



Dismissing employees in the UK

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This is a brief guide which sets out how to terminate an employee's employment in the UK.

Short service employees (less than two years' service)

In summary it is unlawful to dismiss any employee, no matter how long they have been employed by you:

- For a **discriminatory reason** (a reason related to an employee's age, disability, gender reassignment, marriage or civil partnership, race, religion or belief, sex or sexual orientation);
- **Because they "blew the whistle"** in relation to any illegal activity; or
- For a set number of other very **specific reasons** (which are outside the scope of this note, including health and safety reasons).

Provided none of these reasons apply, normally with short service employees you don't need to go through any formal process before they are dismissed to avoid a statutory unfair dismissal claim (see below for more details on unfair dismissal).

Note however that employees who are dismissed while pregnant or during statutory maternity or adoption leave must be given written reasons for dismissal without requesting it, no matter their length of service.

Employees with more than two years' service

Normally (and unless the dismissal is for a reason under the bullet points under "*Short service employees*", above) only employees with more than two years' service have the right not to be "unfairly dismissed". This means the dismissal must be for one of five potentially fair reasons, the process leading up to dismissal must be fair in all the circumstances and the decision to dismiss must not be unreasonable in the circumstances.

The five potentially fair reasons are:

- 1) Capability, such as poor performance or attitude
- 2) Conduct
- 3) Redundancy
- 4) Illegality, where it would be illegal to continue to employ them, such as where the employee's VISA has expired; or
- 5) "Some other substantial reason" for choosing to dismiss the employee. This might be a restructure which doesn't necessarily involve a redundancy.

It is important to follow a fair process, even if you think the reason for dismissing is obvious. For example, in a misconduct case you should still follow a fair process even if you believe you have caught the employee 'red-handed'. If you don't, you can still end up losing an unfair dismissal claim at a tribunal (although you may end up paying less in compensation).

Unfair dismissal - Process

The key things to remember in order to get the process right are to:

- Carry out a reasonable investigation into the facts before making any decision (even where you consider the case clear cut)
- Allow the employee the opportunity to give their side of the story and take it into account when making your decision
- Warn the employee that the consequences of the process may include dismissal
- Follow the **ACAS code** (ACAS is a quasi-government body that publishes best practice) wherever possible as a failure to do so can result in an increased award against you, should you lose at tribunal
- Ensure the decision to dismiss is reasonable in all the circumstances, including, for example bearing in mind their length of service and how other employees have been treated in similar circumstances; and
- Offer a right to appeal.

Collective Redundancies

In addition to the individual consultation requirements explained above, if you propose to make 20 or more dismissals at a particular establishment in any 90-day period for reasons that are not related to the employees' performance you will also need to first allow time to inform and consult with elected employee representatives. Note that redundancy has a broader than usual meaning in this context and also covers termination and rehires.

The minimum consultation period is 30 days (45 days if you propose dismissing 100 or more employees) and consultation should start without delay as soon as the proposal is made. Before consulting you will need to allow time to prepare certain statutory information and to elect representatives if you do not already have representatives in place. You must also inform the UK Government.

This is not something that should be overlooked. The penalty for breach can be a compensation award of up to 90 days' pay for each affected employee and there are potentially criminal sanctions for failing to notify the Government in a timely manner. Note that there is no two-year qualifying service requirement for failing to consult (although there is for any unfair dismissal).

Giving notice

No matter whether they have two years' service, all employees are entitled to receive notice of termination of employment. Usually, the notice period you must give the employee will be stated in their employment contract, but that period must not be less than the statutory minimum notice period. This is one week per year of employment, up to a maximum of twelve weeks.

Employers may either:



- Terminate on notice and require the employee to work during the notice period
- Terminate on notice and suspend the employee until the end of their notice period, known as “Garden leave”, (provided this is permitted by the contract) or
- Make a payment to the employee in lieu of the pay they would have received during their notice period as a lump sum so their employment terminates immediately, known as “Pay in lieu of notice” or “PILON” (provided this is expressly permitted by the contract).

Dismissing an employee without giving them the notice they are entitled to could lead to a legal claim by the employee for the pay and benefits they should have received in the notice period. They will also be released from their obligations under the contract, including any restrictive covenants.

Dismissal costs

To help budget for a termination situation, typically dismissal costs include the following components:

- Salary and other costs up to the termination date
- Notice pay or payment in lieu of notice as per the employment contract (as above)
- Payment for accrued but untaken holiday time
- A statutory redundancy payment (in redundancy situations)
- Entitlements (if any) in relation to bonuses, commission and incentives in accordance with the relevant contractual provisions.

Costing up legal risk

In addition to the dismissal costs, employees who are unfairly dismissed have a right to be compensated. In “ordinary” unfair dismissal cases damages are capped and the maximum possible award is the sum of the following:

- £16,320 depending on age, pay and service; and (in addition)
- £89,493 or (if less) 12 months’ pay and benefits depending on their loss of earnings.

In most cases employees are entitled to substantially less than the theoretical maximum allowed, although compensation is in theory uncapped if the dismissal is because of discrimination/whistleblowing or in some other limited situations. The amount of compensation awarded normally depends on how long the employee is reasonably expected to be out of work in-between jobs, rather than being punitive damages. Prior to the pandemic in practice the usual position was that this would typically take up to 6 months in a normal unfair dismissal case and up to 12 months in a typical discrimination case. We don’t yet have enough information to say how the pandemic may have affected this.

Note that aside from compensation, employees can also ask a tribunal to order that they be re-employed by their employer, but these requests are rare and granted in less than 1% of cases.

Alternatives to a formal process

Following a formal process can be expensive and time-consuming and may not be the best approach for you or the employee in every situation. In some cases, you may want to consider another practical approach. This might be dismissing the employee without going through a process or agreeing a mutual exit. Before taking these options, you should seek legal advice to make sure you best manage the practical and legal risks of your particular situation.

This guide is for information only and is not legal advice. It reflects the position as at 14 June 2021. For any questions, please get in touch with natasha.adom@gqlittler.com or your usual GQ|Littler contact.