



The Open University

Law School



## KNOW YOUR EMPLOYMENT RIGHTS

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## **DISCRIMINATION IN THE WORKPLACE**

### What is discrimination?

- Discrimination is people from many different categories from below being treated unfairly
- **Age:** protects individuals of all ages from being excluded from promotions or wage increases
- **Disability:** any individual with physical or mental impairment- effects day to day activities-short term or long term
- **Race:** includes nationality, colour or ethnic groups- a individual can belong to more than one group
- **Religious and other beliefs:** religious beliefs- catholic/protestant/Sikhism/Islam – other beliefs: no beliefs/physiological/humanism/atheism
- **Sex: reference to a person's gender:** man/woman
- **Sexual orientation:** a person who is gay/lesbian/heterosexual/bisexual

### What is the Equality Act 2010?

- Legislation that covers multiple areas of law to prevent people being excluded from society
- This legislation also covers activities in the workplace

The Equality Act 2010 and types of discrimination;

- Age [s5]
- Disability [s6]
- Gender reassignment [s7]
- Marriage and civil partnership [s8]
- Race [s9]
- Religion/belief [s10]
- Sex [s11]
- Sexual orientation [s12]
- Pregnancy and Maternity [s.17 and s.18]

These in the list above are under the Equality Act Known as ***protected characteristics [s4]***

### What is direct discrimination?

Direct discrimination is a form of Discrimination:

- This is not allowed under the Equality Act 2010: s13
- Your employer cannot treat you less favourably than anyone else due to one or more of the protected characteristics. So, you cannot be directly discriminated against due to your age, disability or race etc
  
- Q. Both myself and another work colleague of a different gender have not been offered overtime. I think this is unfair.
- A. This maybe unfair but it is not direct discrimination under the law. If you were being discriminated against the protected characteristic of your gender it might be. However, if you and your work colleague are different gender this could be lawful. So not all unfair treatment is unlawful discrimination.

### What is indirect discrimination?

Indirect discrimination is another type of discrimination:

- This is not allowed under the Equality Act 2010: S19
  
- Sometimes employers might have a **practice, policy or rule** which applies to everyone in the same way. However, some people might be badly disadvantaged by this. Again, it has to be related to a particular protected characteristic.
  
- Q. I am a mother with young children and have been asked to travel to very short notice. I cannot arrange childcare that quickly.
- A. This could be indirect discrimination as a practice seeking employee to travel at short notice would affect you as a mother much worse than other employees.
  
- The employer has a duty to prove that the provision, criteria, practice was to provide reasons for their decision to implement a policy by placing written explanation with their policies for example their code of practice.
  
- The employer must show that they have operated within the law when reach a decision about a policy and it was necessary at the time of implementation.

### What is harassment?

- S.26 the Equality 2010
  
- Harassment is covered under this section as three different types:

- **General Harassment:** An individual conduct or behaviour towards another individual. The behaviour or conduct must be towards the other individual's protected characteristics like **race, gender or disability**. The person conduct or behaviour **must** also create a **hostile/degrading/humiliating/offensive**, work environment. There areas not covered by harassment: ***marriage and civil partnership, and pregnancy and maternity.***
- **Sexual Harassment:** This harassment follows the same rules as general harassment the behaviour or conduct must create the hostile environment. Sexual harassment focuses on behaviour of **a sexual nature**.
- **Less favourable treatment due to Harassment:** This type of treatment can be defined as an individual being treated unfairly by an employer, for example unfair treatment could as result of being subjected or rejected to sexual harassment or harassment due to gender reassignment or sex.

### What is victimisation?

- S27 Equality Act 2010
- Victimisation is where one individual makes complaint about one or more of their Protected characteristics being discriminated against like harassment, indirect or direct discrimination. This could mean as an individual treatment towards you is less favourable.
- An example of Victimisation: A women making a complaint of sex discrimination against an employer. This could have resulted in the women being denied promotion. This forms victimisation due to being denied promotion.

## Harassment - you should not be harassed in the work place

### What is this?

- Victimisation
- Discrimination due to disability
- You cannot be treated unfairly because of something connected to your disability.
- Q. What thing might be connected to my disability?
- A. Need for short breaks, to attend hospital appointments etc.....
- However, The Equality Act says employers can justify discrimination if there is a **good enough reason** for treating you unfavourably. However, the employer must make reasonable adjustments for your disability.

### Does EU law cover discrimination?

- EUROPEAN CONVENTION ON HUMAN RIGHTS: disability, race and equal pay for men and women
- UK introduced HUMAN RIGHTS ACT 1988: covers the above Convention
- TREATY ON THE EUROPEAN UNION: ART 6 framework for equal treatment and occupation ART 3 Equality for men and women

### Is there an organisation to help with discrimination?

- The **EQUALITY AND HUMAN RIGHTS COMMISSION**: -
- An individual may make a complaint to the commission or get advice on what to do or if there is a case.
- Advice can be found on their website:

**[equalityhumanrights.com/en](http://equalityhumanrights.com/en) or call 0808 800 0082**

## **GRIEVANCE PROCEDURES**

Problems at work? Do you feel you have been discriminated against? Treated unfavourably? Your employers have a duty to make sure that their practice and treatment of employees stays in line with current Employment Laws. Sometimes this doesn't happen, and it can be overwhelming and feel as if there is no way out of the situation. Don't worry there is help available.

### Steps to take;

Firstly, look at the company's policy on grievances. This will give you an idea of how to proceed. This could be with the Human Resources department or in your contract of employment.

Make sure you write down the details of the problem and the dates and times along with anyone involved.

Once you have written the important details down then give them to an appropriate person in management (usually a line manager)

Think of any other situations where a similar problem has happened that could give an idea of how things can go from there.

Before raising a formal grievance, you could proceed in an informal way with your manager, as they may be able to sort it out. However, if the issue is to do with sexual harassment or

whistleblowing then you should move straight to a formal grievance. Therefore, decide if the issue should proceed in a formal or informal way (written if formal and verbal if informal)

### Informal Process

So, once you have written the important details down then give them to an appropriate person in management (usually a line manager)

Then you can ask for a meeting with your own manager who is not involved in the incident and have details and evidence to present. Take a representative along with you and that can be someone you feel comfortable with. As long as it is not someone concerned with the problem. If the person cannot make the time given, then the employer must reschedule the appointment to a suitable time.

During the meeting either you or the third person can explain how you feel and the effect the problem has had. Have details of the incident and any evidence with you. Also make sure to discuss your desired outcome of the situation.

Allow for an investigation to be done by the manager and perhaps make another appointment. This meeting will allow you to further discuss what your desired outcome of the situation is. Your employer has around 4 weeks to deal with the issue. But generally, as soon as possible.

### Formal Grievance

Following such measures, if the situation is still not rectified by the manager then begin to raise a formal Grievance against your employer. Again, you can check the company's formal grievance procedures first. If the company does not have one, then you can follow the ACAS code of Practice (link is below) The formal grievance needs to be in writing. This could be done in the form of a letter from you addressed to your employer by name. Make sure that all the relevant details are included, and it should include what your complaint is and how you made the employer aware and what you suggested they could do to solve the problem. This should all be done as soon as possible without delay.

Send the letter to the employer or human resources department with details of a timescale and a plan for the problem to be solved.

Your employer will then arrange a meeting. Again, you can have a named work colleague of your choosing present. You will explain the complaint again and what your desired outcome is. The employer will send you a letter with their decision on the matter.

If this procedure is still not sufficient in resolving the issue in question, then further action may be required

### Appeal

You can appeal the matter. To do this send a letter to the employer saying that you wish to appeal the decision and why you do not agree with it. Another meeting will be arranged. Possibly with someone more senior in authority than your manager. The employer will then send you a letter with their final decision.

Further steps if still not satisfied could be mediation or tribunal.

If this procedure is still not sufficient in resolving the issue in question, then further action may be required

Here are a few examples of what would be considered a problem in the workplace.

- 1) Where a pregnant worker is still expected to lift heavy objects or stand for long periods
- 2) A worker not being given the appropriate breaks for long periods of work
- 3) A worker not being given the adequate safety equipment to carry out their job effectively

### Relevant Legislation which Employers should follow:

Trade Union and Labour Relations Act 1992 s199

ACAS Code of Practice for Disciplinary and Grievance procedures

Important note: the above code is not mandatory for employers. However, should any case reach tribunal stage, it could be influential to potential decisions.

## **DISCIPLINARY PROCEEDINGS**

Disciplinary action is a method of dealing with employees who cause problems or do not follow employers' rules and policies. Employers use a range of disciplinary procedures depending on the severity of the behaviour of the employee.

In employment law a person's employment status helps determine:

- Their rights
- Their employer's responsibilities

the main types of employment status are:

- Worker
- Employee

Firstly, must establish if you are a worker or an employee. There are different types of statuses for a person who is a worker, is employed or an employee, those who are working are likely to fall into one or more of the following categories of the above categories.

A person is generally classed as a 'worker' if:

- They have a contract or other arrangement to do work will services personally for a reward (your contract doesn't have to be written)
- There reward is for money or benefit in kind, for example the promise of a contract or future work
- They only have a limited right to send someone else to do the work (subcontract)
- They must turn up for work even if they don't want to
- Their employer must have work for them to do if the contract or arrangement loss
- They aren't doing the work as part of their own limited company in an arrangement where the 'employer' is a customer or client

### Employment rights

- workers are entitled to certain employment rights, including:
- national minimum wage
- protection against unlawful deductions
- statutory minimum level of paid holiday
- statutory minimum length of rest breaks
- not to work more than 48 hours on average per week or to opt out of this right if they choose
- protection against unlawful discrimination
- protection for whistleblowing
- to not be treated less favourably if they work part-time

### They may also be entitled to:

- statutory sick pay
- statutory maternity pay
- statutory maternity pay
- statutory adoption pay
- shed parental pay

### Workers usually aren't entitled to:

- minimum notice. If their employment will be ending, for example if an employer is dismissing them
- protection against unfair dismissal
- the right to request flexible working



- timer for emergencies
- statutory redundancy pay

### Someone is likely to be a worker if many of the following apply:

- They occasionally do work for a specific business
- The business doesn't have to offer them work and they don't have to accept it - they only work when they want to
- The contract with the business uses terms like 'casual', 'freelance', 'zero hours', 'as required' or something similar
- They had to agree with the businesses terms and conditions to get work - either verbally or in writing
- They are under the supervision or control of a manager or director
- They can't send someone else to do their work
- The business deducts tax and national insurance contributions from their wages
- The business provides materials, tools or equipment they need to do the work

### The difference between employee and worker is:

- employee is an individual entered into a contract of employment, the contract can be implied or expressed an employee is obliged to do work for the employer and the employer is obliged to provide work. The employee is obliged to accept work from the employer and the employer must provide a contract which gives details to the employee of how they should carry out their work.
- A worker is entitled to fewer rights than employees however, the key legal rights a worker has is protection from discrimination. To see further details of the definitions between employee and worker can be found at section 230 (1) and section 230 (3) of the Employment Rights Act 1996 respectively.
- According to the definitions all employees are workers but not all workers are employees, as an employee you will enjoy all rights and protections that a worker has, however, an employee will have additional rights and protections that the worker does not have.

### **Disciplinary:**

#### What constitutes a disciplinary?

A disciplinary is part of the process that is followed through by the employer when addressing an employee or a worker's behaviour/standard of acceptable conduct.

Types of action taken by an employer during a disciplinary:

- verbal

- written

### What constitutes disciplinary?

Disciplinary can be applied by the employer when addressing employees/workers standards of acceptable conduct and provides the means for an employer to follow process in respect of a employees/workers' performance or conduct.

Both employers and people working for them need to know their rights and responsibilities therefore it is important to be sure of your employment status. Employment status is important as it affects your legal rights and entitlements please see [www.acas.org.uk/checking-your-employment-rights](http://www.acas.org.uk/checking-your-employment-rights).

ACAS disciplinary procedure: [www.acas.org.uk/disciplinary-procedure-step-by-step](http://www.acas.org.uk/disciplinary-procedure-step-by-step). ACAS code mainly applies to those with employee status but to keep good working relationships it is a good idea if the employees follow some fair procedures for all workers. ACAS code of practice or disciplinary and grievance procedure is the minimum a workplace must follow. ACAS code is not the law, if disciplinary reaches employment tribunal judges take into consideration whether the employer followed the ACAS code in a fair way.

ACAS code mainly applies to those with employee status but to keep good working relationships it is good for the employer to follow the same fair procedure for all workers. Please see below a brief explanation of disciplinary action and process.

### An employer's duty during disciplinary:

First and foremost is an informal stage to deal with any issues that have arisen in respect of a worker, the employer must refer to ACAS code of practice to start the disciplinary proceedings.

- write to you outlining issues (S)
- advise you of your rights
- invite you to a formal meeting
- should give you opportunity to set actual case
- formal letter should be sent to you regarding the decision made by the employer

### Employees rights and duties during disciplinary

- keep notes of the process
- seek access to legal advice
- Access to representation
- have an opportunity to appeal against the decision
- make a complaint to the employment tribunal
- challenge your dismissal

Your employer should provide you with written policies and procedures for how workplace issues are dealt with. You can also find information via the ACAS website. Please see below for all links to organisation that can provide help and guidance during a disciplinary.

## **UNFAIR DISMISSAL**

Unfair dismissal in the United Kingdom is the part of UK labour law that requires fair, just and reasonable treatment by employers in cases where a person's job could be terminated.

Here are some key words explained;

**Fair** - sacked for valid reason

**Unfair** - sacked for no good reason

**Wrongful** - sacked and statutory notice period ignored

**Constructive** - employee resigned because work conditions were intolerable



To determine whether you can do anything to challenge your dismissal, follow these steps.

### 1. Check that you have actually been dismissed.

The first stage in fighting a wrongful dismissal claim is establishing that it actually happened. If your employer has ended your contract of employment, with or without notice, refused to renew your fixed-term contract, made you redundant (including voluntary redundancy), dismissed you for going on strike or stopped you coming back to work after maternity leave, then you have been dismissed.

You have not been dismissed if you resigned by choice or have been suspended.

### 2. What is your employment status?

You can check your employment status on [GOV.UK](https://www.gov.uk). This is a very important stage to consider, as only employees (part-time or fixed-term) have the right to claim for unfair dismissal.

You do not have rights to claim for unfair dismissal if you're self-employed, a police officer or in the armed forces, a share fisherperson, are working overseas or for a foreign government, a registered dock worker or if you're an agency worker or classed as a 'worker.'

### 3. Have I been dismissed for a reason that is fair?

The basic rules on unfair dismissal state that an employee is protected from unfair dismissal after two years of continuous service. If the employee started their job prior to 6 April 2012 then only one year of continuous service is needed in order to be protected from unfair dismissal.

Below is a table which shows the ways in which an employee can be fairly dismissed.

	POTENTIAL <b>FAIR</b> REASON FOR DISMISSAL UNDER s98 ERA 1996	EXAMPLE OF EVIDENCE
1.	Conduct	Theft, Violence, Abuse.
2.	Capability	The Employer believes the Employee is unable/incapable of doing their job properly.
3.	Redundancy	The business is closing down. The business needs less employees to complete the work.
4.	Statutory Restriction	A delivery driver loses their driving license.
5.	Other substantial reasons	Restructuring The employee is in prison. Severe breakdown in relationship

If the reason for dismissal doesn't fall under one of the above categories, the dismissal could potentially be considered unfair.

It must be noted that complaint to the Employment Tribunal for unfair dismissal must be made within 3 months from the date of which they were dismissed.

#### 3a. When is an employee termination considered unfair?

There are some situations where dismissing an employee is automatically unfair.

Automatic unfair dismissal is a term used to describe situations where an employee was dismissed for a specific reason, which is protected by legislation. Some examples of this are dismissals relating to: asserting a statutory right, maternity/paternity leave, parental/adoption leave, being paid the minimum wage, or pregnancy.

If the reason for dismissing an employee was for one or more of the reasons mentioned above, then the dismissal will be considered automatically unfair. The difference between unfair dismissal and an automatic unfair dismissal is that the latter is available to all employees regardless of length of service.

If an employment tribunal finds a dismissal to be automatically unfair then the employer will not be able to defend the claim, and the employee automatically succeeds in their unfair dismissal claim. The employer may have to reinstate or re-engage the employee and pay compensation.

### To Re-cap;

The 5 preliminary requirements for a claim of unfair dismissal are;

- One year's continuous service (unless employed after 6th April 2012 when two-year requirement applies (s108 ERA 1996))
- Employee must have been dismissed
- Claim brought in time (3months)
- Not an excluded category
- Effective date of termination

This is not to be confused with wrongful dismissal.

You should contact your nearest [Citizens Advice](#) for further help and guidance.

## **WRONGFUL DISMISSAL**

### What is wrongful dismissal?

When an employee's job is terminated for a reason that can be established as being valid, then the termination cannot be wrongful. Wrongful dismissal occurs when an employee is fired by the employer without reasonable notice. It is worth noting that the actual reason for the dismissal itself may be correct, but if the amount of notice given is not sufficient, then it may still be considered "Wrongful".

Wrongful dismissal is a claim for breach of the terms of an employment contract. Only an employment contract is valid to consider whether an employer has breached it.

This may happen when the employer dismisses the employee without notice, or with less than the minimum notice period, either by statute or what was stated in the contract. Advance notice of termination is required, as specified in the contract of employment, which cannot be less than one week for each year of service. This means that there's a minimum of one week and a maximum of 12 weeks required notice period depending on the contract of employment. This is known as the statutory minimum notice period.

### How would you know that you have been dismissed?

If your employer dismisses you in person, or if the employer dismisses you by letter or e-mail.

### When can a claim be raised?

In order to bring a wrongful dismissal claim, the employee must establish that they were dismissed in breach of their employment contract, or with less than the statutory minimum notice period (i.e. summary dismissal) and that they suffered a loss as a result (i.e. the loss of wages sustained). The employer can justify dismissing the employee with less than the statutory minimum notice period if the employee has committed gross misconduct, or a serious breach of the contract (e.g. theft, violence or dishonesty). However, failure to follow a contractual disciplinary procedure can amount to a wrongful dismissal.

### What notice should be given?

If you have worked less than two years, the statutory period of notice is one week.

If your employer tells you personally that you're going to be fired, then the notice period usually begins the following day, unless your contract stipulates something different. So, if you are notified on Sunday, the statutory notice period will start on Monday and end the following Sunday.

If your employer dismisses you by letter or email, the notice period will only begin after you have read the letter/email, unless your contract stipulates something different. This means that if your employer sends you a letter on Monday giving you a week's notice, but you don't read it until Wednesday, the notice will start on Thursday and end on the following Wednesday.

If you have worked longer than two years, the statutory notice period is one week for each full year worked up to a maximum of 12 weeks' notice, though your employment contract might give a longer period of notice.

If your employer tells you not to come to work for your notice period, they are still required to pay your wages until the termination of the notice period.

You should verify that you have had the correct notice period, and that you have been paid for it.

There are steps you can take if your employer does not pay you properly.

### How can a claim be raised?

Employees must file a claim for wrongful dismissal with the Employment Tribunal within 3 months of the effective date of their termination. No period of service is required for wrongful dismissal, because it is a breach of contract claim. Any compensation paid from a wrongful dismissal claim is covered by £ 25,000. An employee can only be compensated for the net loss he has incurred as a result of the wrongful dismissal. Recoverable damages may also include other benefits that could have been earned or accrued during the period of the contractual notification, this includes bonuses, pension benefits, or special health coverage.

### When can Wrongful Dismissal be justified?

If the employee commits serious misconduct - for example, violence or theft, this is called Summary dismissal, which is legal dismissal without notice.

### When will a claim in Wrongful Dismissal fail?

A claim may fail firstly, if the employer gave the dismissed employee the correct notice period, and secondly, if the dismissal was with payment in lieu of notice.

### What are dismissals with payment lieu of notice?

It is somewhat common for an employer to pay his employee to calculate the notice period. These types of agreements are called payments in lieu of notice (PILON), and are typical in labour contracts. These payments are usually a replacement for the notice period. If the employer does have a PILON agreement with his employee, and has paid the agreed amount then there will be no breach of contract. This is therefore a very helpful way in preventing any wrong dismissal claims.

## **Redundancy**

There are other types of work dismissals, such as Redundancy and this happens when the employer wants to reduce their workforce.

### What happens if you are made redundant?

You may be eligible for certain things, including:

- Redundancy pay.
- A notice period.
- A consultation with your employer.
- The option to move into a different job.
- Time off to find a new job.

The reason for your redundancy must be fair, and not based upon discriminatory factors for example age, gender, if you're disabled or pregnant. The selection of who is made redundant must be made with consideration to each employee's capability to do their job.

### What is the method used for redundancy?

Last in, first out (employees with the shortest length of service are selected first).

Asking for volunteers (self-selection).

Disciplinary records.

Staff appraisal markings, skills, qualifications and experience.

### When the employer can make a redundancy without needing to follow a selection process?

When your job no longer exists, for example if:

- Your employer is closing down a whole operation in a company and therefore making all the employees working in that section redundant
- You're the only employee in your part of the organization.

### Could this be appealed?

Under employment law you can only appeal against being made redundant if you believe that you were unfairly selected, and believe that you were singled out and discriminated against.

### Redundancy pay



You are usually entitled to legal compensation if you have been an employee, and have been working for your current employer, for two years or more.

You are entitled to;

- Half-a-weeks wages for every full year of employment, under the age of 22.
- One week's salary for every full year of employment that you were 22 or older, but under 41.
- One and a half weeks' wages for each full year of employment that you are 41 years or older

The maximum service period is 20 years.

## **References:**

### Discrimination in the workplace;

[equalityhumanrights.com/](http://equalityhumanrights.com/)

### Grievance procedures;

Trade Union and Labour Relations Act 1992 s199

ACAS Code of Practice for Disciplinary and Grievance procedures

<https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures>

### Disciplinary proceedings;

[www.acas.org.uk/checking-your-employment-rights](http://www.acas.org.uk/checking-your-employment-rights)

[www.gov.uk/disciplinary-procedures-and-action-at-work](http://www.gov.uk/disciplinary-procedures-and-action-at-work)

[www.acas.org.uk/disciplinary-procedure-step-by-step](http://www.acas.org.uk/disciplinary-procedure-step-by-step)

Section 230(1) and section 230(3) of the Employment Rights Act 1996 respectively.

<https://www.citizensadvice.org.uk/work/problems-at-work/dealing-with-disciplinary-action-and-dismissal-at-work/>

<https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures>

<https://www.acas.org.uk/disciplinary-procedure-step-by-step>

### Unfair Dismissal;

Employment Rights Act 1996 c. 18 sections 98 and 108

<https://www.citizensadvice.org.uk/about-us/contact-us/contact-us/contact-us/>

<https://www.gov.uk/employment-status>

### Wrongful Dismissal;

Equality Act 2010

Human Rights Commission

### Redundancy

<https://www.citizensadvice.org.uk/work/leaving-a-job/dismissal/your-notice-period-during-dismissal/>

<https://www.rocketlawyer.com/gb/en/quick-guides/wrongful-dismissal>

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