

EMPLOYMENT: OVERVIEW:
ENDING EMPLOYMENT: UNFAIR DISMISSAL

The right not to be unfairly dismissed is a purely statutory right arising under the ERA 1996, s 94.

The ERA 1996, Part X contains most of the provisions relating to who has the right, how to bring a claim, when the right is infringed and the remedies available following a successful claim.

Time limits

Claims for unfair dismissal may only be brought in an employment tribunal and must generally be presented within 3 months of the effective date of termination of employment.

Who can claim

The right is generally subject to a number of qualifying conditions and exceptions, including that the claimant:

- must be an employee
- must have been dismissed

There are specific provisions setting out which categories of employee and employment situation have the right not to be unfairly dismissed.

Qualifying period

The right not to be unfairly dismissed generally only arises when the employee has been continuously employed for a period of at least one year. However, there are many exceptions to this requirement, mostly relating to situations in which the employee is automatically unfairly dismissed for one of a number of impermissible reasons.

Definition of dismissal

To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. The circumstances in which an employee is treated as having been dismissed for the purposes of an unfair dismissal claim are limited to:

- termination of the employee's contract by the employer
- notice to terminate the contract given by the employer, followed by counter-notice given by the employee that expires before the end of the original notice period

- termination of a limited-term contract on the happening of the limiting event
- resignation by the employee, where he is entitled to do so by reason of the employer's conduct (constructive dismissal)

Dismissal does not include:

- termination by mutual consent
- genuine voluntary resignation
- termination by frustration

Effective date of termination

Where a qualifying period of employment is required to bring an unfair dismissal claim, the claimant's period of continuous employment is calculated up to and including the 'effective date of termination'.

The effective date of termination is the date when:

- notice expires where the contract is terminated (by employer or employee) on notice
- termination takes effect where the contract is terminated without notice (ie on summary dismissal)
- termination takes effect on the happening of a limiting event with limited-term contracts

Reason for dismissal

Once an employee has established that he has the right not to be unfairly dismissed and that he has been dismissed, a tribunal will generally look to the employer to show that the reason or principal reason for dismissal was one of a list of potentially fair reasons.

Potentially fair reasons for dismissal include:

- capability
- conduct
- redundancy
- retirement
- breach of statute
- some other substantial reason

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EMPLOYMENT: PRECEDENT

STARTING EMPLOYMENT: EMPLOYMENT CONTRACT:

PRECEDENTS: AGREEMENT - BASIC EMPLOYMENT CONTRACT

THIS AGREEMENT is made **BETWEEN:**

- 1 [insert name of Employer] [of/whose registered office is at] [insert address]
- [or] [the persons named in the Schedule who are partners in the firm of [insert name] of [insert address]]
- [or] [an unincorporated club governed by [a trust deed dated [insert date] and deeds and resolutions made subsequent to it and] rules adopted on [insert date] (the 'Employer')]

2 [insert name] of [insert address] ('You')

1 Appointment and termination

- 1.1 The Employer appoints You and You agree to act as [a] [insert job title] [or in such other capacity as the Employer may from time to time reasonably direct] subject to and in accordance with the terms of this Agreement.
- 1.2 You agree to perform all and any duties associated with [or ancillary to] Your position as [insert job title] and such other duties [compatible with Your status] as the Employer may reasonably require of You to further its legitimate business interests.
- 1.3 Your employment [and Your period of continuous employment] shall start on [insert date/the date of this Agreement] (the 'Commencement Date').
- 1.4 Your employment shall continue [for a fixed period [of [] years from the Commencement Date] until [insert date] [and thereafter] [subject to earlier termination/until terminated by [either party giving to the other/the Employer giving You] not less than [] [weeks'/months'/years'] notice [or by You giving to the Employer not less than [] [weeks'/months'/years'] notice [in either case expiring [on or] at any time [after the end of the fixed period].
- 1.5 No employment with a previous employer counts as part of a period of continuous employment/Your employment with [insert name of previous employer] forms part of a continuous period of employment which began on [insert date].
- 1.6 The Employer shall be entitled in its discretion to terminate Your employment at any time by giving You summary notice and payment of amount equal to Your Salary [and the taxable value (as shown in Your then most recent P11D) of any contractual benefits to which You are entitled under this Agreement] for the unexpired period of Your [fixed term/notice entitlement pursuant in clause []], after deduction of tax and other statutory deductions as required by law.

2 Place of work

2.1 Your usual place of work shall be [the Employer's [London] [head office/factory/premises] currently at [specify address].

3 **Salary**

3.1 You shall be paid a salary (which shall accrue from day to day) at the rate of £... per [hour/day/week/month/year] (or such other rate as may be agreed from time to time) [which shall be inclusive of any directors' fees payable to You for holding any office in or on behalf of the Employer] (the 'Salary').

3.2 The Salary shall be payable [by credit transfer to Your nominated bank account/specify method of payment] in arrears by equal [monthly/weekly] instalments on or about the [insert day] of every [week/month].

3.3 The rate of Salary payable to You shall be reviewed annually in [about] [insert month] of each year] by the [Board/Employer] (except in circumstances You have served or received notice of termination of Your employment) and may be increased by such amount, if any, as the [Board/Employer] decides [having regard to Your performance, contribution to the Employers' business, inflation and other factors].

4 **Pension and retirement**

4.1 [The Employer has no pension scheme applicable to Your employment [but shall facilitate access by You to a designated stakeholder pension scheme to the extent it is required to do so by law/On [commencement of/completion of [] months'] employment] [the Employer shall contribute an amount equal to [..%] of Your Salary each year in equal monthly instalments at the end of each month into Your [stakeholder/ HMRC-approved private] pension scheme [provided You contribute at least []% of Your Salary each year] to such plan]/You shall be entitled to membership of the Employer's [contributory/non-contributory] pension scheme [details of which are set out in the booklet entitled [insert title]/a copy of which can be obtained from [specify source]]. Your membership of the pension scheme shall be subject to and in accordance with its trust deed and rules from time to time.

4.2 A contracting out certificate is [not] in force for the purposes of Part III of the Pension Schemes Act 1993 in relation to Your employment.

4.3 The Employer's normal retirement age for employees [of Your grade] is [65].

5 **Normal Hours**

5.1 Your normal hours of work are from [8.30] am to [6] pm on every day of the week except Saturday and Sunday]/from [am/pm] to [am/pm] on [Monday to Friday inclusive/specify days of week to be worked].

5.2 You are entitled to a [paid/unpaid] [lunch/rest] break to be taken between [1 pm] and [2 pm] each working day.

6 **Holiday**

6.1 You are entitled to [24] working days' holiday [including/in addition to all [English public holidays/statutory and customary holidays] observed by the Employer] in each holiday year, which runs from [insert date] to [insert date]. Your holiday entitlement for each month during which You are employed in the holiday year when Your employment commences shall be 1/12th of Your annual entitlement.

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EMPLOYMENT: DRAFTING NOTE:

STARTING EMPLOYMENT: EMPLOYMENT CONTRACT:

PRECEDENTS: AGREEMENT - BASIC EMPLOYMENT CONTRACT

This employment contract is drafted to comply with the requirements for a written statement of particulars, which must be given to an employee within two months of the commencement of the employment i.e. this contract is doubling up as the written statement. ERA 1996 allows for a contract (or a letter of engagement) to provide the information required in a written statement. In this document the employee acknowledges receipt of this as a written statement of particulars in any event. ERA 1996, s 7A

For a sample written statement see Agreement - written statement of particulars. These drafting notes identify:

- where a clause in this contract provides the required information for a written statement, and
- where it is possible to refer the employee to another document for the required information.

For a more complex contract for a senior executive and/or director see Agreement - executive service contract. This contract is very basic: you should also refer to Agreement - written statement of particulars for more detailed provisions, and to the other individual precedent clauses identified below.

Parties

In relation to the employer's name, check that it is accurately recorded and that its status is clear — for example is it a limited company, a limited partnership, a partnership, a sole trader or a trading association? If acting for an employee where the company name is vague or you have reason to doubt it is a limited company, consider obtaining a company search. ERA 1996, s 1(3)(a)

If employed by a partnership note that continuity of employment is preserved on a change of partners. ERA 1996, s 218(5)

Clause 1.1

Note that this clause in the second set of square brackets contains some flexibility for the employer to be able to change the employee's job. If acting for the employee, you should try to exclude this wording if possible. Clauses allowing for future changes will be strictly construed. A lesser form of flexibility is to allow the employer to allocate additional or other duties to the employee to meet the employers' business needs — this is covered in clause 1.2 below. ERA 1996, s 1(4)(f)

Clause 1.2

If acting for an employer, include the words in the first set of square brackets, but exclude the wording in the third set of square brackets regarding compatibility with status. If acting for the employee, delete the wording regarding ancillary duties in the first set of square brackets, but include the wording in square brackets regarding compatibility with status in the third set of square brackets. If acting for the employee, bear in mind that this sort of flexibility clause is very common and it is likely to be unreasonable to try to resist it completely.

Clause 1.3

The contract must state the start date and the date the continuous employment started. These dates are normally the same unless for example the contract has commenced but there is then a delay to the physical start date, for example where the employee is off sick on their expected start date. The continuous employment date will not however be the same if previous service eg with another group company which is an associated employer, counts — see clause 1.5 below. If the continuous employment date is different from the start date then you should exclude the reference to continuous employment in this clause and ensure the different continuous employment date is included in clause 1.5. ERA 1996, s 1(3)(b)-(c)

Clause 1.4

This clause either provides for an indefinite contract, terminable by either party by notice or provides for a fixed term. If drafting an indefinite contract terminable by notice, you will need to choose the 'Your employment shall continue until terminated by [notice provisions]' option. Notice must be at least statutory minimum notice. See also our precedent for a statutory minimum notice clause increasing with continuity of employment. ERA 1996, s 1(4)(e), 1(4)(g)

This clause then gives three options in square brackets for a fixed term and when the fixed term will end, as follows:

- a fixed term starting and ending on a specified date, or
- an initial fixed term starting on a specified date and ending on a specified date, but providing for the contract to continue after the fixed term and be then terminable on notice (the 'and thereafter' option in square brackets combined with the wording in the final set of square brackets). This option means that the parties have the certainty of an initial fixed term during which neither party may terminate, but the contract thereafter turns into an indefinite term which is terminable by notice in the usual way, or
- a fixed term starting on a specific date and ending on a specific date, but during that period the parties can terminate on notice (the 'subject to earlier termination' option in square brackets but excluding the wording at the end of the clause regarding notice expiring on or after the end of the fixed term, as not applicable). This option means that if the parties do not serve a notice of early termination the contract will automatically terminate on the expiry date of the fixed term

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