



Free information sheet on Unfair Dismissal

Please Note: This not legal advice this is helpful commentary only.
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Unfair Dismissals

Like all statutory protection for workers, one must be an employee to come within the terms of the Unfair Dismissals Acts;

The vast majority of working people are employees but some are what is known as office holders or independent contractors. Employees have an element of subordination in their relationship with their Employer. There are various tests to determine whether one is an employee or an independent contractor – control test, integration test and mixed test. An independent contractor has a contract for services rather than a contract of service. Office holders are very common in the Public Service.

Rules

Qualifying to bring a claim - Time Limit

You have six months to commence your claim for unfair dismissal from the date the dismissal took place. If there are "exceptional circumstances", you may be allowed to extend this period up to 12 months from the date of dismissal. However, these must be exceptional circumstances - saying you did not know the law will not suffice.

Wrongful Dismissal as against Unfair Dismissal.

Wrongful dismissal is a remedy available under the common law. However, unless constitutional provisions are involved, the matter is essentially one of contract i.e. it must be proved that the dismissal was in breach of contract. If the terms of the contract of employment are not breached and the employer does not act unconstitutionally in terminating the contract, then it is not wrongful dismissal.

Unfair Dismissal – before the 1977 Act, there was no legislation in Ireland to deal with dismissal for an unjust cause. The common law action for wrongful dismissal was all that was available and was inadequate, cumbersome and expensive. The International Labour Organisation brought out a report during the 1960's and the then E.E.C. Commission reported in 1976. These reports contained a summary of the legal position in relation to dismissal in all member states and essentially pointed the way forward.

Basic Principles:

The 1977 Act provided for the bringing of claims for redress for unfair dismissal before a Rights Commissioner or the Employment Appeals Tribunal within six months of the date of the dismissal (the six month limitation period can become twelve months in some exceptional circumstances). The advantages of the statutory claim include time, costs and informality. Also the Unfair Dismissals Act sets out criteria upon which dismissals lawfulness can be judged.

The onus is on the employer to show that the dismissal is fair. It is the overall assessment of the reasonableness of the dismissal that is important. To void a finding of unfairness, an employer must not only show what the reason for the dismissal was, but also that that reason is within one of the general categories likely to be regarded as fair.

Dismissals deemed not to be unfair:

- a) Capability, competence or qualifications to do the work;
- b) Conduct of the employee;
- c) Redundancy of employee;
- d) Employer prohibited by statute from continuing to employ the employee.

Dismissals deemed to be unfair:

- a) Trade Union membership or activity;
- b) Religious or political opinions;
- c) Employee involved in civil proceedings against the employer;
- d) Employee involved in criminal proceedings against the employer;
- e) Exercise or proposed exercise by employee of right to parental leave – Parental Leave Act, 1998;
- f) Race, colour, or sexual orientation;
- g) Age;
- h) Membership of travelling community;
- i) Pregnancy, giving birth, breast feeding or matters connected therewith;
- j) Proposed exercise of rights under Maternity Protection Act 1974;
- k) Proposed exercise of rights under Adoptive Leave Act, 1995;
- l) Unfair selection for redundancy

Who is covered by the Act:

Certain categories of employees are not covered by the act e.g. Gardai, members of the Defence Forces. Also an employee has to have at least one year continuous service (except where dismissal is for Trade Union activities or is related to a pregnancy). Also employees who have reached normal retiring age and persons working for a close relative in a dwellinghouse or a farm, officers of Local Authorities, Health Boards and V.E.C's. Employees on probation are not covered by the Act, if the probation is for one year or less.

Constructive Dismissal:

Here the fact of dismissal will be in dispute as the employee has terminated his/her own contract of employment. The employee will have to go first in such cases as he/she has to prove that there was a dismissal. Essentially therefore, the employee must also show that the dismissal was unfair. The employee must show that the resignation was *“because of the conduct of the employer, the employee was or would have been entitled or it would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer”*. This is a high standard for the employee.

There are two tests –

1. Contract test – where employee argues entitlement to terminate the contract as the employer has breached a fundamental condition of the contract;
2. Reasonableness test – where employer may have acted within the terms laid down in the contract of employment but its conduct may be nonetheless unreasonable – so much so entitling the employee to treat the contract as being at an end.

The contract test is the test that applies in Britain while either can apply in Ireland. The contract test is more stringent on the employee.

Just as an employer, for reasons of fairness and natural justice must go through disciplinary procedures before dismissal, so too an employee should invoke the employer's grievance procedures in an effort to resolve his/her grievance. Where no such procedures are in existence, then at the very least an employee should communicate his/her grievance to the employer and allow the employer a little time to do something about the grievance.

An employer may seek to rely on flexibility or mobility clauses in constructive dismissal cases.

Employers often give employees the option to resign or be dismissed. This is a very bad idea as it gives rise to the classic constructive dismissal situation. This may however not be so if an employee faced with prosecution or adverse publicity sought the option to resign.

Remedies for Unfair Dismissal:

- Re-instatement – this is re-instatement by the employer of the employee to the position to which he or she held immediately before dismissal on the terms and conditions on which the person was employed immediately before his or her dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal.
- Re-engagement – re-engagement by the employer of the employee either in the position which he/she held immediately before his/her dismissal or in a different position which would be reasonably suitable for him/her on such terms and conditions as are reasonable having regard to all the circumstances.

- Compensation – this is the most common remedy as frequently the relationship between the parties has broken down and the Tribunal will not force parties together where this is the case. Compensation is confined to two year's salary but this is infrequently given. The employee is compensated for his actual losses and must show mitigation of losses i.e has applied for alternative employment. However, all actual losses such as bonuses, overtime and other allowances are included.

Forum – Employment Appeals Tribunal or at the option of both parties a Rights Commissioner. Employment Appeals Tribunal consists of three parties usually one from an employee's organisation eg a Trade Union Official, one from an Employer's organisation and a chairperson, usually a legal person, a Solicitor or a Barrister with particular expertise in this area. The Tribunal sits in Dublin and at regional venues around the country.

Justifying the dismissal

If you establish your right to bring a claim and that there was a dismissal, the onus of proof will be on your employer to show that the dismissal was a fair one.

Your employer must show that your dismissal was connected with one or more of the potentially fair grounds set out in the legislation.

Your employer must show that he/she acted fairly.

Your employer will have to disprove any allegation by you that your case involves any of the automatically unfair reasons for dismissal.

Your employer can rely on one or more of the following to show that the dismissal was fair:

Your capability

Capability-related dismissals usually centre on issues like lateness, absenteeism and persistent absence through illness.

If lateness/absenteeism is at issue, your employer will be expected to have documentary proof of this allegation, such as clocking in records or documented absences on file that are not medically certified. In addition, your employer will also be expected to show that you were made aware of the problem and warned as to the consequences for your continued employment.

If illness or injury is at issue, it is often assumed that you cannot be dismissed fairly while on certified sick leave from your work. However, this is not true. It is difficult to lay down hard and fast rules to apply to these cases as each will be treated on its own merits. Issues such as length of service, previous record and the importance of the job will vary and will have to be taken into account. These types of claim are often divided into short-term and long-term absences.

Short-term illness-related dismissal generally occurs where you have a medical problem that results in frequent absences for short periods from the workplace. Assuming that your employer is not questioning the genuine nature of your problem, he/she will be expected to have:

- established that a pattern of absence exists and that it is causing problems
- satisfied himself/herself that the problem is unlikely to get better in the long run
- warned you that dismissal is likely to result if things do not improve.

Many of the same considerations exist in a long-term absence case. However, your employer here will be expected to obtain detailed medical evidence that an early return to work is unlikely. There is no set period of absence by which it can be said that a dismissal will or will not be considered reasonable. Obviously, the longer the absence, the easier it is for your employer to show that it is causing genuine difficulty in terms of the organisation of the workplace.

In terms of medical evidence, your employer may require you to attend his/her own medical expert because he/she is doubtful or uncertain about your doctor's view. If there is a conflict of medical evidence between you and your employer as to the possible return date, your employer will be expected to get a second opinion before taking the decision to dismiss.

Your competence

Competence refers to your ability to do your job. In the first place, you need to be made aware of the standards that are expected of you and these must refer to the job you were hired to do.

Secondly, if you fall short of the required standard, this must be clearly explained to you. This should be done through a formal set procedure. Your employer should also specify what improvements are necessary. These should be achievable and a reasonable timeframe must be allowed for the improvement.

Ultimately, a final warning setting out the likelihood of dismissal should be given to the employee.

Your qualifications

The kind of situation envisaged by this form of dismissal can take two forms. Either you mislead your employer about qualifications you had when applying for the job or your employer made continued employment conditional upon you obtaining further qualifications and you failed to achieve this.

Your conduct

Conduct covers a very large area of behaviour and might be more accurately termed misconduct. There is a need to distinguish between gross misconduct and ordinary instances of misconduct.

Gross misconduct may give rise to instant (summary) dismissal without notice or pay in lieu of notice.

Other instances of misconduct may be a series of minor incidents which, when taken together, are enough to warrant dismissal, although your employer is obliged to give you notice or pay in lieu of notice in this type of situation.

Your employer will need to investigate each situation adequately to ensure that he/she has all the facts of the case. Other than cases of gross misconduct, it is essential that you have received appropriate warnings about your conduct and been made aware that dismissal may result if the problems continue. In this way, you are given a chance to improve your conduct.

Your continued working would contravene the law

For example, you need a current driving licence to work, but you have lost your licence on a drunk driving charge. You cannot continue to work without breaking the law and dismissal may be justified. Although even in such a case, your employer might be expected to look at alternatives depending on all the facts of the case.



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