follow the additional contractual procedures would have made no difference to the decision to dismiss.

The disciplinary procedure should state what acts of misconduct are considered by the employer to be gross misconduct, the stages of the procedure itself, any right to be represented or accompanied, and any right to appeal against a decision reached.

The rules of natural justice provide that a worker

- e) should know the allegations against them,
- f) have an opportunity to answer those allegations, and
- g) that the investigations and hearings are carried out in good faith.

The extent to which a tribunal will be critical of an inadequate investigation or a failure in the disciplinary procedure will vary with the size of the employer. As small employers have limited resources, minor procedural defects will often be forgiven by a tribunal.

Statutory right to be accompanied

There is a statutory right to be accompanied at a disciplinary hearing. This is set out in the Employment Relations Act 1999 (see s10 -15). This gives an employee the right to be accompanied by a trade union official or another worker at a disciplinary hearing.

### **b) *Previous conduct***

Dismissal for a single act of gross misconduct will often be fair, so a lack of previous warnings for misconduct will not render such a dismissal unfair. If the misconduct in question is not sufficient to amount to gross misconduct then dismissal will usually be unfair unless the employee has previously been warned that a repeat of the conduct may lead to dismissal.

### **c) *Length of service***

A tribunal will expect an employee's long service to count in his or her favour.

### **d) *Equal treatment***

If different disciplinary sanctions are used against different employees for the same misconduct a tribunal may consider this to be unfair. Very often an employer will be able to point to different circumstances that may justify the different treatment so that it is not unfair.

*e) The circumstances as a whole*

The tribunal will look at the circumstances as a whole and will decide whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal in all the relevant circumstances of the case. The tribunal will only find a dismissal to be unfair if the decision to dismiss was so unreasonable that no reasonable employer would have dismissed in these circumstances.

*f) Contributory conduct.*

Where the tribunal decides that an employee has caused or contributed to his/her dismissal it can reduce both the basic and compensatory award by a percentage which could be up to 100%.

*g) Mitigation.*

Although not relevant to the fairness of the dismissal, generally an employee will only receive compensation for loss of earnings where the tribunal is satisfied that following the dismissal, the employee made genuine and reasonable efforts to find work.

**What you will need to prove**

At the tribunal you will be aiming to draw the tribunal's attention to points in relation to your dismissal where you think the employer has acted unreasonably in terms of any or all of the above points.

*You can contact the Law Centre for help by phoning 0114 2731888. When you phone, have any documents with you relating to your dismissal.*

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