DOCUMENT NAME:	Absence Management Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law of absence management.

Disclaimer

This document has been prepared on the basis of what is required by law at April 2023 what is good practice, and our understanding of common issues. This document is not intended to be a comprehensive guide, may not be suitable for your circumstances and should not be considered a substitute for the advice of a lawyer. You agree you use this document at your own risk in these respects.

Absence Management

Factsheet

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1 Legal terms explained

"Disability" under the Equality Act 2010 is a physical or mental impairment that has a substantial and long term, adverse effect on someone's ability to do normal daily activities;

"Occupational Health Provider" is usually an external medical expert who can support you in assessing an employee's health position and who can answer work-related health questions, for example to explain the nature of an employee's health condition, how this might impact their ability to carry out their role and what adjustments may be appropriate to support them in the workplace;

"Permanent Health Insurance" or **"PHI"** is a form of insurance that is usually taken out by an employer to provide income/benefits to employees if they become permanently incapacitated and unable to work (subject to specific rules under the scheme).

2 Introduction

2.1 It is important that you monitor absenteeism, which can have a serious adverse effect on your business and its employees.

2.2 Absenteeism generally falls into two categories which will be considered in this factsheet:

- Persistent, short-term absenteeism or poor time keeping which is unrelated to any underlying medical conditions
- Long-term absenteeism which is usually related to an underlying medical problem.

3 Short-term absence

3.1 Short-term absence and lateness can be problematic because it can be disruptive and also harder to arrange cover than in cases of long-term absence.

3.2 You must ensure that you keep a written record of all absences and review the information regularly to identify whether individuals are exceeding accepted levels of absenteeism. Holding return to work meetings can be an effective absence management tool and ensures that the reason(s) for absence are captured.

3.3 When considering absence records, you should look for any patterns in absences e.g. Mondays only.

3.4 You should identify what you consider to be the levels of unacceptable absence and communicate this to all staff via an absence policy. You might include *"trigger"* points at which formal absence management procedures will be instigated (e.g. three separate occasions of absence within a rolling three month period).

3.5 Once any triggers are met, or absence levels are deemed to be at an unacceptable level, the first step will usually to hold an informal discussion with the employee to understand the reasons for their absence and check for any underlying health conditions/ reasons where a formal meeting/warning might not be the right way to manage the absence e.g. disability or pregnancy-related absences.

3.6 As far as intermittent absence which is not related to any underlying health problem is concerned, this will be dealt with under your absence management procedure or disciplinary procedure (if you do not have a dedicated absence management process) whereby the employee is invited to attend formal absence management meetings and staged warnings given. However, intermittent absences can sometimes be linked by an underlying medical condition or *"disability"* for the purposes of the Equality Act 2010 and reflect short-term lapses in coping strategies. In that case, the absences should be dealt with in the same way as long-term absences due to an underlying health problem (see the section on long-term absence below). Please also see the separate factsheet on Discrimination for more information.

3.7 When holding formal absence management meetings at which a formal warning may be issued, you should give the employee the right to be accompanied by a Trade Union representative or colleague. Following the meeting, you should confirm the length of any warning and any further absence triggers which would lead to the next stage of the absence management process (e.g. a further formal meeting/next stage of warning) being invoked. Your absence management policy will provide further details if you have one in place and should always be followed.

3.8 If you have exhausted the staged warning process e.g. the employee has a live final written warning and their absence levels do not improve, usually the next stage will be to consider dismissal. In most cases, you must issue at least two warnings before dismissal can be considered as the final stage.

3.9 Where an employee has two or more years' service, they have the right not to be unfairly dismissed and you should take advice to ensure a full and fair dismissal process is followed and to limit the risk of legal claims.

3.10 It is important to note than an employee does not need any length of service to bring a discrimination claim (and compensation can be unlimited in such claims). Therefore when dismissing for reason of absence (i.e. capability) you should be satisfied that the absence is not related to any protected characteristic e.g. disability, pregnancy etc. Again, we recommend taking legal advice before proceeding with any dismissal.

4 Long-term absence

Long-term absence can have an adverse impact on your business and it's important to manage this proactively to support the individual in returning to work, wherever possible.

If you have a specific absence management policy, it may define what is meant by *"long-term"* absence and how to manage this. Generally, absences of a month or more are taken to be long-term.

4.1 Keeping in touch

It's important to keep in touch with the absent employee to stay up-to-date with their current health position and to discuss ways to support the employee to return to work, wherever possible.

It's good practice to agree the level of contact with the employee and by what means e.g. every other week by telephone. This can avoid disputes about the level of contact and its reasonableness.

If the employee is absent due to work-related stress, you may find that employees resist contact with you. Employees who are absent from work **must** maintain a reasonable level of contact and you can suggest alternative methods if the employee is finding this difficult (e.g. contact in writing, or via a family member).

It is a good idea to hold regular welfare meetings which can take place at the office, the employee's home, or a neutral location. If attending the employee's home, always go accompanied.

4.2 Carry out investigations

When holding welfare meetings, it's important to understand:

- The nature of the employee's health condition e.g. how it impacts them and their ability to carry out their role?
- Any timescales for improvement and the likelihood of a return to work and when?
- Any adjustments you could make, or alternative roles, which would support the employee in returning to work?
- Any other support the employee needs to facilitate a return to work?
- Are fit notes up-to-date?
- Is the employee's health condition likely to meet the test for "disability" under the Equality Act 2010? (If so, you will need to ensure you meet your legal obligations in this regard and we recommend you take additional advice).

4.3 Obtaining a medical report

As part of your investigations into the employee's current health position and support required, it will often be necessary to obtain a medical report. Obtaining a medical report will provide you with a clearer picture on the employee's health, particularly if the employee is not forthcoming with information. The medical professional can also provide practical advice and guidance on support measures which could facilitate a return to work.

The medical professional will also be able to give their opinion on whether an employee is likely to meet the test for "disability" under the Equality Act 2010 and suggest any reasonable adjustments to ensure you meet your legal obligations in this regard.

A recent medical report is also necessary when considering dismissal of an employee on ill health grounds as part of a fair dismissal process (more on this below).

You can obtain a medical report as follows:

- Write to the employee's own GP or specialist. You should obtain the employee's written consent to approach their GP/specialist to obtain a report
- Obtain an occupational health report. You do not require the employee's consent to obtain a report from such a doctor, but they will probably need to see the employee's medical

records. If so, you should obtain the employee's written consent to disclosure of health records which can be a simple letter signed by the employee. The employee may also need to co-operate with arrangements for an examination, and it is therefore important that you explain your reasons for requesting a medical report in advance.

Generally, occupational health providers are more geared up to supporting employers whereas GP reports can sometimes be less pragmatic/employee-biased. Whoever you are instructing, you should instruct the medical professional in writing. Often, the occupational health provider will have a standard form which you must complete with the necessary information.

An employer is not required to undertake a detailed medical examination themselves, all the employer is required to do is ensure the correct questions are asked and answered and so the questions put to the medical professional are key and we recommend you take advice to get these right as they would vary from situation to situation.

4.4 Once the medical information is received, you should arrange to meet with the employee to consider the contents of the report on a one to one basis.

4.5 Generally when managing long-term absence, you are trying to understand how quickly someone will return, what needs to happen in order for them to return, how you can help and how likely it is that, on return, the employee can resume stable attendance. You can explain to the employee that you are there to support them, but their absence is also having an impact on the business which cannot be sustained indefinitely. A reasonable timescale must be set over which the employee must return to work in some capacity. What is *"reasonable"* is fact specific and your legal adviser can assist you with advice on this.

5 Long-term absence dismissal

5.1 An employee's poor health may mean that, ultimately, the employee is incapable of carrying out their job. The law recognises that there may come a point in time when you can fairly dismiss an employee on ill health (capability) grounds if there is no reasonable prospect of improvement.

5.2 Before you can contemplate terminating the employment of an employee in these circumstances, you will need to have considered the following:

- The nature of the illness
- The length of the absenteeism
- The likelihood of the illness continuing/further recurrences
- The prospects of the employee returning to work in some capacity
- The need for the employee's work to be done by that employee
- The impact of absences on others who work with the employee
- If there are any adjustments you can make to the employee's role to enable them to return to work in some capacity
- If there are no adjustments you can make to their role, if there are any suitable alternative roles within the organisation that would enable the employee to return to work
- The difficulties that the employee's absence causes to your business
- Whether the employee has been told that his/her ill health may ultimately result in dismissal.

5.3 You will have to investigate the facts, and consult with the employee before making any decisions.

5.4 It is also vital that you follow a full and fair dismissal procedure and you should take legal advice to ensure that you take the right steps **before** embarking on any process.

6 What investigations should you carry out?

6.1 You must first make proper investigations to ascertain the employee's true medical position, by finding out:

- The nature of the employee's medical condition
- The prospects of the employee recovering
- The timescales for that recovery
- The extent to which any recovery will be sufficient for the employee to return to his existing role
- What assistance can be given, or adjustments made, by you to facilitate the employee's return either in the existing role or some other job.

6.2 You should obtain this information by speaking to the employee and, in most cases, by obtaining a medical report as set out above.

6.3 If there is no reasonable prospect of the employee returning to the existing job in the foreseeable future because of ill health, you must consider whether any adjustments can be made to that employee's existing duties, or working arrangements to facilitate a return to work. This may, for example, involve removing (either temporarily or permanently) particular aspects of the employee's job which can no longer be carried out by the employee because of ill health, or altering working hours.

6.4 It may well be that the employee is classed as "disabled" within the meaning of the Equality Act 2010. The legislation sets out a specific test for identifying whether or not this is the case. As above, a medical report can provide an opinion on whether or not an employee meets the test for "disability" and your legal adviser can also offer guidance on this. If the employee meets the criteria for disability then you should seek further advice as there will be further legal obligations to consider and meet.

6.5 For example, if an employee is disabled you are under a specific duty to consider whether there are any adjustments that can reasonably be made to the employee's role or working environment to assist the employee returning to work. This might involve purchasing equipment to assist an employee, or adapting the physical working environment to accommodate the employee's disability. Any adjustment must be *"reasonable"* taking into account the size and resources of the employer.

6.6 Whether or not the employee has a disability, if it proves impracticable to make adjustments for the employee to return to his existing role, you will in any event have to consider with the employee what alternative roles might be available within the business or any associated business.

6.7 Once you have obtained recent medical advice and consulted with the employee about this medical advice, you may decide that the employee **will** be returning to work in some capacity in the reasonably foreseeable future. If this is the case, you should meet with the employee to confirm the outcome of the consultations with them and set a date for the expected return to work and any agreed adjustments. You should also confirm this in writing.

6.8 If there is a possibility of a return to work in the foreseeable future, but the position is not certain, it may be appropriate to delay your decision to dismiss and give the employee one *"final chance"* to demonstrate sufficient improvement. For example, if the employee is not currently well enough to return to work but medical investigations suggest that they are likely to be able to return in a reasonable further period. Again, what is *"reasonable"* is highly fact-specific, looking at factors including (but not limited to) the impact of absence on the business, the employee's length of absence to date and you should take legal advice in these circumstances.

6.9 If there is no prospect of a return in any capacity in the reasonably foreseeable future, you will have to make a decision as to whether you can sustain the continued absence of the employee and, if so, over what period. Other factors may also be relevant for consideration including the employee's length of service, past performance and ill-health record, and what action you have taken in the past to ensure a consistent approach.

6.10 You should also take into account any detrimental effect on business operations that the employee's continued absence is causing and balance that against the need to act fairly towards the employee in terms of giving them enough time and support to facilitate a return.

6.11 Any dismissal must only take place after you have carried out the above steps and must be carried out following a full and fair dismissal procedure. Before you carry out a dismissal on these grounds, you should take legal advice.

6.12 If dismissed, the employee is entitled to receive full notice pay and benefits, even if any entitlement to contractual sick pay has expired. The only exception to this is where the employee's contractual notice entitlement exceeds the statutory entitlement by seven days or more.

7 What should I do if the employee is entitled, or will shortly become entitled, to PHI (Permanent Health Insurance)?

7.1 If the employee is entitled to PHI, the law implies a term into the contract of employment that you will not without some other substantial cause, dismiss that employee on the grounds of ill-health so as to prevent them receiving benefits under the policy.

7.2 We recommend that prior to initiating the dismissal of an employee who has the benefit of PHI, you take legal advice or you may face a costly legal claim.

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Last review: April 2023

DOCUMENT NAME:	Changing Terms and Conditions of Employment Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets, including a separate factsheet on employment contracts.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on changing terms and conditions of employment.

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Changing Terms and Conditions of Employment

Factsheet

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1 Legal terms explained

"Contract of employment" is a legally binding agreement setting out the terms under which the employee agrees to work for the employer;

"Constructive dismissal" occurs when the employee resigns and can show that they were entitled to do so because of their employer's conduct. A constructive dismissal may be both an unfair and wrongful dismissal as the employer has also breached the employee's contract of employment;

"Employment terms" are terms that are considered to exist in the employment contract whether or not they have been included in a formal written employment contract. These can be expressly agreed or implied from a number of different sources including common law;

"Mutual obligation of trust and confidence" refers to the obligations owed in an employment relationship between the employer and the employee;

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2 Can an employer change an employee's terms and conditions?

2.1 The terms of a contract can generally only be changed with the agreement of both parties.

2.2 However, it may well be that an employee's contract of employment already makes provision for the employer to change certain terms. The employer may be permitted, for example, to require the employee to carry out different duties, or to require an employee to work from another location. However an express contractual authority doesn't automatically make the proposed changes lawful.

2.3 These *"flexibility"* clauses must be exercised reasonably and in a way that does not breach the mutual obligation of trust and confidence. For example, in the relocation example above, giving reasonable notice and providing reasonable relocation expenses (if applicable) and showing alternatives have been considered

2.4 The employer will also need to have regard to employees' individual circumstances. For example, if using a flexibility clause to change hours of work for a team of individuals, this might indirectly discriminate against female employees in the team who statistically are more likely to have childcare commitments and may, for example, need to finish at a particular time to collect their children. These issues will need to be considered carefully and, to proceed lawfully, the employer would need to be able to evidence a legitimate business aim which they have applied proportionately (i.e. there weren't any less impactful alternatives for the employee which would still achieve their aim).

2.5 If there is any doubt about whether the employer has the power to make these changes within the contract of employment, further advice should be sought.

3 Can an employer agree the change with the employee?

3.1 If the employer does not have the power to enforce changes under the contract of employment, the contract can only be changed by agreement.

3.2 The key, as ever, is to consult with the affected employee(s) with a view to reaching agreement to the proposed changes. Consultation will involve explaining the reasons for the changes, the implications for the employee, and listening to and responding to any objections raised by the employee. Agreement may necessitate some *"consideration"* for the change – a lump sum payment to compensate the employee for the loss of a benefit, for example.

3.3 If the employer can reach agreement with the employee, they should confirm the change to the contract in writing, by way of an updated contract of employment, or letter of variation, to avoid any confusion.

4 What if you cannot agree?

4.1 If any employee will not agree to a change in terms and conditions after all due consultation, one option is to impose the changes without consent. However, this is not something we would recommend as this risks being in breach of contract and the employee potentially resigning from their employment and claiming constructive unfair dismissal (if they have two or more years' service). However, in some circumstances, an employee can give their implied consent to the change through their conduct e.g. by continuing to work under the new terms without protest. However, this is a risky approach to take.

4.2 As such, the employer may decide to take the ultimate step of terminating the existing contract of employment and offering employment to the employee on the revised terms. This approach is also not without risk and should be seen as a *"last resort"* after all other consultation has failed.

4.3 Before taking that route, the employer must ensure that there are reasonable grounds to do so. For example:

- the employer has a sound business reason for pressing ahead with the proposed change and that the changes are no more than they reasonably require
- the employer has carefully balanced up the pros and cons of the change for the business and the employee, including listening to and considering fully the employee's concerns
- the employer has considered any alternatives to dismissal
- the employer has reached a reasonable conclusion that the interests of the business in pressing ahead with the changes outweigh any disadvantage to the employee
- the employer has fully consulted with the employee about the proposed change, listened to their concerns and responded to them, considered any proposals they may have raised
- the employer has ensured that the employee is aware that the consequences of their continued refusal to agree may be the termination of their employment
- the employer has taken legal advice.

4.4 If that is the case, the employer should invite the employee to a final consultation meeting to discuss the proposal to dismiss them from their employment and re-engage them with the right to be accompanied at that meeting and, if there is still no agreement, serve full contractual notice on the employee to bring their existing contract to an end.

4.5 At the same time the employer should offer in writing to re-engage the employee under the revised terms from the date of the expiry of the existing contract, or earlier if agreed.

4.6 If the employee has a change of heart at any stage and accepts the new terms, then the variation will take effect as above.

4.7 If the employee still refuses to accept the offer of re-engagement on new terms, the termination of the old contract will amount to a dismissal in law. Any employee with more than two years' service could then challenge the reasonableness of the employer's actions by way of a claim for unfair dismissal. As such, it is important to take legal advice when terminating and re-engaging to get the process right and reduce the risk of a costly unfair dismissal claim (and possible discrimination claim).

4.8 ACAS has produced useful guidance for employers on making changes to employment contracts which can be accessed here.

5 Collective consultation obligations

5.1 In some circumstances the employer may need to consult with appropriate representatives, in addition to consulting with employees on an individual basis.

5.2 For example, if employees' refusal to accept the new contract may result in the dismissal of 20 or more employees at one establishment in a 90-day period, collective consultation obligations may also arise. The employer hould take further advice in these circumstances to ensure these obligations are met – particularly as a failure to collectively consult can result in huge financial penalties for employers.

5.3 Furthermore, if the organisation has a recognised Trade Union then there may be a collective agreement in place which requires consultation with the Trade Union about any proposed changes to employees' contracts (regardless of the number of employees involved). It may also be the case that the Trade Union can agree changes on behalf of those employees covered by the collective agreement. Again, legal advice should be taken to understand the remit of any such agreement and obligations before beginning any process.

6 Changing terms and conditions following a TUPE transfer

6.1 It can be difficult to make changes to terms and conditions following a TUPE transfer.

6.2 TUPE protects employees' rights where there is a transfer of a business or a service from one entity to another. Under TUPE legislation, the employment contracts of the transferring employees transfer with them, including all existing rights and liabilities under that contract. Therefore, it's likely that employees who transfer will have different terms and conditions to those who are already employed by the organisation.

6.3 In those circumstances the employer may want to harmonise terms (i.e. bring them in line with their current employees) and it is possible to do so if the changes are more beneficial to the transferring employees and they agree to this (e.g. more generous holiday entitlement). However, where any changes leave the transferring employees in a worse position, any such changes will be void if the sole or principal reason for the change is the transfer itself. There are some limited exceptions to this if the employer can show that they have an economic, technical or organisational reason (**"ETO reason"**) involving a change in the workforce.

6.4 An "ETO reason" might include an organisational restructure or a change to the way in which the work is carried out (processes/equipment). In addition to this there must also be "a change in the workforce" which could be redundancies, changes to work location etc. This is a complex area (which extends beyond the scope of this factsheet) and further legal advice should be sought.

6.5 Of course, if a contract change is not related to the transfer in any way, then TUPE does not prevent this. And, as time goes on post-transfer, valid reasons shall arise for changing terms and conditions of those transferring employees which are completely unrelated to the transfer, for example due to changing business needs (and in which case the usual process for changing terms and conditions of employment should be followed as above).

7 Potential claims

7.1 If the employer seeks to amend the contract in a substantial or fundamental way without terminating the old employment and offering new employment, the employee may:

- Accept the breach and carry on working under the new terms
- Refuse to work under the new terms
- Stand and sue, which means they continue to work but state that they object to the new terms and work under protest and bring an action against the employer for any losses
- Resign and claim constructive unfair dismissal.

7.2 Where the employer terminates the existing contract and substitutes a new one, the employee may:

- Refuse to accept the new offer of employment and leave. They may also be able to claim unfair dismissal
- Stand and sue, which means they accept the new offer of employment but work under protest and bring an action against the employee for breach of contract, unlawful deduction from wages or a claim for unfair dismissal.

8 Remedies

Under general contractual principles, if a party to a contract breaches one of its terms, the other can sue for damages and in some cases terminate the contract.

8.1 Unfair dismissal

If an employee is dismissed from their employment as part of a dismissal and re-engagement exercise, they can bring an unfair dismissal claim if they have worked for the employer for at least two years.

For more information, please refer separately to our Unfair Dismissal Factsheet.

8.2 Constructive dismissal

In the context of an employment contract, an employee can treat the employment relationship as being at an end where the employer has committed a fundamental breach of contract. An employee can bring a constructive unfair dismissal claim if they have worked for the employer for at least two years.

For more information, please refer to the separate factsheet on Constructive Dismissal.

8.3 Wrongful dismissal

In addition, any dismissal by the employer in breach of contract will give the employee the right to bring a claim for wrongful dismissal, which can be brought in an Employment Tribunal or County or High Court. There are important limitations to the amount that can be awarded for wrongful dismissal in the Employment Tribunal, (currently £25,000) and claims can only be issued if the employee's employment has ended.

The most common type of wrongful dismissals are:

- Dismissal with no notice or inadequate notice where the employee has not committed an act of gross misconduct
- Termination of a fixed term contract before it is due to expire
- Dismissal in breach of a contractual redundancy or disciplinary procedure.

8.4 Unlawful deduction from wages

Employees may also be able to claim for lost or reduced earnings in the Employment Tribunal. The time limit is three months from the failure to pay or from the last in a series of underpayments or non-payments. This is known as the 'primary limitation period'.

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation which suspends the primary limitation period. For more information, please refer separately to our Unfair Dismissal Factsheet.

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1 Legal terms explained

"Claimant" is a person bringing a claim at an Employment Tribunal;

"Employment Tribunal" is part of the Ministry of Justice. Employment Tribunals determine the validity of disputed employment cases and award compensation;

"ET1 form" is the form required to begin a claim at an Employment Tribunal;

"Ex-gratia payment" is a payment an employer makes when under no legal obligation to do so such as a one-off 'thank you payment' for outstanding work;

"Respondent" is usually an employer defending a claim at an Employment Tribunal;

"Repudiatory breach of contract" is a breach that the law regards as sufficiently serious to justify termination of employment by an employee.

2 What is constructive dismissal?

Employment law has developed the concept of a constructive dismissal, as distinct from an actual dismissal of an employee by their employer.

A constructive dismissal occurs where the employer does not expressly dismiss the employee but the employee resigns and can show that they were entitled to do so because of their employer's conduct towards them.

3 Circumstances in which an employee may be constructively dismissed

Normally, to claim unfair dismissal an employee must show that they have been dismissed. However, an employee who resigns may be treated as being dismissed if they resign as a result of the employer's conduct towards them. This is often referred to as a repudiatory breach of contract.

The following rules apply:

- The employee must have a good reason to resign
- The employer's conduct must be such that the employee is able to resign with or without notice and treat their contract as being at an end and resigns because of that conduct
- The employee must resign promptly

It is for the employee to prove that the employer's conduct was sufficiently serious to entitle them to resign. If the employee cannot show the breach was sufficiently serious, they will not be treated as having been constructively dismissed.

The employer's conduct may be one particularly serious breach, but it may also consist of a series of cumulative actions building up over time. This is sometimes referred to as the "last straw".

Examples of breaches which may entitle an employee to resign and consider themselves constructively dismissed are where the employer:

- Reduces an employee's pay without their agreement
- Varies an employee's benefits or duties without their agreement
- Discriminates against the employee
- Bullies, sidelines or otherwise treats the employee unfairly

Many cases are not clear-cut and the employee will have to show that:

- The employer's conduct breached either an express or implied term of their contract (it is not necessary for the term to be set out in writing)
- The breach is sufficiently serious
- The employee resigned in response to that breach
- The resignation was made within a reasonable time of the breach itself

By way of example, many employees in constructive dismissal claims argue that, as a result of their employer's conduct over a period of time, they no longer have any trust and confidence in their employer.

An employee will only be constructively dismissed if they actually resign as a result of the conduct concerned. If the employee decides to stay on despite the employer's conduct, and then leaves for another reason, this will not amount to a constructive dismissal.

The employee will also not be able to claim if they wait too long before resigning, as the employee may be treated as waiving the breach of contract and agreeing to continue in employment.

4 Eligibility to claim

An employee who believes that they have been constructively dismissed may be able to bring a claim for constructive unfair dismissal. To be eligible to claim constructive unfair dismissal, an employee must:

- Be an "employee" not a "worker" (this will exclude independent contractors and most agency staff)
- Not be within an excluded category of employee such as the police, armed forces or certain other public servants
- Have at least two years' continuous service

5 Time limit for bringing a claim

The claim must be submitted within three months less one day of the termination date of employment. For example, if the last day of employment was 3 October the claim would have to be submitted to the Tribunal by 2 January. This is known as the 'primary limitation period'.

If the employee resigns on notice, the termination date is the date on which notice expires. If the employee resigns without notice, or the employer asks the employee to leave immediately and a payment in lieu of notice is made, the termination date is the last day of employment (i.e. the last day that the employee worked).

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation. Employees are required to contact ACAS on or before the 'primary limitation date' to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

Early Conciliation enables the employee and employer to try and resolve the dispute without the need to bring a claim in the Tribunal. If the parties both agree to conciliate, an ACAS conciliator will act as a 'go between' and try and reach agreement. There is no need for the employee to communicate directly with their employer unless they wish to do so.

This process usually lasts for six weeks. If Early Conciliation fails, the employee will be issued with an Early Conciliation Certificate which the employee needs before they can issue a claim in the Employment Tribunal.

Time limits for bringing a claim are paused from the day after the employee submits the Early Conciliation Form until the date the employee receives a Certificate. Generally the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk

6 Compensation

If the employee succeeds with their claim for constructive unfair dismissal, the Employment Tribunal will determine whether to award a remedy. There are three remedies available and the employee can choose which remedy to ask for.

6.1 Re instatement

This permits the employee to return to the same job. However, it is rare for employees to ask to be reinstated to the same job they have left and it can undermine their credibility.

6.2 Re engagement

This is where the employee is re-employed within a different role within the same company. Again requests for re-engagement are rare in constructive unfair dismissal claims.

A reinstatement or reengagement order will generally require the employer to make up all the employee's lost salary and benefits for the period between dismissal and the date of reinstatement, taking appropriate account of sums already received including pay in lieu of notice, ex-gratia payments and earnings from any other employment.

6.3 Compensation

If reinstatement or re-engagement is not ordered, the tribunal will award compensation instead.

In the vast majority of successful unfair dismissal claims, the remedy awarded is compensation.

The employee may receive compensation for:

- Breach of contract
- Unfair dismissal

More information about how compensation is calculated in unfair dismissal claims is available in our factsheet on unfair dismissals.

7 Compensation for breach of contract

Often when an employee claims constructive dismissal, they leave without working their notice. If so, the employee is entitled to issue a separate Tribunal claim for their notice pay, which is known as a claim for breach of contract. The claim can be included on the same ET1 form.

The compensation for that loss is designed to put the employee in the financial position that they would have been in if they had been(unfairly) dismissed in accordance with their contract. This means that the employee is entitled to receive their net pay and the value of any benefits that they would have received if they had worked throughout their notice period.

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Last review: April 2023

DOCUMENT NAME:	Discrimination Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on discrimination.

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Discrimination

Factsheet

irwinmitchell

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1 Legal terms explained

"Direct discrimination" occurs where someone with a protected characteristic is treated less favourably than someone without that protected characteristic;

It also covers situations where someone is treated less favourably because of their association with a person with a protected characteristic or where the person is thought to have a protected characteristic even if they do not (perception discrimination);

"Indirect discrimination" occurs where an employer operates what often appears to be a neutral provision, criteria or practice but which has a negative impact on certain employees or groups of employees who share one of the protected characteristics as the individual concerned;

"Harassment" occurs where a person engages in unwanted conduct towards another person related to a protected characteristic, which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;

"Sexual harassment" means unwanted verbal, non verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;

"Victimisation" occurs where a worker is subjected to a detriment because s/he does or might do "protected acts" such as bringing discrimination claims, complaining about harassment or being involved in some way with another employee's discrimination complaint such as giving evidence on their behalf;

"Disability" means a physical or mental impairment that has a substantial and long-term adverse effect on an individual's ability to carry out normal day-to-day activities. The effect must have lasted for 12 months or more or be likely to last 12 months or more. An effect that is likely to recur is treated as continuing for this purpose;

"Equal pay" is a legal concept that implements the principle that men and women should receive equal pay for equal work; and

"Employment Tribunal" means part of the Ministry of Justice, Employment Tribunals determine the validity of disputed employment cases and award compensation.

2 What is discrimination?

Discrimination laws aim to create a "level playing field" so that people are employed, paid, trained and promoted because of their skills and ability to do the job. The laws relating to discrimination are found in the Equality Act 2010 ('Equality Act').

The Equality Act applies to all areas of employment including job adverts and the recruitment process, terms and conditions of work, conduct during employment and social events within a work context. It also applies to dismissals and any work related matters arising after employment has ended such as giving references.

However, the Equality Act is not solely an employment measure. It covers non-employment areas such as discrimination in the provision of goods and services, public procurement, discrimination in private members' club rules and protection for mothers breastfeeding in public.

The Equality Act applies to England, Wales and Scotland. Northern Ireland has its own, similar provisions. The Equality Act applies to workers who work partly outside Great Britain but it will usually not apply if the work is to be done wholly outside Great Britain, although there are some exceptions.

3 Who is protected?

The Equality Act protects most people including employees, workers, former employees, job applicants, directors and partners being treated unfairly because of the following reasons, known as protected characteristics:

- Sex
- Race
- Disability
- Age
- Religion and belief
- Sexual orientation
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity.

4 Liability for discrimination

If an employer, discriminates against their employees they will be liable for their actions.

Employers can also be held responsible for the wrongful actions of their employees and agents and in limited circumstances, third parties. Claims may also be brought against the actual person responsible for the discrimination such as a manager, fellow employee or agent.

Under the Equality Act, anything done by an employee in the course of their employment is treated as having also been done by the employer regardless of whether the employee's acts were done with the employer's knowledge or approval. This is known as vicarious liability.

There is a defence available to the employer, if they can show that they took all reasonable steps to prevent the employee from doing the discriminatory act in question. This will usually involve putting in place an equal opportunities policy, providing regular training on it and taking a robust approach to any evidence of discrimination in the workplace.

5 Forms of discrimination

There are various types of discrimination and other unlawful conduct set out in the Equality Act that apply to most (and in some cases all) of the protected characteristics: These are:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation
- Instructing, causing, inducing and aiding discrimination.

There are also addition types of discrimination that relate to disability discrimination which are set out in further detail below

5.1 Direct discrimination

The following can amount to direct discrimination:

- An employee is treated less favourably because of the race of someone with whom the employee associates
- A job applicant is treated less favourably because employer perceives that the employee is of a certain race
- Employee is treated less favourably where employer refuses to promote a long-standing employee because they are considered to be too old for the new post even though they may have all of the necessary qualifications and experience.

Direct discrimination cannot be justified direct discrimination. This means that once an employee can show they have been subjected to direct discrimination, employer will not be able to provide an excuse for the discriminatory behaviour if that is deemed to be the reason for the treatment.

The only exception is in the case of age discrimination which can be justified provided employer can show that the discrimination is a proportionate means of achieving a legitimate aim. This means that the employer must have a good reason for their actions and must be able to show that there is no other (less onerous) way of achieving the same result.

This is often called the objective justification test and is more easily explained by using examples:

- A building company has a policy of not employing under 18s on its more hazardous building sites. The aim behind this policy is to protect young people from health and safety risks associated with their lack of experience and their generally less developed physical strength. This aim is supported by accident statistics for younger workers on building sites and is likely to be a legitimate one. Imposing an age threshold of 18 would probably be a proportionate means of achieving the aim if this is supported by the evidence. Had the threshold been set at 25, the proportionality test would not necessarily have been met and would be likely to be regarded as discriminatory
- A haulage company introduces a blanket policy forcing its drivers to stop driving articulated lorries at 55, because statistical evidence suggests an increased risk of heart attacks over this age. The aim of public safety would be a legitimate one that is supported by evidence of risk. However, the company would have to show that its blanket ban was a proportionate means of achieving this objective. This might be difficult, as medical checks for individual drivers could offer a less discriminatory means of achieving the same aim.

5.2 Indirect Discrimination

The following can amount to indirect discrimination:

- A requirement to be less than 5' 8" would discriminate against men who generally are taller than this
- A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. This criterion disadvantages certain religious groups as both Muslim women and Sikh men cover their hair
- If an employer were to advertise a position requiring at least five GCSEs at grades A to C without permitting any equivalent qualifications, this criterion would disadvantage everyone born before 1971, as they are more likely to have taken O level examinations rather than GCSEs. This could therefore amount to age discrimination.

The employer may be able to justify indirect discrimination if they can show that they have a justifiable reason for imposing the condition and that there is not a less discriminatory way to achieve the same objective. This is more easily explained by using the following example:

- A food manufacturer has a rule that beards are forbidden for people working on the factory floor. Unless it can be objectively justified, this rule may amount to indirect religion or belief discrimination against the Sikh and Muslim workers in the factory. If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate
- However, the employer would need to show that the ban on beards is a reasonable means of meeting health and safety requirements. When considering whether the policy is justified, an Employment Tribunal is likely to examine closely the reasons given by the employer as to why they cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, such as by wearing beard guards.

6 Harassment

Harassment need not be targeted at an individual and can consist of a general culture that for instance appears to tolerate the making of, for example, sex related, ageist or racist comments.

Unwanted conduct covers a wide range of behaviour including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

The word unwanted means the same as unwelcome or uninvited. It does not mean that a person has to object to the conduct before it is considered to be unwanted. A serious one-off incident can also amount to harassment.

Harassment includes intentional bullying, but will also include less obvious forms of bullying. It may involve nicknames, teasing, name calling, being "sent to Coventry" or other behaviour which the victim finds upsetting.

The following examples can amount to harassment:

- A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. This could amount to harassment related to disability
- A worker is subjected to homophobic banter and name calling, even though his colleagues know he is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

The behaviour does not necessarily have to be directed at an individual to constitute harassment.

- For example, during a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She may be able to bring a claim for harassment even though the remarks were not specifically directed at her.

6.1 Sexual harassment/less favourable treatment

Sexual harassment occurs when a worker is treated less favourably by their employer because they submitted to or rejected sexual contact. It also applies to unwanted conduct that is related to the worker's sex or to their

gender reassignment. In all cases, the worker has to show that the unwanted behaviour creates a hostile or intimidating working environment.

- For example, a shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for a promotion that she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim for harassment.

6.2 Third party harassment

The position is more complicated when a worker is harassed in the workplace by a third party, such as a customer or visitor.

An employee may be able to argue that their employer's failure to prevent third-party harassment amounted to unwanted conduct.

Employees should notify their employer if they are subjected to any form of discrimination by third parties by raising a formal grievance. The employer should investigate this and, if there are grounds to do so, take appropriate action (e.g. asking the customer not to return to the workplace).

7 Victimisation

Victimisation occurs where a worker is subjected to a detriment because they have or might do protected acts such as bringing discrimination claims, complaining about harassment or being involved in some way with another employee's discrimination complaint such as giving evidence on their behalf.

Detriment can take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or where it put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, being excluded from opportunities to attend training or overlooked in the allocation of discretionary bonuses or performance related awards.

For example, a non-disabled worker gives evidence on behalf of a disabled colleague at an Employment Tribunal hearing where disability discrimination is claimed. If the non-disabled worker is subsequently refused a promotion because of that action, they would have suffered victimisation.

8 Disability

8.1 The meaning of disability

The Equality Act sets out a technical meaning of disability that does not necessarily correspond with common perceptions of disability or with other legal approaches.

Some conditions are expressly deemed to be disabilities. These are:

- Blindness, severe sight impairment, sight impairment and partial sightedness
- Severe disfigurements, with the exception of un-removed tattoos and piercings
- Cancer, HIV infection and multiple sclerosis.

In all other cases a disability must be a physical or mental impairment which has a long-term and substantial adverse effect on a person's ability to carry out normal day to day activities.

8.2 Physical or mental impairment

A physical impairment is any physical difficulty. This can include muscular weaknesses or cramps as well as more obvious conditions such as being unable to walk.

A mental impairment can cover a wide range of problems relating to mental functioning including what are often known as learning disabilities and depression.

8.3 Long term

A condition will be long term if it has lasted at least 12 months or is likely to last at least 12 months or for the rest of the person's life (if shorter).

A condition will still be long term even if in remission and not displaying symptoms, if it is intermittent or likely to recur, such as in the case of conditions such as epilepsy.

8.4 Substantial effect

The condition must be more than minor or trivial. There are three types of case in which a person's ability to carry out normal day-to-day activities is deemed to be substantially adversely affected, even if at the

relevant time, the effect may in fact be minor or non-existent. These are where:

- The substantial effect is likely to recur
- The condition is progressive
- Treatment is reducing the effect of the impairment.

8.5 Effect must be on day-to-day activities

The inability to perform normal day-to-day activities focuses on normal activities that are carried out by most people on a fairly regular basis such as walking, driving, shopping, reading, writing, getting washed and dressed rather than specialist activities required for particular jobs.

In the case of mental and emotional illnesses the categories of day-to-day activities most likely to be affected are memory, the ability to concentrate, learn or understand and the perception of physical danger.

There are some conditions that are expressly stated not to be impairments (and therefore are not disabilities). These are:

- Addiction to alcohol, nicotine or any other substance*
- Tendency to set fires, steal or to physically or sexually abuse other people
- Exhibitionism, voyeurism and having tattoos and body piercings.

*Although these conditions cannot be disabilities, it should be borne in mind that the employee may have other physical or mental impairments alongside these conditions which may amount to a disability e.g. serious depression.

8.6 Discrimination arising from disability

This is where:

- A worker is treated unfavourably because of something arising in consequence of their disability
- The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.

For example, if an employee's visual impairment means that he cannot work as quickly as colleagues, and employer dismisses him because of his low output, this dismissal will be discrimination arising from disability unless employer can objectively justify it.

To objectively justify the treatment, employer must produce evidence to support their assertion that it is justified and not rely on generalisations.

If employer genuinely does not know that the employee has a disability, they will not be liable for this type of discrimination. However, they cannot simply ignore the issue. Instead they must do all that can reasonably be expected to find out if a worker has a disability. In some cases, employees may exhibit signs and symptoms of a disability but not think of themselves as a "disabled" person. In other circumstances, an employee may deliberately try to conceal the real reason for their absences. This can be tricky and employers should make reasonable enquiries about the employee's health including speaking with them and seeking a report from an Occupational Health provider or the employee's GP. We recommend employers take appropriate legal advice to ensure they meet your legal obligations fully in this regard.

8.7 Reasonable adjustments

Employers have a duty to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. For example:

- Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, employers must take reasonable steps to avoid the disadvantage
- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, employers must take reasonable steps to avoid the disadvantage
- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, employers must take such steps as it is reasonable to have to take to provide the auxiliary aid.

This could include:

- Making adjustments to premises

- Allocating some of the disabled person's duties to someone else or transferring them to another job
- Altering the disabled person's hours or place of work or allowing time off for treatment
- Providing additional training, supervision or support
- Providing special equipment, or the services of a reader or interpreter
- Modifying testing or assessment methods to avoid disadvantaging the disabled person.

If employer fails to make reasonable adjustments, this constitutes discrimination against the employee.

Employers are only obliged to make reasonable adjustments if doing so will actually assist the employee. They are not obliged to make adjustments where, even if implemented, an employee will still not be able to carry out his or her duties, or where they are prohibitively expensive or time consuming.

Employers must pay for the cost of making an adjustment subject to this being "reasonable" (taking into account the size and resources of your business). They cannot pass this cost onto the employee, although they may ask the employee to apply for funding help through the access to work service.

The employer must have knowledge of the employee's disability to trigger the duty to make reasonable adjustments. However, they cannot simply ignore the issue and must make enquiries, where for example, it is aware that an employee is suffering from some kind of medical condition.

Obtaining a medical report (Occupational Health or the employee's own GP) can help employers to determine what adjustments would support the employee and alleviate any disadvantage(s) suffered by them in the workplace. It is sometimes the case that there are no further reasonable adjustments that can be made and which a medical report can also confirm.

8.8 Pre-employment health questions

Generally, employers must not ask about a job applicant's health including any disability before offering them work. There are some exceptions to this including where it is necessary to establish whether the applicant will be able to carry out a function intrinsic to the work.

Employers can make any job offer conditional upon completion of a satisfactory health questionnaire. If the responses to the questionnaire indicate that the applicant has a disability, employers will be under a duty to consider making reasonable adjustments to enable them to do the job.

9 Pregnancy and maternity

Specific provisions in the Equality Act protect women from discrimination at work because of pregnancy or maternity leave. These apply during the protected period, which starts when a woman becomes pregnant and continues until the end of her maternity leave or until she returns to work if that is earlier.

It is unlawful discrimination to treat a woman unfavourably because of her pregnancy, a pregnancy related illness or because she is taking or wishes to take maternity leave.

Unfavourable treatment will only be unlawful if employer is aware the woman is pregnant. They must know, believe or suspect that the employee is pregnant. Knowledge can be acquired by formal notification by the employer or through the office "grapevine".

A pregnant employee does not have to inform her employer of her pregnancy until the 15th week before the expected week of childbirth. However, she will not be able to benefit from protection for pregnancy related discrimination and other rights such as the entitlement to paid time off for antenatal care and risk assessments until her employer is made aware that she is pregnant.

Employers must not demote or dismiss a woman or deny her training or promotion opportunities because she is pregnant or on maternity leave. Nor must they take into account any period of pregnancy related sickness absence when making a decision about her employment.

For example, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the any of the following reasons:

- The fact that because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed

whether permanently or on a fixed term contract
- The pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations
- The costs to the business of covering her work
- Any absence due to pregnancy related illness
- Her inability to attend a disciplinary hearing due to morning sickness or other pregnancy related conditions
- Assuming that a woman's work will become less important to her after childbirth and giving her less responsibility or less interesting work as a result.

10 Equal pay

The right to equal pay applies to both men and women. Anyone employed under a contract personally to do work is entitled to enjoy contractual terms that are as favourable as those of someone of the opposite sex in the same employment, if they are employed on like work or work of equal value. These concepts have been interpreted by case law.

The law achieves this by implying an equality clause into a woman's contract of employment, which operates so as to replace her less favourable terms with the equivalent more favourable terms of a man's contract or vice versa.

However, the sex equality clause does not operate if employers show that the difference in contractual terms is due to a material reason that is neither directly nor indirectly sex discriminatory. However, a reason that is, on the face of it, unrelated to the sex of a person but which, in practice, has a disproportionate adverse impact on the opposite sex will need to be objectively justified by employers.

There are also specific provisions aimed at protecting women's pay during pregnancy and maternity leave. A woman who has taken maternity leave must not lose the benefit of any pay rise that she would otherwise have had, in calculating either her maternity pay or her pay on return to work. In addition, she must not lose out on any bonus that she would otherwise have received during her maternity leave, although this is subject to some restrictions. This is referred to as the "maternity equality clause".

11 Exceptions

There are some circumstances where discrimination is lawful. These are limited and are known as occupational requirements and apply to claims concerning recruitment, access to promotion, transfer or training and dismissal. They are summarised below:

Occupational requirement - general exception

This exception is available where, having regard to the nature or context of the work being of a particular sex, race, disability, religion or belief, sexual orientation or age (or not being a transsexual person, married or a civil partner) is an occupational requirement.

For example, employers can restrict applications based on a person's sex if it is crucial to the post:

- Where it is necessary for realism, such as acting or modelling
- Where there are considerations of privacy or decency, such as working in a public changing room or providing intimate personal care
- When a charity is providing a benefit to one sex only, in accordance with its charitable instrument.

There are also exceptions for:

- Organised religion
- Employers with a religious ethos
- Armed forces
- Employment services.

These exceptions are subject to complex rules not covered in this fact sheet.

12 Positive discrimination

In general, positive discrimination that favours someone with a protected characteristic is unlawful. However, there are limited exceptions for what is called positive action, such as allowing members of a disadvantaged group access to facilities for training or encouraging people of a particular protected characteristic to apply for a specific job where their characteristic are under-represented.

In addition, employers can recruit or promote someone from a disadvantaged group but only if the individual is as qualified as other candidates. This is subject to complex rules not covered in this factsheet.

13 Redundancy during maternity and other statutory leave

If a redundancy situation arises during an employee's maternity leave and it is not practicable by reason of redundancy for the employer to continue to employ her under her existing contract, the employee is entitled to be offered a suitable alternative vacancy in preference to other employees at risk of redundancy. The same provisions apply to employees taking adoption leave, additional paternity leave or shared parental leave.

14 Remedies

If an individual has been discriminated against because of any of the protected characteristics they can bring a complaint in an Employment Tribunal. The Tribunal may make a declaration of the employee's rights under the Equality Act, make recommendations as to what actions their employer should take concerning the discrimination and/or award compensation to the employee.

15 Time limit for bringing a claim

Most employment claims can only be brought in the Employment Tribunal which imposes very strict time limits. Discrimination claims have to be issued in the Employment Tribunal within three months of the act complained of. This is known as the "primary limitation date".

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation. Employees are required to contact ACAS on or before the "primary limitation date" to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

Early Conciliation enables the employee and employer to try and resolve the dispute without the need to bring a claim in the Tribunal. If the parties agree, an ACAS conciliator will act as a "go between" and try and reach agreement. There is no need for the employee to communicate directly with their employer unless they wish to do so.

This process usually lasts for six weeks. If Early Conciliation fails, the employee will be issued with an Early Conciliation Certificate which the employee needs before he/she can issue a claim in the Employment Tribunal.

Limitation is paused from the day after the employee submits the Early Conciliation Form until the date the employee receives a Certificate. Generally the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk

Calculating the correct time limits for bringing a discrimination claim can be complex and we recommend that specialist advice is obtained.

If a claim is not lodged on time, it is unlikely that the employee will be able to pursue it.

16 Amount of compensation

There is no limit on the maximum award for compensation in discrimination cases. Compensation is calculated so as to put the employee in the financial position they would have been in if they had not been discriminated against. This will include compensation for losses incurred if the employment has been terminated.

Compensation can include a payment to represent the distress and upset caused. This is known as an injury to feelings award. In addition, the employee can receive compensation for psychiatric injury or other injury suffered as a result of the treatment received.

Although there is no cap on the amount of compensation that can be awarded, the tribunal has to follow strict guidelines which means that very few successful claimants receive the substantial sums sometimes reported in the media.

17 Grievances

In most cases, the employee should try and resolve any discrimination by following their employer's grievance procedure.

If the employee has submitted a grievance and employer has not dealt with it properly, a tribunal may increase the compensatory award by up to 25%. Likewise, if an employee has failed to co-operate with the grievance procedure the compensatory award may be reduced by up to 25%.

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Last review: April 2023

DOCUMENT NAME:	Employment Contracts Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on employment contracts.

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Employment Contracts

Factsheet

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1 Legal terms explained

"Employment contract" is a legally binding agreement setting out the terms under which the employee agrees to work for the employer;

"Parties" means the employee and employer entering into a contract of employment;

"Employment Rights Act (ERA) 1996" is an Act of Parliament providing a number of rights to employees. It sets out the information which must be given give to all employees;

"Employment terms" are terms that are considered to exist in the employment contract whether or not they have been included in a formal written employment contract. These can be expressly agreed or implied from a number of different sources including common law;

"Variation" is a change to the contract of employment that is usually agreed between the employer and employee;

"Unilateral variation" means variations that are imposed by one party, usually the employer, without the agreement of the other party. They may not be effective without formal agreement. Agreement can sometimes be implied if a variation goes unchallenged for a period of time;

"Job description" means the job title and the detailed description of the duties, responsibilities and the skills required to fulfil those duties; and

"Grievance and disciplinary procedures" means formal methods for dealing with the grievances of employees and disciplining employees.

2 The employment relationship

In order for there to be an employment contract, there has to be a genuine employment relationship between the parties.

The ERA 1996 states that an employee is an individual who works under a contract of employment. Importantly, the employment contract must be a contract of service as opposed to a contract for services (which is not employment). A contract for services generally means that the individual is self-employed.

An individual will be an employee if the following conditions are met:

- The employee agrees to use their own skills to do the job, usually in exchange for pay. This means that the employee cannot ask someone else to do his or her job if they are absent for whatever reason
- The employee agrees that whilst performing their job, they are under the employer's control. This means that the employer can tell the employee what they want the employee to do and how to do this
- The other provisions of the contract are consistent with it being a contract of service.

3 Terms of the employment contract

The relationship between the employer and the employee is primarily a contractual one governed by the terms and conditions agreed between them and contained in a contract of employment. These are called the express terms.

In addition, employees have a large number of statutory rights and restrictions as well as terms that are implied into their contracts, which are known as implied terms. They may also be subject to other terms and agreements that have been collectively agreed with a union or representative body.

Legal requirements

As from 6 April 2020, employees are entitled to a written statement outlining their main employment terms. This requirement applies to all employees and workers and from day one. This means that even casual staff or those on zero-hours contracts must receive a statement on or before their first day of work. This statement is sometimes referred to as a "Section 1 Statement".

Once an employee has unconditionally accepted a job offer, the contract is binding and the employer cannot unilaterally withdraw the offer.

The parties are bound by the terms of the employment contract until it ends, usually by giving notice, or until the terms are varied, usually in an agreement between the parties.

4 Express terms

The employer must provide an employee with the following details of their employment in writing:

- The employee's and employer's name
- The job title or a brief job description
- The date when employment began and how long it will continue unless it is to continue indefinitely
- The pay rate and how often it will be paid
- The hours of work
- The holiday entitlement
- Where the employee will be working and if this is in more than one place, the other locations
- Sick pay arrangements
- Notice periods that both parties have to give to terminate the contract
- Some information about disciplinary and grievance procedures
- Any collective agreements that affect the employee's terms and conditions of employment
- Details of the pension scheme available to the employee.

Since 6 April 2020, the following additional information is now also required:

- Working pattern and if hours or days may be variable
- Entitlement to paid leave other than paid holiday such as maternity and paternity leave
- Any probationary period and its length
- Any mandatory training provided by the employer and training for which they will not bear the cost.

This information may be included in one or more documents such as the letter offering the job or in the contract of employment.

Some employers provide new starters with a copy of the staff handbook or other documents that contain the policies that apply to them. For example, the disciplinary and grievance procedures are often contained in a separate policy document or company handbook rather than being set out in full in the contract of employment.

If the employer does not offer one of the terms set out above, the contract or Section 1 Statement or other document must confirm that it is not offered. For example, if the employment is not subject to any collective agreements, the employer should confirm this in writing. The employer should not just leave this information out.

Employers are required to keep the section 1 statement or other documents up to date. Generally they should notify the employee/worker of any changes to it within a month of the change being made. If employers wish to make significant changes to an employee's terms and conditions, they will also have to undertake further steps to ensure that employees are treated fairly and lawfully.

The contract of employment will often include a number of other terms. Senior employees can expect to have contracts that contain additional information setting out their entitlement to benefits such as personal health insurance or a company car.

In addition, their contracts will often include restrictions that apply during their employment as well as for a limited period of time afterwards. Restrictions that apply after the employment ends are known as restrictive covenants.

5 Implied terms

It is unusual for a contract of employment to contain all of the terms of that contract. Implied terms are deemed to form a necessary part of the contract of employment and impose obligations on the employer and the employee.

5.1 Employee's obligations

The most common implied terms relevant to employees are:

- The duty to render faithful service, sometimes referred to as a duty of fidelity. This means that the employee is under a duty not to act in a way that is contrary to the interests of the employer
- The duty to obey lawful and reasonable orders
- The duty to exercise reasonable care and skill
- The duty not to destroy the relationship of trust and confidence between the employee and employer.

5.2 Employer's obligations

The main implied terms affecting the employer are:

- The duty to provide reasonable support
- The duty to provide a safe system of work and a safe workplace
- The duty not to destroy the relationship of trust and confidence between the employee and employer.

5.3 Implied duty of mutual trust and confidence

The relationship of employer and employee is regarded as one based on mutual trust and confidence between the parties. It is a wide ranging obligation and can overlap with other implied terms.

Employees bringing claims for constructive dismissal most frequently rely on breaches of the implied term of trust and confidence.

6 Incorporated terms

The employer and the employee may agree to incorporate contract terms from other sources. The most common are those contained in:

- Collective agreements
- Works rules
- Disciplinary procedures or codes.

Once incorporated they are as much a part of the contract as any other term.

Most policies and procedures contained in the employer's Staff Handbook will be non-contractual. This makes it easier to update the policies (as changes to contractual policies usually need to be agreed – more on changing terms and conditions below). Further, any deviation from a policy which is contractual by either the employer or the employee could amount to a breach of contract (which could lead to claims in certain circumstances), whereas a deviation from a non-contractual policy would not. As such, employers should think carefully before incorporating any policies or rules into employee contracts – this will be appropriate for some terms or policies but not others. Further advice should be sought from us where in doubt.

An employee may expressly agree to incorporate certain terms. For example, the contract of employment may expressly refer to other documents, such as national or local collective agreements that set pay scales and working hours.

Alternatively, incorporation may be implied, for example where there is a clear custom that terms of collective agreements are incorporated into contracts of employment where it is obvious that the parties would have agreed to it.

7 Statutory terms

The law imposes a number of terms that are deemed to be included in a contract of employment. The most important are:

7.1 Equality clause

This is intended to ensure that men and women receive the same pay for the same work or work of equivalent value.

7.2 Statutory minimum notice period

Employees are entitled to certain minimum periods of notice on termination by the employer. Employees with over one month's service are entitled to receive one week's notice for each year worked, subject to a maximum of 12 weeks' notice.

7.3 Working time

The working time regulations impose a contractual obligation on employers to ensure that workers do not work for more than 48 hours on average per week and it also sets out minimum rest periods and holiday requirements.

In most cases, the employer cannot exclude these terms by a contrary express term in the contract of employment. However, an employee can contract out of the 48-hour working week.

8 Changing an employee's terms and conditions

Please see our separate factsheet on changing terms and conditions.

Disclaimer

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Last review: April 2023

DOCUMENT NAME:	Family Friendly Rights Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on family friendly rights.

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Family Friendly Rights

Factsheet

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1 Legal terms explained

"Statutory maternity leave" means a period of maternity leave granted to an employee, which consists of 26 weeks ordinary maternity leave and 26 weeks additional maternity leave;

"Statutory maternity pay" means pay at a certain level payable to a woman who takes maternity leave or stops working due to childbirth provided:

(a) she has at least 26 weeks continuous service at the end of the qualifying week, which is the fifteenth week before the expected week of childbirth;

(b) is still employed during that week;

(c) SMP is payable for up to 39 weeks

"Statutory shared parental leave" means a period of leave available to eligible employees and their qualifying partners. Shared parental leave is available for up to 50 weeks during the first year of the child's birth or placement for adoption;

"Shared parental pay" means pay available to eligible parents who elect to take shared parental leave. It is available for up to 37 weeks and can in some cases be shared between the parents;

"Statutory parental leave" means unpaid leave which can be taken by either parent, subject to certain qualifications;

"Statutory paternity leave (SPL)" means paid leave of up to two weeks which can be taken by the partner of the child's mother or adopter;

"Statutory paternity pay (SPP)" means Pay at a certain level paid for up to two weeks' ordinary paternity leave;

"Statutory adoption leave (SAL)" means up to 52 weeks' leave entitlement for the adopter of a child;

"Statutory adoption pay (SAP)" means pay at a certain level for up to 39 weeks of adoption leave;

"Statutory bereavement leave" means up to two weeks' leave available to parents and others following the death of a child under the age of 18 or stillborn after 24 weeks.

"Statutory bereavement pay" means pay at a certain level payable for up to two weeks' available to those eligible for statutory bereavement leave who have 26 weeks service.

2 Maternity rights and leave

Statutory maternity leave of up to 52 weeks is available to all employees, regardless of how long they have worked for their employer.

In addition, pregnant employees or employees on maternity leave benefit from a number of protections and have a right to:

- Paid time off to attend antenatal appointments
- Health and safety protection whilst pregnant and breastfeeding
- The right to return to the same job or to a suitable alternative job in some circumstances
- Priority for alternative employment in redundancy cases that happen during maternity leave
- Protection from dismissal, detriment or discrimination because of their pregnancy or maternity leave.

2.1 Maternity Leave

A pregnant employee does not have to inform her employer of her pregnancy until the fifteenth week before the expected week of childbirth. However, she will not be able to benefit from rights such as the entitlement to paid time off for antenatal care and risk assessments until her employer is made aware that she is pregnant.

Statutory maternity leave is for 52 weeks. It is made up of two periods:

- Ordinary maternity leave of 26 weeks
- Additional maternity leave of 26 weeks.

Employees must take a minimum of two weeks' maternity leave starting with the day on which they give birth. This is known as compulsory maternity leave and the period is extended to four weeks for factory workers.

2.2 When can an employee start statutory maternity leave?

The employee can choose to start her maternity leave on any day, provided that it is not before the beginning of the eleventh week before her expected week of childbirth. She must notify her employer of the date she

wishes to commence maternity leave no later than the end of the fifteenth week before the expected week of childbirth.

However, maternity leave will automatically start:

- If the employee gives birth before her ordinary maternity leave has started. Where this occurs her maternity leave starts automatically on the day after the date of the birth
- If the employee is absent from work due to a pregnancy-related illness after the beginning of the fourth week before the expected week of childbirth, but before the date she has notified, her maternity leave begins automatically on the day after the first day of her absence.

Employees can work for up to 10 keeping in touch days during their statutory maternity leave period without bringing that leave to an end if they wish to do so, to attend training or take part in any other work related activity.

2.3 Rights during ordinary and additional maternity leave

The contract of employment continues throughout ordinary and additional maternity leave unless either party expressly ends it or, in the case of a fixed-term contract, it expires without renewal.

During statutory maternity leave, an employee has a statutory right to benefit from the terms and conditions which would have applied to her had she been at work, except for the terms providing for her pay. Therefore, all her other benefits such as the accrual of annual leave, health club membership, permanent health insurance or use of a company car will continue.

2.4 Transferring some maternity leave to fathers

A woman who returns to work before the end of their 52 week maternity leave period can, subject to meeting qualifying conditions, elect to end their maternity leave early and opt into shared parental leave. This will enable working parents to share any remaining leave in the year after their child's birth in a flexible way.

Shared parental leave enables parents to take time off together to care for their child and return to work in between taking periods of leave.

2.5 Statutory maternity pay

An employee is entitled to statutory maternity pay if she has:

- Worked for her employer for at least 26 weeks up to and including the fifteenth week before the expected week of childbirth
- Her average earnings are at least the lower earnings limit for national insurance purposes.

Statutory maternity pay is payable for 39 weeks at the following rates:

- The earnings related rate, which is 90% of her average earnings for the first six weeks
- The prescribed rate is either £172.48 (from 2 April 2023) or 90% of normal weekly earnings if lower for the remaining 33 weeks.

These rates are usually adjusted each April.

A woman who does not qualify for statutory maternity pay may qualify for maternity allowance or other social security payments.

NB Some employers provide enhanced payment returns for their employees. Information about this is usually found in the employer's Maternity Policy or Company Handbook.

3 Shared parental leave

The amount of shared parental leave available is calculated using the mother's entitlement to maternity or adoption leave (52 weeks). If they reduce their maternity or adoption leave then they, and/or their partner may opt in to the shared parental leave system and take any remaining weeks as shared parental leave. For example, a mother may decide to take three months maternity leave and nine months shared parental leave.

Shared parental leave must be taken in blocks of at least one week. It cannot be taken in 'odd days'.

3.1 Who is eligible?

Only employees can apply for shared parental leave. To qualify, the employee (either the mother or her partner) must have been continuously employed for at least 26 weeks before the fifteenth week before the baby is due and must remain so.

Their partner must also be **"economically active"** which means that they must have worked (although not necessarily as an employee) and earned a minimum amount over a qualifying period. Therefore, if the employee is the sole 'bread winner', he/she will not be eligible for shared parental leave.

Shared parental leave is only available to:

- The child's mother or father
- Their spouse or civil partner
- A partner living with the eligible mother or father in a family relationship
- It is not available to the parent's mother or child, a grand-parent, sibling, aunt or uncle or niece or nephew.

3.2 Notification requirements

An eligible mother or adopter who wants to take shared parental leave, or enable her eligible partner to take it, must end her maternity or adoption leave early. She can do this by returning to work before the end of her maternity leave period, or by giving notice that she intends to end it at a future date. This is called a **"curtailment notice"**.

Eligible employees will also have to give their employers a notice which confirms that they are entitled to take shared parental leave. This is called a **"notice of entitlement"** and must include the following information:

- State how many weeks of shared parental leave (and pay) will be taken
- How much leave (and pay) each parent intends to take
- When they expect to take their leave (although this is not binding)
- Be signed by the eligible co parent.

In addition, employees must give their employers a separate written notice at least eight weeks before they wish to take leave. This is known as a 'booking notice' and must be signed by the eligible co-parent.

Employees can only give their employers three notices to book leave or to vary a previously agreed pattern of leave, unless their employer agrees to extend this. This means that employees must carefully consider the arrangements they need if they are to avoid 'wasting' a notice.

3.3 Do employers have to agree to the leave periods requested?

Employees who ask to take a single block of leave are entitled to take it. However, if an employee asks in a single notice to take leave in different blocks (for example, two weeks in June, three weeks in September etc.), their employer does not have to agree to it.

3.4 Keeping in touch days

Employees who take shared parental leave are entitled to take up to 20 shared parental leave in touch days (known as **"SPLIT"** days) in addition to any keeping in touch days they have taken during maternity leave.

4 Shared parental pay

Employees taking shared parental leave may also be eligible to receive shared parental pay for up to 37 weeks. However, shared parental pay will only be paid if there is any remaining statutory maternity or adoption pay that would otherwise be available which can, subject to certain rules, be transferred to the other parent or utilised by the primary carer.

Shared parental pay is paid at a flat rate only - £172.48 from 2 April 2023 or 90% of normal weekly earnings if lower. Therefore women requesting shared parental leave in the first six weeks of their maternity leave would lose out on the enhanced element of statutory maternity pay.

5 Paternity leave

Working fathers and same sex partners may have the right to take up to two weeks' paid time off work within 56 days of the date of childbirth or the date of placement of an adopted child. The entitlement is called statutory paternity leave.

To be entitled to statutory paternity leave following the birth of a child an employee must be:

- The biological father of the child
- Be married to the mother
- Be the civil partner of or be the partner of the child's mother.

A partner is someone who lives with the mother in an enduring family relationship but who is not a relative. It does not matter whether the person is of a different sex or the same sex as the mother.

The right to take paternity leave and additional paternity leave is only available to employees who have been employed by the same employer for at least 26 weeks by the end of the fifteenth week before the expected week of childbirth.

If the leave is in respect of an adopted child, the employee must have been employed by the same employer for at least 26 weeks at the point when the adopter of the child, usually the employee's spouse or partner, is notified by the adoption agency that they have been matched for a child.

Paternity leave is not available to workers including agency and casual staff.

5.1 Notice requirements

Employees wishing to take paternity leave must provide their employers with written notice giving the following information:

- The expected week of the child's birth/adoption
- How long the employee wishes to take as paternity leave
- The date on which the employee wishes leave to begin and in adoption cases, the date the adopter was matched with the child.

There are special rules for situations where the child is born early or late.

5.2 Statutory paternity pay

The weekly rate of statutory paternity pay which applies on birth and adoption is the lesser of:

- The prescribed rate which is £172.48 from 2 April 2023
- 90% of the employee's normal weekly earnings if lower than the prescribed rate.

6 Adoption leave

Adoption may be undertaken by single people, married couples, civil partners, same-sex couples and unmarried couples. When two people adopt as a couple, they can elect who is to be the adopter for the purposes of taking statutory adoption leave and receiving statutory adoption pay. The adopter's partner or spouse may also be entitled to statutory paternity leave and pay.

The entitlement is called statutory adoption leave and is for a period of 52 weeks. An employee may also be entitled to paid statutory adoption pay of up to 39 weeks.

The right to take statutory adoption leave is available to all employees regardless of how long they have worked for their employer.

It is not available to workers including agency and casual staff.

6.1 Taking statutory adoption leave

Employees adopting a child within the UK can start statutory adoption leave:

- From the date the child starts living with them
- Up to 14 days before the date they expect the child to start living with them
- As soon as the child is placed with foster parents who are fostering for adoption.

Statutory adoption leave can start on any day of the week.

The statutory requirements vary slightly where the child is being adopted from outside the UK. Employees adopting a child from overseas should obtain separate guidance.

6.2 Notice requirements

Employees wishing to take statutory adoption leave must tell their employer within seven days of being matched for a child that they wish to take statutory adoption leave and provide the following details:

- When they expect the child to be placed with them
- When they wish statutory adoption leave to start.

6.3 Surrogacy

Qualifying employees who meet the relevant qualifying criteria are entitled to one period of adoption leave (52 weeks) regardless of how many children are born or expected as part of the same pregnancy.

Employees wishing to take statutory adoption leave for a child born from a surrogacy relationship must, in or before the fifteenth week before the expected week of the child's birth, give their employer notice stating the expected week of the child's birth.

6.4 Statutory adoption pay

To be entitled to statutory adoption pay an employee must meet the eligibility criteria.

The rates of statutory adoption pay are:

- The earnings related rate, which is 90% of the employee's average earnings for the first six weeks
- The prescribed rate, which is £172.48 from 2 April 2023 or 90% of normal weekly earnings if lower for the remaining 33 weeks

These rates are usually adjusted each April.

6.5 Restrictions

There is no right to statutory adoption leave or pay for:

- Private adoptions
- Step-parents who adopt their step-children
- Foster parents who subsequently adopt their foster children by means of a court order.

7 Parental leave

Parental leave is a form of statutory unpaid leave available to some working parents and is in addition to statutory maternity, paternity and adoption leave.

Those who qualify are entitled to up to 18 weeks in total and may be split into a number of shorter periods, unlike maternity, paternity or adoption leave. However parents cannot take more than four weeks' parental leave per year.

Parental leave is available to birth and adoptive parents and also to anyone who has or expects to have parental responsibility for a child provided they:

- Have been employed by the same employer for a year or more
- Are an employee with a contract of employment.

It is not available to workers including agency and casual staff.

The right applies for each child. For example, an employee with one qualifying child may normally take 18 weeks' leave and an employee with two children will be entitled to 36 weeks' in total.

Parental leave must be taken before the child's eighteenth birthday.

All employees must make a written request to take parental leave. Minimum notice periods apply and it must be taken in blocks of one or more weeks except where the child is disabled.

8 Compassionate leave

From 6 April 2020 parents will be able to take up to two weeks bereavement leave to help them cope with the death of a child under the age of 18 or stillborn after 24 weeks.

The right applies to biological parents (and their partners), adoptive parents, and, in some cases to other adults such as foster parents and family members who care for the child in their own home in the absence of the child's parents. Anyone with parental responsibility for the child will also be covered.

The right to take bereavement leave is a 'day one' right. However, parents must have worked for at least 26 weeks' to receive statutory bereavement pay. Statutory bereavement pay is paid at the same rate as other statutory family related payments, currently £172.48 per week, or 90% of their weekly earnings if lower.

For all other employees who have suffered a loss, there is strictly no legal right to be given time off paid or unpaid for compassionate leave, although many employers do have a policy for granting paid compassionate leave at management's discretion.

9 Emergency time off for dependants

Employees are entitled to take a short amount of unpaid time off work to deal with an emergency that is affecting a dependant. A dependant includes a spouse, partner, child, parent or anyone living in the employee's household as a family member.

A dependant may also be anyone who reasonably relies on the employee for help in an emergency, for example an elderly neighbour living alone who falls and breaks a leg and the employee is closest on hand to help.

The right is for a reasonable amount of unpaid time off to take necessary action, which may include finding someone to look after the dependant. A reasonable amount of time would not usually be longer than a day or two. Where a dependant child is sick, for example, the right does not extend to taking off the whole period of illness.

If the employee needs to take time off, he/she should let his employer know as soon as possible but does not have to do it in writing or provide evidence, unless the employer's policy requires him/her to do so.

10 Flexible working

All employees with at least 26 weeks' continuous service with the same employer have a statutory right to ask their employer for flexible working arrangements such as working part-time or changing their working pattern or hours.

An employee can only make one statutory request in any 12 month period.

Employees do not have to provide a reason for their request (although their employer may ask the employee for this information) and can ask to work flexibly for any reason. **It does not have to be linked to their childcare or other caring responsibilities.**

The application must be in writing and state that it is a request to work flexibly and set out details of the employee's current pattern of working and what changes he/she would like to make. The employee needs to prepare a carefully thought-out application as the onus is on the employee, not the employer, to explain the advantages and disadvantages of the arrangement and why it might work.

The employer must consider the application in accordance with the procedure set out below. The process must be concluded within three months unless the parties agree that it can take longer. However, it can reject the application if there are good business reasons for doing so.

10.1 Meeting

The employer should arrange to meet with the employee to discuss their request (unless it is able to grant the request without further discussion). The employee is entitled to be accompanied by a colleague or Trade Union Official at the meeting.

10.2 Decision

The employer must write to the employee either to agree to the new work pattern and set a start date or to provide grounds for the rejection of the application and set out the appeal procedure. The employer may agree to the new work pattern on a temporary basis to see if it will work in practice.

10.3 Appeal

If the employee appeals, the employer must invite the employee to a meeting to discuss their grounds of appeal and notify the employee of their decision in writing. The employee has the right to be accompanied at the appeal hearing.

10.4 Consequences of the employer accepting the request

Once a request is granted it will usually result in a permanent change to the contract of employment.

11 Employment contracts and family friendly rights

This fact sheet provides a basic overview of maternity leave, shared parental leave, parental leave, adoption leave, compassionate leave and flexible working rights. However it should be noted that rights over and above these basic rights can be provided for in a contract of employment or other contractual documentation.

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Last review: April 2023

DOCUMENT NAME:	Handling Disciplinaries Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets, including a separate factsheet on unfair dismissal.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on handling disciplinaries.

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Handling Disciplinaries

Factsheet

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1 Legal terms explained

"ACAS Code Practice on Disciplinary and Grievance Procedures" or **"ACAS Code"** is the statutory code reflecting good practice for dealing with disciplinary and grievance processes which employers and employees should follow.

"Constructive dismissal" occurs where an employee resigns and can show that they were entitled to do so because of their employer's conduct.

"Employment Rights Act 1996 (ERA 1996)" is an Act of Parliament providing the law on unfair dismissal and additional rights to employees;

"Unfair dismissal" is the dismissal of an employee by the employer without a fair reason for the dismissal and/or without following a fair dismissal process.

2 Introduction

2.1 Disciplinary procedures and rules must be implemented and observed to ensure fairness throughout your business. A poor disciplinary process can, depending on the facts of the case, lead to costly Employment Tribunal claims including unfair dismissal and compensation.

2.2 Even if you are issuing a first level warning, that warning could be the building block and foundation of a future disciplinary process which could ultimately end in dismissal and lead to a future claim for unfair dismissal (in which your disciplinary process is scrutinised by an Employment Tribunal). As such, it's important to ensure that you are following the right process at every stage of the disciplinary process.

2.3 Line managers with responsibility for employee handling disciplinaries should ensure that they are familiar with not only the organisation's disciplinary policy, but also the ACAS Code. Your disciplinary policy should reflect the minimum requirements of the ACAS Code.

2.4 Whilst a failure to observe the ACAS Code does not give an individual a claim itself, in any Tribunal claim which relates to a matter where the ACAS Code applies (essentially unfair dismissal, all discrimination and breach of contract claims, save for redundancy dismissals or dismissals on the renewal of a fixed-term contract), the Tribunal will have the power to increase or reduce "any award" it makes to a successful claimant by up to 25% to reflect either the employer's or employee's **unreasonable** failure to comply with the ACAS Code.

3 The basics principles of the disciplinary process

3.1 The first "golden rule" is to establish rules or standards of conduct that are expected of employees by specifying them in the disciplinary procedure or other formal communications with staff e.g. policies, codes of conduct, memos to staff etc.

3.2 If an employee fails to comply with those standards, it may be appropriate to initiate the disciplinary process. Without clear rules and policies, it can be more difficult to discipline staff if, for example, they state that they were not aware of the rules.

3.3 When initiating a disciplinary process, the following basic principles should be observed:

3.3.1 A full investigation must be carried out into any allegation of misconduct or non-performance;

3.3.2 The employee must be informed of the allegations against them;

3.3.3 The employee must be provided with the evidence against them;

3.3.4 The employee must be given sufficient time to formulate a response;

3.3.5 The employee must be given the opportunity to make representations in their defence at a disciplinary hearing;

3.3.6 The employee must be given the right to be accompanied at that hearing by a Trade Union representative or a work colleague (there is no general right to be represented by a lawyer);

3.3.7 Any new issues that arise at the disciplinary hearing must be investigated;

3.3.8 No employee should be dismissed for a first offence, except in cases of gross misconduct;

3.3.9 The employee must be given a right of appeal;

3.3.10 You must also follow the steps and timetable set out in your disciplinary procedure and familiarise yourself with its provisions at the outset.

4 Should you suspend the employee?

4.1 If appropriate, you may suspend the employee on full pay whilst the allegation(s) against the employee is investigated. However, the decision on whether or not to suspend must be carefully considered before suspending the employee, to establish first if there is a reasonable and proper cause to do so.

4.2 Suspension may be necessary if:

4.2.1 You consider there is a potential risk to the business were the employee to remain at work; and/or

4.2.2 You consider that the employee will interfere with witnesses, obstruct the investigation in some way, or otherwise be disruptive to the process; and/or

4.2.3 Relationships at work have or might have broken down.

4.3 However, in all cases, suspension should be handled sensitively and you should be careful not to give the impression of having pre judged the issue to the individual and to others. You should always seek advice before suspending an employee.

4.4 Suspension should not be a "knee jerk" reaction, nor should it be seen as some form of punishment for the employee, but rather as a means of carrying out an investigation unhindered as quickly as possible. If you do suspend an employee, you should confirm the suspension in writing making it clear that it is not a disciplinary sanction.

4.5 Any suspension should only continue for such period as is reasonable to complete the investigation and the decision to suspend should be kept under review if there is a lengthy investigation. To avoid any ambiguity or dispute, you should confirm the suspension in writing.

4.6 You should check to see if the employee's contract of employment has any terms relating to suspension and ensure that you comply with those. A failure to follow any requirements could leave you open to a claim for breach of contract and/or for the employee to resign and bring a claim of constructive dismissal. While it is better for an employer to have an express contractual right to suspend an employee, where the circumstances justify, you can still suspend without an express contractual right. Again, we recommend that you always take advice before suspending.

5 How should you investigate the allegation?

5.1 When investigating an allegation, you should act without delay and collect evidence whilst events are fresh in witnesses' minds. You should ensure that, wherever possible, the person investigating the offence is not the person who will conduct the disciplinary hearing.

5.2 You should speak to relevant witnesses and take signed and dated statements from them. You should also collect all the documentary evidence that might be necessary and consider whether other forms of evidence (CCTV, emails, electronic access records etc) might be relevant.

5.3 In most cases, the investigation will require holding an investigatory meeting with the accused employee to understand their version of events. In some limited cases however, the investigation stage will be a simple collation of evidence for use at the disciplinary hearing without the need to meet with the employee concerned. Usually there is no right to be accompanied at the investigation meeting and no need for a formal invite, although you should check your own disciplinary policy for any additional requirements.

6 What notification should you give to the employee of any disciplinary hearing?

6.1 If you consider there is sufficient evidence to proceed to a disciplinary hearing, you should write to the employee to invite them to a disciplinary hearing, setting out full particulars

of the allegation(s) of the misconduct alleged and the potential outcome of the hearing if upheld. In particular, if there is an allegation of potential gross misconduct, the employee should be warned that dismissal is one potential outcome.

6.2 The evidence collated during the investigation should be enclosed with this letter. It's a good idea for any statements and documentary evidence to be put together in a single bundle and numbered. Copies can then be distributed for all parties involved for ease of reference during the hearing.

6.3 The employee should be reminded of their right to be accompanied and informed of the time and venue and who is carrying out the hearing.

6.4 Any invite letter and enclosures should be dispatched in sufficient time before the disciplinary hearing to enable the employee to prepare their case.

7 How should you conduct the disciplinary hearing?

7.1 The employee should be given every reasonable opportunity to make representations in their defence at a hearing. If the employee chooses to be accompanied, their companion can address the hearing to put and sum up the employer's case, respond on behalf of the worker to express any views expressed at the meeting and confer with the employee during the hearing. The companion does not, however, have the right to answer questions on the employee's behalf, address the hearing if the employee does not wish it or prevent the employer from explaining their case.

7.2 You should go through all of the allegations and evidence gathered and discuss this with the employee, giving them the opportunity to make their case. It is not necessary for the employee to be given the opportunity to question witnesses who have given evidence against them directly, although they must be given details of all evidence against them. It may be necessary to adjourn to investigate further any challenges to witnesses' evidence that the employee raises.

7.3 The employee should normally also be allowed to call witnesses to support their case if they wish to do so.

7.4 You should take a full note of the hearing. Asking the employee to sign a copy of the notes to confirm that they are accurate is good practice and will prevent any later disputes arising about was or was not said (e.g. as part of any future Employment Tribunal process).

7.5 Once all the evidence has been considered and discussed (and the employee has made all the representations they wish to make), you should adjourn the hearing to deliberate the decision. The employee should be told that a decision will be sent in writing. You should keep notes of your deliberations, and also note down the main points of the evidence that have led you to make your decision. We do not normally recommend giving a decision at the hearing as it is important that you give full consideration to any sanction applied and you may ultimately face criticism from a Tribunal if a decision is made quickly at the hearing itself. Even if the case is straightforward, you should still adjourn the hearing.

7.6 When making your decision where facts are disputed you will need to make a finding based on the "balance of probabilities" – so deciding, based on the evidence, what is more likely than not to be the truth. This is a different approach to "beyond reasonable doubt" which is a criminal standard of proof.

7.7 If a sanction is issued, the disciplinary outcome letter should set out:

7.7.1 The nature of the misconduct alleged;

7.7.2 The reasons why you have made your decision;

7.7.3 The nature of the sanction given (i.e. first written warning, final written warning, dismissal with or without notice);

7.7.4 In cases of a warning:

7.7.4.1 The duration of any warning;

7.7.4.2 The improvement required within the duration of the warning;

7.7.4.3 The consequences of failure to improve his or her conduct or performance within the specified time frame;

7.7.5 In cases of dismissal, the employee should be paid contractual notice pay if the dismissal follows a previous warning and is a "totting up" dismissal. If the offence is one of "gross misconduct" however, you can dismiss without notice ("summary dismissal").

7.8 The employee should be advised of their right of appeal.

8 What sanction should you apply?

8.1 The sanctions that are normally available to you are set out below but you should consult your own disciplinary policy for guidance. The appropriateness of each sanction depends on the severity of the misconduct alleged and any possible mitigation. Your disciplinary procedure may indicate the appropriate action to be taken. No employee should be dismissed for the first offence, except in cases of gross misconduct.

8.2 The recommended sanctions are:

8.2.1 Written warning

This should be used for relatively minor offences such as poor timekeeping or poor performance.

8.2.2 Final written warning

This should be used for serious cases of misconduct or poor performance for which dismissal is not considered appropriate. This should also be used where an employee has failed to comply with the terms of a previous written warning.

Warnings should always be clearly time limited in their duration.

8.2.3 Dismissal

8.2.3.1 Dismissal may be appropriate where misconduct or poor performance is repeated following a final written warning or amounts to gross incompetence or neglect.

8.2.3.2 Dismissal for the first offence should be imposed only in cases of "gross misconduct". These cases are the most severe cases, which would involve acts of dishonesty, theft, damage to property, fighting, drugs or alcohol on company premises, or bringing the company into disrepute. If there are circumstances unique to your business or industry that would be considered to be gross misconduct (for example breaches that could endanger health in one business that would not do so in another), these should be detailed in your disciplinary policy.

8.2.3.3 There may be alternative sanctions to dismissal which should always be considered before dismissing. For example a demotion or a transfer to another team. These sanctions should only be considered as an alternative to dismissal (and not some other level of warning) and the employee must agree to this unless there is something in the employee's contract which permits this (uncommon).

8.3 When deciding on the sanction to impose, you should consider:

8.3.1 The employee's previous disciplinary record;

8.3.2 The employee's length of service and general performance;

8.3.3 What action (if any) you have taken against other employees in similar previous cases to ensure consistency;

8.3.4 The reasons provided by the employee for their conduct (mitigation);

8.3.5 Whether the sanction is reasonable in all of the circumstances.

9 How do you conduct an appeal process?

9.1 The employee should identify their grounds of appeal in writing when notifying you of their decision to appeal. It may be helpful in certain cases to write to the employee and/or his representative to clarify what the grounds of appeal are and take more information, if needed.

9.2 For example, the employee may not necessarily be disputing that they committed the act of misconduct complained of. They may, however, be appealing on the basis that a decision to dismiss was too severe a sanction in the circumstances.

9.3 You should hold an appeal meeting at which the employee is entitled to make representations. You may have to hear evidence from witnesses again. It will not be sufficient, for example, simply to write to the employee after having reviewed the notes of the disciplinary hearing and the accompanying evidence and confirm the outcome.

9.4 The details of the appeal hearing should be confirmed to the employee in writing and any provisions in the disciplinary procedure must be followed. The employee should be given the right to be accompanied at the meeting, as above.

9.5 You should ensure that all grounds of appeal are fully considered at the appeal hearing by someone other than, and if possible, more senior to, the person who conducted the disciplinary hearing. That person should be provided with all documents relating to the investigation and disciplinary process and should read these fully.

9.6 Following the appeal hearing, the employee should be provided with a copy of the notes taken and asked to confirm their accuracy.

9.7 The employee must be notified of the outcome of the appeal, in writing. Usually there is no further right of appeal unless your disciplinary policy specifically provides for this.

10 Unfair dismissal

10.1 To dismiss an employee fairly, the dismissal must be for one of the potentially fair reasons contained in the ERA 1996. In a disciplinary context, the fair reason is usually “conduct”.

10.2 You must also follow a fair dismissal procedure (as above).

10.3 The decision to dismiss must be within the range of reasonable responses open to an employer.

10.4 To be **eligible** to claim unfair dismissal, the individual must:

10.4.1 Be an employee (this will exclude independent contractors and most agency staff)

10.4.2 Usually have at least two years’ continuous service

10.4.3 Not be within an excluded category of employee (for example, the police, army or certain other public employments)

10.5 For more information on unfair dismissal and the compensation available to an employee, please see our separate factsheet on unfair dismissal.

10.6 It’s important to note that where an employee’s dismissal is for a discriminatory reason (e.g. because they are pregnant), they don’t need any length of service to bring a claim for this reason. The same applies for dismissals for an automatically unfair reason e.g. health and safety or whistleblowing. As such, when dismissing an employee with less than two years’ service, it’s important to be aware of these issues and take legal advice to understand any such risks. Please see our separate factsheet on discrimination for more information.

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Last review: April 2023

DOCUMENT NAME:	Handling Grievances Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on handling grievances.

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Handling Grievances

Factsheet

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1 Legal terms explained

"ACAS Code of Practice on Disciplinary and Grievance Procedures" or **"ACAS Code"** is a statutory code reflecting good practice for dealing with disciplinary and grievance processes which employers and employees should follow;

"Constructive dismissal" occurs when an employee resigns and can show that they were entitled to do so because of their employer's conduct;

"Grievance" is a complaint or problem raised by an employee to their employer about their employment;

"Grievance procedure" or **"Grievance policy"** is a written procedure which sets out the process for an employer to investigate and respond to any grievance raised by one of its employees. All employers should have a written grievance procedure in place;

"Formal grievance" is a complaint raised under the formal grievance procedure and which should be dealt with under your formal grievance procedure;

"Informal grievance" is a complaint or problem which is resolved informally, without having to resort to the formal grievance procedure. For example, by holding an informal meeting with the employee concerned to understand the nature of their concern, investigating it (where necessary) and proposing a resolution. Many grievances can be resolved in this way;

"Whistleblowing" occurs where there is a disclosure of information by a worker to their employer or other prescribed person which tends to show, in their reasonable belief, a prescribed form of wrongdoing which has been committed, is being committed or is likely to be committed. There is also a requirement for the worker to reasonably believe that their disclosure is in the public interest.

2 Introduction

2.1 You should have a grievance procedure in place which enables you to deal with any grievances raised by your employees quickly and efficiently. All managers should familiarise themselves with the grievance procedure and ensure this is followed.

2.2 Managers handling grievances should also be familiar with the ACAS Code and your grievance policy should reflect the minimum requirements of the ACAS Code.

2.3 Whilst a failure to observe the ACAS Code does not give an individual a right of action in itself, in any Employment Tribunal claim which relates to a matter where the ACAS Code applies (essentially unfair dismissal, all discrimination and breach of contract claims save for redundancy dismissals or dismissals on the renewal of a fixed-term contract), the Employment Tribunal will have the power to increase or reduce "any award" it makes to a successful claimant by up to 25% to reflect either the employer's or employee's **unreasonable** failure to comply with the ACAS Code.

3 How to recognise a grievance?

3.1 An employee does not need to put a grievance in writing, label it as a "grievance" or refer to any written policy in order for the complaint to constitute a grievance. It may be a serious issue or concern raised with a manager during a 1-1 meeting, an email sent, or a conversation in a lift. If an employee is raising a serious issue relating to their employment that you consider needs resolving or warrants further investigation, then it will be appropriate to refer the employee to the grievance procedure as a mechanism to do this.

3.2 It's important to approach grievances with the mind-set of trying to achieve a resolution for all those concerned – rather than trying to point the finger or apportion blame. As such, when receiving a grievance, one important consideration is understanding what outcome the employee wants.

4 Informal -v- formal approach?

4.1 You should try to deal with grievances informally wherever possible in the first instance.

4.2 However, it won't be possible to resolve all grievances informally and some grievances may not be appropriate for informal resolution. For example more serious complaints including bullying, harassment, discrimination or where relationships have broken down. You may also wish to investigate concerns raised sensitively even if the complainant does not wish to do so, and

this should be set out in the grievance policy. By way of an example, if there are allegations of sexual harassment, you may want to investigate this if the complaints are serious even where the complainant wishes not to take it further. Detailed advice should be taken.

4.3 Where an employee raises a grievance formally, there is nothing to stop you asking them if they wish to try to resolve the matter informally (rather than formally) and seeing if they are open to this. However, you cannot insist that the employee does so if they wish to proceed with the formal route. And, as above, not all grievances will be appropriate for informal resolution.

4.4 If you do first try to resolve the matter informally and cannot achieve a resolution, the next step will be the formal grievance process.

5 Formal grievance: what are the minimum procedures that I should follow?

5.1 The minimum procedure that you should comply with is as follows:

5.1.1 The employee should set out their grievance in writing.

5.1.2 If the grievance is complicated or key information is missing, it is a good idea to meet with the employee initially to understand their grievance and ask them to explain the key points (don't forget to give the employee the right to be accompanied at this meeting).

5.1.3 The employee should then be invited to a grievance hearing to consider the complaint in more detail.

5.1.4 During the hearing, the employee should be given the opportunity to speak freely about their concerns. You should ensure that you take all the information you need in relation to each allegation e.g. date, time, who witnessed the allegation etc. It is likely that there will be further investigations which need to be undertaken before a decision is made and you may need to meet with the employee again if there are further details to be clarified (again, don't forget to give the right to be accompanied at any further meetings).

5.1.5 The employee should be given the right to be accompanied at the grievance hearing by a Trade Union representative or a colleague. If the employee's choice of companion is not able to attend the hearing, you should reschedule this within five working days of the original hearing date. This can be longer if both parties agree.

5.1.6 At the end of the hearing you should adjourn to make your decision. You should avoid making a decision at the grievance hearing as it is important to show that you are giving due time and consideration to the decision-making process, even in the most straightforward cases. Following the hearing, you should conduct any further investigations as are necessary (and, as above, you may need to hold further meetings, as required).

5.1.7 Once you have completed your investigations, you will need to decide whether each allegation is upheld or not, and why. For each allegation, the burden of proof is assessed on the "balance of probabilities" (i.e. is it more likely that this incident happened, or not?). This is a much lower hurdle than "beyond reasonable doubt" which is used in criminal cases. In some cases, there may be insufficient evidence to either uphold or dismiss the allegations, for example if allegations happened a long time ago.

5.1.8 Whatever course of action you take, it must be fair and reasonable, and you must confirm your findings in writing to the employee within a reasonable timescale. In terms of what is "reasonable" you should check your own policy for any set timescales and ensure these are followed in the first instance. If the grievance is particularly long and complex, you should keep the employee updated and you may need to agree an extension to any timescales set out in your grievance policy with the employee.

5.1.9 In the grievance outcome letter, employees should also be notified of their right to appeal.

5.1.10 If the employee lodges an appeal, an appeal hearing must take place to discuss the grounds of the appeal. Ideally, the appeal should be heard by a person within the business who is completely independent of the grievance and the original hearing (and more senior wherever possible). The employee should again be given the right to be accompanied at the appeal hearing.

5.1.11 The employee should be notified of the appeal decision in writing and within a reasonable timescale. Again, you should check your policy for any specific timescales.

5.2 Where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. However, if the grievance and disciplinary cases are related it may be appropriate to deal with both issues at one hearing.

6 Legal risks to consider

6.1 In certain situations, the law protects workers raising specific types of complaint in the workplace from suffering any detriment or being dismissed as a result of them having raised that particular complaint.

Whistleblowing

6.2 This includes where workers "blow the whistle". A worker will "blow the whistle" if they disclose information which, in their reasonable belief, tends to show that there has been, is, or is likely to be:

6.2.1 A criminal offence committed

6.2.2 A breach of a legal obligation

6.2.3 A miscarriage of justice

6.2.4 Health and safety endangerment

6.2.5 Damage to the environment

6.2.6 An attempt to conceal one of the above matters.

6.3 There is also a requirement for the worker to have a reasonable belief that their complaint is in the public interest. If you are unsure if there is any whistleblowing element to a grievance, you should take legal advice to understand how best to respond to this and limit the risk of a claim.

Health and safety concerns

6.4 A worker is also protected under separate legislation from being subject to a detriment and/or dismissed for raising health and safety concerns. Again, if an employee raises health and safety concerns as part of any grievance, you should take further legal advice.

Victimisation

6.5 This is a specific type of claim which protects workers including those who raise concerns about discrimination or give evidence about discrimination from being subjected to any detriment because they have done so.

6.6 For example, an employee raising allegations of sexual harassment by their manager was subsequently not put forward for a promotion by that same manager because they had done so. This would amount to victimisation.

6.7 An employee is also protected from dismissal because they have raised concerns about discrimination.

Constructive unfair dismissal

6.8 A further risk in not addressing grievance complaints promptly, or thoroughly, is a claim of constructive unfair dismissal. If an employee with two years' service or more resigns in response to a fundamental breach of contract by their employer, they can bring a claim of constructive unfair dismissal. In a grievance context, an employee might seek to argue that their employer's conduct in ignoring their grievance concerns, or conducting flawed grievance process, is a fundamental breach of the implied duty of trust and confidence. In order to minimise the risk of this type of claim arising, it's important to take legal advice and get the grievance process right.

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Last review: April 2023

DOCUMENT NAME:	National Minimum Wage Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on National Minimum Wage.

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National Minimum Wage

Factsheet

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1 Legal terms explained

"National Minimum Wage" is a minimum hourly rate of pay set by government which applies, with some exceptions, to all workers. Employers are under an obligation to pay the National Minimum Wage, and there are no exclusions for smaller employers;

"National Living Wage" is the rate of the national minimum wage available to workers who are aged 23 and over. It is different from the living wage set by the Living Wage Foundation; and

"National Minimum Wage Act" means the provisions relating to the National Minimum Wage and are contained in the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015.

2 National Minimum Wage

The rate and timing of a worker's pay is governed by their contract of employment or statement of employment terms.

However, almost all workers are entitled to a minimum level of pay known as the National Minimum Wage or National Living Wage even if they do not have a written contract or agreement.

The National Minimum Wage and National Living Wage are calculated on gross pay, before tax and National Insurance have been taken off. All employers large and small are under an obligation to pay their workers the National Minimum Wage.

3 Current rates

There are different rates of National Minimum Wage for the four different categories of worker. These are:

- **National Living Wage rate:** available to workers aged 23 and over
- **Standard (adult) rate:** available to workers aged between 21 and 22
- **Development rate:** available to workers aged between 18 and 20
- **Young workers rate:** available to workers aged under 18 but above the compulsory school age of 16 that are not apprentices
- **Apprentices rate:** available to anyone working under a contract of apprenticeship or taking part in certain training programmes.

The National Living Wage was introduced on 1 April 2016 and is reviewed each April. The National Minimum Wage hourly rates are also reviewed annually in April.

4 Tips

Employers cannot use tips, gratuities or service charges to top up a worker's wage to meet the National Minimum Wage or National Living Wage. Employers must pay each worker the National Minimum Wage or National Living Wage, even if employers allow their staff to keep any tips they receive.

5 Agency staff

The National Minimum Wage and National Living Wage apply to agency workers and it is the person who actually pays the agency worker who is responsible for ensuring that the worker receives the appropriate rate.

Please note: some agency workers have the right to the same pay as equivalent permanent staff after a 12-week qualifying period.

6 Workers under compulsory school age

Workers under the compulsory school age are not entitled to the National Minimum Wage.

7 Agricultural workers

Workers who are employed in agriculture in England are entitled to be paid the National Minimum Wage, National Living Wage for their age. The Agricultural Minimum Wage has been abolished in England.

The position is different for agricultural workers employed in Wales who are entitled to be paid at least the Agricultural Minimum Wage, the National Minimum Wage, or National Living Wage if that is higher. The Agricultural Minimum Wage rate depends on the worker's job grade and category.

8 Other workers

Different rules apply to workers who are paid for the number of things they make (for example, articles of clothing) or tasks they do (for example filling envelopes). These types of workers are often known as "output workers".

Employers must choose between paying an output worker either:

- The National Minimum Wage or National Living Wage for every hour worked
- A fair piece rate for each piece produced or task performed.

Workers can also be engaged on unmeasured time. For example, where the worker has tasks to do but the employer does not set the times when the work has to be done or only requires the worker to carry out work as needed or when it is available.

The hours of unmeasured work which count for the National Minimum Wage or National Living Wage can be identified in either of two ways:

- Reaching a daily average agreement of hours to be worked
- Recording every hour worked.

9 Benefits in kind

Workers should receive the National Minimum Wage or National Living Wage in cash form rather than in the form of other benefits like meals, fuel, medical insurance or pension contributions.

The only exception to this is where the employer provides the worker with accommodation. If employer provide accommodation to their worker, it can count some of its value towards paying the National Minimum Wage or National Living Wage. This is called the accommodation offset and the rate changes each year. You cannot count more than the accommodation offset rate that is in force at any given time.

It makes no difference whether employer take rent out of the worker's wages, the worker has to pay rent to employer, or employer can simply provide the accommodation as part of their employment package.

In all cases, the accommodation offset is the most employer can count towards National Minimum Wage or National Living Wage pay.

10 What time does not count towards the National Minimum Wage or National Living Wage?

For the purposes of calculating a worker's National Minimum Wage or National Living Wage hourly rate, certain periods do not have to be counted as set out below:

- Rest breaks including a recognised lunch hour, even if the worker works voluntarily during that time
- Time spent absent from work such as holiday or sick leave
- Time spent travelling between home and work
- Time spent taking part in industrial action
- On call time where the worker is allowed to stay at home, resting or sleeping - but time spent responding to a call will be counted.

11 Deductions

11.1 From pay and payments from an employer

Some deductions and payments must be subtracted from the total gross pay in order to reach the National Minimum Wage or National Living Wage pay. In addition, employer cannot make any deductions from a worker's pay or take payments from them unless certain conditions are met.

11.2 Payments that are not included in the National Minimum Wage or National Living Wage pay

The following payments are excluded from the calculation:

- Loans
- Advances of wages
- Pension payments
- Lump sums on retirement
- Redundancy payments
- Rewards under staff suggestions schemes
- Tips, gratuities and service charges.

In addition, employer cannot offset higher overtime payments or shift premiums against the National Minimum Wage.

12 Record keeping

Employer must keep certain records in relation to the hours worked by, and the payments made to workers, to show that their workers have received the National Minimum Wage or National Living Wage.

13 Legal presumption and criminal offences

If there is a dispute, it will be presumed that the worker has **not** been paid the National Minimum Wage or National Living Wage unless the employer can prove that it has been paid.

An employer can face criminal prosecution if it:

- Refuses to pay the National Minimum Wage or National Living Wage
- Fails to keep proper records or keeps false records.

14 Remedies

A worker who does not receive the National Minimum Wage or National Living Wage to which they are entitled, has a number of options open to them to recover underpayments.

14.1 HMRC

Workers can complain to HMRC either online or in writing. HMRC will investigate and recover underpaid National Minimum Wage or National Living Wage. The can also fine the employer.

14.2 Employment Tribunals & County Court

Unlawful deduction claims can only be brought in an Employment Tribunal and strict time limits apply. Claims have to be issued within three months of the date of the deduction (that is, the failure to pay the National Minimum or Living Wage) or the last in a series of deductions. Workers are usually unable to recover underpayments going back more than two years.

However, before a claim can be issued in an Employment Tribunal, the employee must engage in a process known as ACAS Early Conciliation. Employees are required to contact ACAS **on or before the primary limitation date** to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

ACAS Early Conciliation enables the employee and employer to try and resolve the dispute without the need to bring a claim in the Tribunal. If the parties agree, an ACAS conciliator will act as a 'go between' and try and reach agreement. There is no need for the employee to communicate directly with their employer unless they wish to do so.

This process usually lasts for six weeks. If Early Conciliation fails, the employee will be issued with a Certificate which the employee needs before he/she can issue a claim in the Employment Tribunal. This has to be done on a form known as an ET1.

Limitation is paused from the day after the employee submits the Early Conciliation Form until the date the employee receives an Early Conciliation Certificate. Generally the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk.

Workers may also be able to bring a claim for breach of contract, either in the Employment Tribunal or the County Court.

Employment Tribunals can only hear a claim for breach of contract if employment has ended and the claim is brought within three months of termination.

Claims have to be issued in the County Court within six years. Fees are payable.

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Last review: April 2023

DOCUMENT NAME:	Performance Management Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on performance management.

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Performance Management

Factsheet

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Managing Poor Performance

1 Legal terms explained

"Disability" means a physical or mental impairment that has a substantial and long term adverse effect on an individual's ability to carry out normal day to day activities. The effect must have lasted for 12 months or more or be likely to last 12 months. An effect that is likely to recur is treated as continuing for this purpose.

2 Introduction

2.1 It is critical to the effective running of all businesses that required standards of work are established and communicated to staff so that employees know what is expected of them and the consequences of performing below those standards.

2.2 Performance management can include:

2.2.1 Day-to-day supervision of employees, including motivating staff, providing feedback and informal coaching;

2.2.2 Objective setting, appraisals and performance reviews as part of a formal performance management process to track and measure performance;

2.2.3 Providing rewards to incentivise good performance including bonuses, commission etc;

2.2.4 Providing training and coaching to upskill employees;

2.2.5 Tackling poor performance. A key component of performance management, however this can be one of the most difficult and daunting elements for managers. This factsheet will focus on the basics of managing poor performance.

3 Role of the manager

3.1 An important factor in managing poor performance is the line manager whose role it is to identify and address poor performance promptly before it becomes problematic.

3.2 We strongly recommend that your line managers are regularly made aware of their responsibilities, receive training if insufficiently experienced to ensure they are sufficiently up to date with any developments, and are provided with copies of any relevant performance management procedures.

4 Identifying signs of poor performance and risks

4.1 It is important that managers are on the look out for signs of poor performance. There may be an underlying issue (i.e. a personal problem) that is causing changes in performance or behaviour.

4.2 Some common warning signs include:

4.2.1 Missed deadlines;

4.2.2 Conflict with the team;

4.2.3 Blaming others;

4.2.4 Poor work quality;

4.2.5 Avoiding responsibility;

4.2.6 Lack of punctuality/increased absence levels;

4.2.7 Signs of stress or anxiety.

4.3 There are a wide range of reasons as to why an employee may suddenly be underperforming, including lack of resources, market factors, personal problems, a disability, pregnancy, stress etc.

4.4 As soon as performance issues are noted, the manager should speak to the employee on an informal basis in the first instance to understand the reasons for this and identify and implement any support needed to improve this. This might be at a scheduled one to one meeting, for example.

4.5 It is important that managers who are tasked with performance management are aware of potential legal risks and know when to flag these with HR for further advice and support.

4.6 For example, the employee may be protected under the Equality Act 2010 or other legislation and their performance issues being raised by their manager may be caused by other issues including (but not limited to):

4.6.1 Pregnancy-related reasons;

4.6.2 Disability-related reasons;

4.6.3 Employees having previously raised a public interest disclosure (i.e. whistleblowing);

4.6.4 Employee having previously asserted a statutory right (e.g. requesting time off for dependants, raising health and safety concerns).

4.7 In these circumstances there may be additional legal obligations which need to be considered and met. For example if poor performance is related to a disability, it will be necessary to consider and make any reasonable adjustments to ensure that the employee is not at a disadvantage due to their disability. A reasonable adjustment to a performance management process might be allowing additional time for the individual to evidence that they can meet performance standards, or adjusting their workload.

4.8 Whilst this area is complex and outside of the scope of this factsheet, the key point to note is that, where issues of this nature are identified, further advice should be taken before embarking on a formal performance management process in order to minimise the risk of legal claims.

4.9 If the reason for poor performance appears to be a **"won't do"** rather than a **"can't do"** then the problem may be one of misconduct rather than capability. In these circumstances, it may be appropriate to deal with the issue under your disciplinary procedure.

5 Informal performance discussions

5.1 Holding informal performance management discussions can help to nip performance management issues in the bud at an early stage.

5.2 At an informal performance management meeting the line manager should:

5.2.1 Explain the performance concern(s) identified;

5.2.2 Provide evidence or examples of the poor performance;

5.2.3 Ask for the reasons for the poor performance;

5.2.4 Agree a way forward/plan of action;

5.2.5 Agree any training or support measures needed;

5.2.6 Agree a reasonable timescale for improvement;

5.2.7 Set up a follow up meeting;

5.2.8 Explain the consequences if performance does not improve e.g. formal performance management process will be instigated.

5.3 It is good practice to follow up the informal performance meeting in writing, to confirm what was discussed and this can limit misunderstanding. A simple email setting this out will be sufficient.

5.4 Where informal discussions and support do not result in any improvement, the next step will be to implement a formal performance management process.

6 Formal performance management process

6.1 Your organisation may have a dedicated performance management or capability policy/procedure, setting out the steps that you must take when managing poor performance. Not all organisations have a performance management/capability policy in place however; there is no legal requirement to do so, although having one is helpful for both employers and employees to set and manage expectations. Some organisations simply use their disciplinary policy to issue staged warnings for poor performance, which is also acceptable.

6.2 The basic principles of a fair formal performance management process are to:

6.2.1 Investigate the issue;

6.2.2 Explain the issue to the employee, provide evidence and listen to the employee's reasons;

6.2.3 Provide appropriate training and support;

6.2.4 Give the opportunity to improve within a realistic/reasonable timeframe;

6.2.5 Review progress;

6.2.6 Give the right of appeal against any sanction.

6.3 The first step is to investigate the issue, which will involve gathering examples of poor performance (e.g. any evidence of errors, performance data, spreadsheets, figures etc) and speaking with the employee informally in the first instance to understand the reasons for poor performance (and to confirm there are no issues contributing to the poor performance which would mean that a formal performance management route may not be appropriate e.g. poor performance due to pregnancy/disability).

6.4 If you have been managing performance informally, including meeting with the employee to understand reasons for poor performance, then it may not be necessary to undertake further investigation meetings/gather additional evidence (as you may already have this information collated as part of that process).

6.5 Once any investigations are complete, you should invite the employee to a formal performance management meeting, giving them the right to be accompanied by a Trade Union representative or a colleague. Any evidence of poor performance should be attached to the invite letter and which will be discussed at the meeting. You should also confirm any potential outcome of the performance management meeting e.g. a warning/potential dismissal – depending on the stage in the process.

6.6 The format of the formal meeting will cover the same discussion points out at section 5.2 above, but this time in a more formal context. You should adjourn the meeting at the end and notify the employee of the outcome in writing (we wouldn't advise making a decision on the spot and at the meeting, as this may give the impression that you have not given it full consideration).

6.7 When issuing any warning/outcome letter this should:

6.7.1 Set out what happened at the meeting, evidence discussed and the outcome;

6.7.2 Explain the improvement required and the timescales;

6.7.3 Explain what will happen if performance doesn't improve (e.g. next stage of the performance management process will be instigated);

6.7.4 Explain how long any warning will remain on file (you should consult your performance management procedure for any set periods, as applicable);

6.7.5 Give a right of appeal against the sanction.

6.8 In determining how long is a **"reasonable"** period is to improve, this will depend on a number of factors including (but not limited to):

6.8.1 What is the issue and how long it will take to remedy with any support you have put in place;

6.8.2 The seriousness and extent to which customers/others are affected by the poor performance;

6.8.3 Quality/length of past service;

6.8.4 Role/seniority;

6.8.5 Relevant business cycles – sales targets etc (e.g. these might be monthly, quarterly);

6.8.6 Previous informal discussions on the same issue.

6.9 Setting a reasonable time period for improvement is critical to the overall fairness of the process, which will be particularly important for you to evidence if the process ultimately results in dismissal (see the section below on dismissal for more details). It is often best to confirm with the employee that they agree that the time period is reasonable if possible and if not, what they consider to be a reasonable time period and why.

6.10 During the review period, the line manager must consider whether the employee has improved as measured against the standards set with the employee. The line manager shouldn't wait until the end of the review period to meet with the employee and should hold regular meetings to check how the employee is getting on, identify any problems and if any further support is required.

6.11 If anything has hindered performance such as absence or unforeseen market factors, it may be necessary to grant additional time.

6.12 If, at the end of the performance review period, the employee has not improved to the required standard, it will be necessary to invite the employee to another formal performance management meeting and issue the next level of warning as per your procedure.

7 Performance (capability) dismissals

7.1 If an employee's performance has not improved and you have issued at least two formal performance warnings, it will then be appropriate to consider dismissing the employee on the grounds of capability.

7.2 For employees with two or more years' service, in order to dismiss fairly for reason of poor performance you will need to be able to evidence:

7.2.1 A fair reason for the dismissal (capability is one of the five statutory fair reasons for dismissal at law); and

7.2.2 A fair dismissal process.

7.3 If an employee has less than two years' service, they don't have the right to pursue a claim for unfair dismissal and so it may be possible to move straight to a dismissal (with notice) without issuing prior warnings. An employee doesn't need any length of service however to bring a claim for discrimination, whistleblowing, asserting a statutory right (e.g. raising health and safety concerns) etc and so you should always take legal advice before dismissing an employee with less than two years' service to identify any such risks.

7.4 For those employees with two or more years' service, a fair dismissal process, will involve you having taken the following steps:

7.4.1 Investigation;

7.4.2 Given the employee the opportunity to improve within a reasonable timeframe;

7.4.3 Provided appropriate support and training;

7.4.4 Reviewed progress;

7.4.5 Given at least two prior warnings (unless the issue is one of gross misconduct/gross negligence);

7.4.6 Have made it clear that a lack a failure to meet the required standard may lead to dismissal.

7.5 A Tribunal will consider whether an employer genuinely believed, on reasonable grounds, that the employee was incompetent to do their job and therefore you will need to be able to evidence that:

7.5.1 There was clear evidence of incompetence at the time of dismissal;

7.5.2 That you adopted a fair procedure;

7.5.3 You considered alternatives to dismissal e.g. if the employee isn't able to pick up the skills needed to perform in their current role but has the aptitude/skills for another vacant role, redeployment may be an option.

7.6 The employee would need to be invited to a final formal performance management meeting, with the right to be accompanied and warned that dismissal is one potential outcome (see section 6 above for holding formal performance management meetings).

7.7 As above, alternatives to dismissal should be considered before dismissing, however there is no requirement to create an alternative role for the employee if one does not exist.

7.8 An employee should be dismissed with notice (unless the issue is one of gross misconduct/gross negligence) and should be given the right of appeal against their dismissal.

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Last review: April 2023

DOCUMENT NAME:	Unfair Dismissal Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets. including a separate factsheet on constructive unfair dismissal.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on unfair dismissal.

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Unfair Dismissal

Factsheet

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1 Legal terms explained

"Employment Rights Act 1996 (ERA 1996)" is an Act of Parliament which sets out the law on unfair dismissal and additional rights of employees;

"Role and job description" is the job title and the detailed description of the duties, responsibilities and skills required to fulfil those duties;

"Grievance and disciplinary procedures" are formal methods for dealing with the grievances of employees or disciplining employees;

"Effective date of termination" is the last day of continuous employment or the dismissal date for the purposes of unfair dismissal;

"Constructive dismissal" occurs when an employee resigns and can show that they were entitled to do so because of their employer's conduct. A constructive dismissal may be both an unfair and wrongful dismissal as the employer may also have breached the employee's contract of employment;

"ACAS Code of Practice" is the written code reflecting good practice for dealing with disciplinary and grievance processes which employers should follow.

2 What is unfair dismissal?

To dismiss an employee fairly, employer must be able to evidence one of the potentially fair reasons for dismissal contained in the ERA 1996 (more on this below). Employer must also follow a fair dismissal procedure and the decision to dismiss must be within the range of reasonable responses open to an employer (again, more on this below).

3 Employment Tribunal

Any claims for unfair dismissal will be brought before an Employment Tribunal. Part of the Ministry of Justice, Employment Tribunals determine the validity of cases and award compensation to people who are found to have been unfairly dismissed.

4 Eligibility to claim

To be eligible to bring a claim for unfair dismissal, an individual must:

- Be an employee (this will exclude independent contractors and most agency staff)
- Not be within an excluded category of employee (for example the police, army or certain other public employments)
- Usually have at least two years' continuous service.

Please note: Continuous service can be extended if an employee is dismissed without receiving one week's statutory minimum notice. Also, there is no service requirement where the dismissal is for certain automatically unfair reasons.

4.1 Circumstances in which an employee is dismissed

To bring an unfair dismissal claim an employee must show they have been dismissed. That means:

- The employee's contract is terminated by their employer with or without notice - this includes if an employee is made redundant
- The employee is on a fixed-term contract, or a contract which expires on the happening of a particular event (e.g. completion of a project), and the contract is not renewed
- The employee resigns but claims constructive dismissal. For more information refer separately to our Constructive Dismissal Factsheet.

4.2 Circumstances in which a dismissal is unfair

A dismissal will be unfair if:

- The dismissal was for an automatically unfair reason (see below)
- The employer has no fair reason for the dismissal
- The procedure for implementing the dismissal was unfair
- No reasonable employer would have dismissed the employee under the circumstances which the employer did.

4.3 Examples of automatically unfair reasons

The following reasons for dismissal automatically count as unfair (this list is not exhaustive):

- Pregnancy-related dismissals
- Because an employee has attempted to assert a statutory right or made a protected disclosure (i.e. whistleblowing)
- Because the employee belongs to a Trade Union or has refused to belong to one.

Unlike 'ordinary' unfair dismissal claims, employees do not necessarily require at least two years' continuous service in order to bring an automatically unfair dismissal claim.

5 Fair reasons for dismissal

There is a list of potentially fair reasons for dismissal set out in the ERA and employer must show that one of these reasons apply for the dismissal to be fair:

5.1 Conduct

This covers any type of misconduct by the employee, including a one-off but serious incident or a series of minor incidents. This may include conduct during working hours or outside work.

Employer's disciplinary policy and employment contracts should set out examples of unacceptable misconduct.

5.2 Capability

In practice, capability dismissals fall into two main groups:

- Dismissal because of an employee's poor performance or attitude
- Dismissal because of an employee's ill health - this may be a result of a single long-term absence or frequent short-term absences.

5.3 Redundancy

This applies where the business ceases, the place of work closes, or there is a reduced need for employees to carry out work of a particular kind.

5.4 Statutory restriction

This applies where continued employment is only possible if a law is broken. Examples might include a lorry driver who has been disqualified from driving or a worker whose work permit has expired.

Employers must be able to show that the law would be contravened by continuing to employ this person.

5.5 Some other substantial reason

This is a "catch-all" covering other reasons employer can dismiss an employee. For example:

- A business re-organisation
- Employer need to make changes to the employee's duties or work pattern which the employee cannot or will not accept.

5.6 Beliefs and proof

It is sufficient that the employer, honestly and reasonably believed at the time employer made the decision that one of the above reasons applied.

6 Procedural requirements for dismissal

Employers must observe a fair procedure appropriate to the reason for dismissal. If they do not, the dismissal may be unfair. The procedure adopted will depend on the reason for the dismissal.

6.1 Fair procedure in misconduct or poor performance cases

Employers must follow the ACAS Code of Practice and their own written dismissal procedure, which is usually found in the disciplinary policy or handbook. Failure to follow the ACAS Code can be evidence that the procedure is unfair.

The ACAS Code of Practice states that:

- Employers must properly investigate the circumstances of the case. In the case of misconduct, the investigation should be by a different manager than that conducting the disciplinary hearing wherever possible

- The employee must be invited to a meeting and given a proper opportunity to present his or her case, and sufficient information to enable them to do so
- The hearing must be conducted fairly
- The appeal must be conducted fairly - a properly conducted appeal may remedy procedural unfairness in the original hearing, but an unfair appeal may render the whole dismissal procedure unfair
- The employee is entitled to be accompanied at a disciplinary hearing by a companion of their choice, either a trade union representative or a fellow employee. Employees are not normally entitled to be accompanied by a lawyer or family member.

Please see our separate factsheet on handling disciplinaries for more information.

6.2 Fair procedure in redundancy or re-organisation / re-structuring cases

For a dismissal to be fair, the following procedure must usually be adopted:

- Employers should give as much warning as possible of impending redundancies
- Employers must consult employees or their representatives about ways in which redundancies can be avoided or minimised or any alternatives that might be found
- If there is no alternative to redundancies, employer must consult with employees or their representatives as to how the employees to be made redundant should be selected. Unless all the employees are to be made redundant, or all the employees in a particular area, employer should try to agree the selection criteria to be applied
- The criteria must, as far as possible, be objective and verifiable, utilising such things as attendance record, efficiency at the job, experience, rather than the subjective opinion of managers
- Employers must tell employees how they have been scored and give them an opportunity to challenge their own scores
- Employers must make proper efforts to find alternative work for those selected for redundancy
- Employees should usually be given the opportunity to appeal their dismissals.

If employer is proposing to make 20 or more employees redundant within a 90-day period, they are under a duty to enter into a period of collective consultation. We recommend to take bespoke legal advice in this scenario.

For further information please refer to our separate factsheet on redundancy.

6.3 Fair procedure in cases of ill-health, permanent incapacity or other reasons for considering dismissal

Where there is some other reason for considering terminating an employee's employment, for a dismissal to be fair employer usually has to:

- Investigate all the circumstances of the case
- Warn the employee that you are contemplating dismissing them
- Set out in full all the evidence and reasons why they are contemplating terminating the employee's employment
- Invite the employee to a meeting to discuss the matter
- If the decision is to dismiss, give the employee a fair opportunity to appeal.

Please see our separate factsheet on absence management for more information.

6.4 Reasonableness of the decision

Even if employers have a potentially fair reason for dismissal, they must also show that their decision to dismiss fell within the range of responses open to a reasonable employer. The question is whether it is possible that another reasonable employer, faced with the same facts, would have dismissed the employee.

Relevant factors:

- Whether employer had sufficient evidence to conclude that there was a valid reason for dismissing the employee (although employer are not required to have absolute proof)
- Whether employer's actions were consistent with past practice (demonstrating a consistent approach to the treatment of employees)
- Whether employer considered the individual circumstances of the individual employee before making any decision

- In poor performance cases, whether the employee was given further training or assistance, or time to improve
- In disciplinary cases, whether the employer looked at other options to dismissal, including giving them a warning or final warning, or in cases where there is a contractual right to do so, demoting them to a less responsible position instead.

7 The burden of proof

The burden of showing what the reason for the dismissal is rests with the employer. Once employer have done so, it is for an Employment Tribunal to decide whether the dismissal was fair.

8 Time limits for bringing a claim

An unfair dismissal claim must be submitted within three months less one day of the termination of employment. For example, if the last day of employment was 3 October the claim must be submitted to the Tribunal by 2 January. This is known as the "primary limitation date".

However, if the employee is less than one week from their two year anniversary and employer do not give the statutory minimum notice before dismissing, the employee is entitled to add that one week to their termination date to allow them to have the right to bring a claim.

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation. Employees are required to contact ACAS **on or before the primary limitation date** to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

ACAS Early Conciliation enables employer and the employee to try and resolve the dispute without the need to bring a claim in the Employment Tribunal. If the parties agree, an ACAS conciliator will act as a *"go between"* and try and reach agreement. There is no need for the employee to communicate directly with employer unless they wish to do so.

This process usually lasts for six weeks. If Early Conciliation fails, the employee will be issued with an Early Conciliation Certificate which the employee needs before they can issue a claim in the Employment Tribunal.

The time limit for bringing the claim is paused from the day after the employee submits the Early Conciliation Form until the date the employee receives a Certificate. Generally the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk

9 Remedies for unfair dismissal

If the employee succeeds with their claim for unfair dismissal, the Employment Tribunal will determine whether to award a remedy. There are three remedies available in unfair dismissal claims and the employee has the choice over which remedy to ask for.

9.1 Re-instatement

This puts the employee back into the same job they had prior to their dismissal. This is available but it is rare that employees want to be reinstated at a place where they perceive to have been treated badly.

9.2 Re-engagement

This is where the employee is re-engaged within a different sector/ job within the same company. As with reinstatement, such orders are rare.

A reinstatement or re-engagement order will generally require employer to make up all the employee's lost salary and benefits for the period between dismissal and the date of reinstatement, taking appropriate account of sums already received including pay in lieu of notice, ex gratia payments and earnings from any other employment.

9.3 Compensation

If reinstatement or reengagement is not ordered, the Tribunal will usually award compensation instead.

10 Assessment of compensation

Compensation is made up of one or more of the following:

- Basic Award
- Compensatory Award
- Additional Award (awarded if the Employment Tribunal orders either re-instatement or re-engagement and the employer does not comply).

10.1 Basic Award

The employee will get either 0.5, 1 or 1.5 weeks' pay for each complete year of service, calculated as follows:

Working backwards from the last date of employment (**NOT** forwards from the date of starting work):

- for each complete year of service where employee was 41 or over at the start of the year, 1.5 weeks' pay
- for each complete year of service where the employee was between the ages of 22 and 40 at the start of the year, one week's pay
- for each complete year of service where employee was 22 or less at the start of the year, 0.5 of a week's pay.

Length of service is subject to a maximum of 20 years and a week's pay is subject to a statutory maximum, which is increased every year (currently £643 from 6 April 2023).

10.2 Variations

In some cases where a dismissal is for an automatically unfair reason, a higher basic award is payable. However, the basic award may be reduced due to contributory fault or other conduct by the employee.

10.3 Compensatory award

The compensatory award is that amount which is "just and equitable" to compensate the employee for their losses. This is decided by the Employment Tribunal and is subject to statutory caps.

The maximum that an employee can be awarded as a compensatory award is the lower of 52 times a week's gross pay for the Claimant, and £105,707 for dismissals since 6 April 2023. This upper rate is usually adjusted in April each year) but in reality awards are usually much lower than this.

The compensatory award will usually reflect the following losses:

10.4 Immediate loss of wages

This is the immediate loss of earnings from dismissal until the date of hearing. If the employee has a new job on a lower rate, the new earnings will be taken into account so that the employee is not better off than they would have been if they had not been dismissed.

10.5 Future loss of wages

It is often difficult to assess how long the employee will be out of work or how long it will take them to reach their previous level of earnings if their new employment pays less, as it will depend on the job market, the employee's age and qualifications etc.

An employee is required to mitigate their losses i.e. to look for alternative employment and to evidence that they have done so.

10.6 Loss of statutory employment protection rights

An employee needs two years' continuous service to bring most claims for unfair dismissal and many statutory rights such as notice and redundancy pay are dependent on length of service, so even if the employee finds new work at a similar rate of pay, the employee may still be worse off. A sum of a few hundred pounds is normally awarded to compensate for this.

10.7 Deductions

There may be certain deductions made from the compensatory award:

- If the employee has received enhanced redundancy terms, these will be deducted from the compensatory award
- The calculated loss may be reduced by any other amounts the employee has received by way of termination payments received (including notice)

- The employee's compensation may be reduced if the employee could have found alternative work but did not make proper efforts to do so
- Compensation may be reduced if the Tribunal finds the employee contributed in some way to their dismissal
- A deduction may be made where a dismissal is procedurally unfair but the tribunal decides the employee would, or might have been, dismissed even if a fair procedure had been followed.

10.8 **Additional award**

If the Tribunal orders reinstatement or re-engagement and employer refuses to do so, an additional award of between 26 and 52 week's pay may be made.

11 Non-payment of awards

If employer fail to pay an award, it can be enforced through the County Court. Employees will usually be entitled to "judgment in default" or "summary judgment".

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Last review: April 2023

DOCUMENT NAME:	Working Time Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on working time.

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Working Time

Factsheet

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1 Legal terms explained

"Working time" has a special meaning that is defined in the Working Time Regulations. Other regulations such as the National Minimum Wage Regulations have a different definition of working time;

"Working Time Regulations 1998" means regulations that put a limit on the amount of hours most workers can work each week and provide for minimum amounts of break and leave periods.

2 Who is covered by the Working Time Regulations?

The Working Time Regulations only protect workers, defined as all those working under:

- A contract of employment
- Any other contract where the individual undertakes to perform personally any work or services for another party.

This includes employees, temporary workers and freelancers but not the self-employed genuinely pursuing a business activity on their own account.

Some professions and jobs are excluded from the regulations.

3 What is working time?

If a worker is working at their employer's disposal and carrying out their duties, this will be working time for the purposes of the regulations. Time spent undertaking in-house training or work experience also counts towards working time.

Lunch breaks and travel time to and from work do not count as working time, even if the worker receives payment for breaks. However, any travelling that forms part of the worker's job will count.

Where workers are on call at the workplace, all of the time they spend on duty will ordinarily be working time, even if the worker is asleep for some or all of that time. Where a worker is on call away from the workplace, only time spent actually carrying out duties will be working time for the purpose of the regulations. There is much case law on this topic and therefore it needs to be kept under review.

4 How many hours can a worker work each week?

The regulations contain a 48-hour limit on average working time. This is calculated over a standard 17-week reference period, although this can be extended to 26 or 52 weeks in certain circumstances. The formula for the calculation is set out in the regulations.

Workers can still work more than 48 hours in any one week, subject to contractual limits or health and safety considerations, provided the overall weekly average measured time is 48 hours or less.

Employer must take all reasonable steps to ensure that this limit is complied with. Failure to do so is an offence punishable with a potentially unlimited fine.

5 Young workers

For young workers (those over compulsory school age but under the age of 18) there are more stringent daily and weekly limits. They may not work more than eight hours in any one day, and 40 hours in any one week (Monday to Sunday).

Whereas the working hours of adult workers are averaged over a reference period, there are no averaging provisions for young workers.

In addition, young workers cannot generally work between 10 pm to 6 am, although there are exceptions to this. Employer should take bespoke advice if these circumstances apply.

6 Opting out

Workers can agree to opt out of the average 48-hour working week by way of an opt-out agreement, which must be done in writing. The opt-out agreement can last for a fixed period or indefinitely.

Any opted-out worker can cancel the opt-out by giving at least seven days' notice unless the opt-out agreement provides for longer notice, which cannot exceed three months.

Young workers cannot opt out of their weekly work limits.

7 More than one job

If a worker has another job then the average weekly time of each job will be added together. If this means that the total number of hours worked for both employers exceeds an average of 48 hours, employer should ask the worker to sign an opt-out agreement, or if the worker refuses, reduce the worker's hours to comply with the 48-hour limit.

8 Night and shift work

A night worker is a worker who works at least three hours between 11 pm and 6 am. The regulations provide that a night worker must not work more than an average of eight hours a day. There is no scope for individual workers to opt-out of the night limits but employers may make a collective or workforce agreement with unions to modify or exclude these limits.

The regulations require employer to carry out periodic health assessments on night workers.

9 Rest breaks

The regulations set out the minimum amount of rest a worker is entitled to:

- A daily rest period of 11 hours uninterrupted rest per day
- A weekly rest period of 24 hours uninterrupted rest per week or at the employer's choice, 48 hours per fortnight
- A rest break of 20 minutes when a day's working time is more than six hours
- A lunch or coffee break can count as a rest break provided it is uninterrupted. Additional breaks might be given by the contract of employment. There is no statutory right to take a smoking break.

Employer can stipulate when the break must be taken by the worker, as long as it meets the following conditions:

- The break must be taken in one block
- It cannot be taken off either end of the working day - it must be somewhere in the middle.

There is no requirement under the regulations for any rest break to be paid, but employer can choose to provide paid breaks if they wish (and reflect this in the worker's contract of employment).

10 Shift workers

The daily and weekly rest provisions do not apply to shift workers who:

- Change shift and cannot take a daily or weekly rest period between the end of one shift and the start of the next
- Work split shifts.

Shift workers are however entitled to compensatory rest wherever possible.

11 Young workers

Young workers have greater entitlements to rest breaks than adult workers and are entitled to:

- Daily rest of 12 consecutive hours
- A weekly rest period of 48 hours
- A rest break of 30 minutes where daily working time is more than four and a half hours.

12 Compensatory rest

The regulations allow employer, in limited circumstances, to require certain workers to work during periods that would otherwise be a rest period or a rest break. Where a worker is required to work during a period that would otherwise have been a rest period or rest break, employer should wherever possible allow the worker to take an equivalent period of compensatory rest.

13 Holidays

Almost all workers are legally entitled to 5.6 weeks' paid holiday a year (known as statutory leave entitlement or annual leave).

This includes:

- Agency workers
- Workers with irregular hours
- Workers on zero-hours contracts.

Employer can include bank holidays as part of statutory annual leave.

Most workers who work a five-day week must receive at least 28 days' paid annual leave a year. This is the equivalent of 5.6 weeks of holiday.

Part-time workers are entitled to at least 5.6 weeks' paid holiday, but this will amount to fewer than 28 days. For example, if they work three days a week, they must get at least 16.8 days' leave a year (3 x 5.6).

Many employers offer additional contractual holiday entitlement over and above the statutory minimum entitlement, although there is no obligation to do so.

Employers can control when workers take their holiday. For example, some employers require workers to take holiday during Christmas and New Year or may provide a rule which says no holiday should be taken during the month of August. These rules should be set out within the employee's contract of employment, or in the employment handbook.

Workers with normal hours are entitled to be paid their normal pay during the first four weeks of their holiday entitlement. This may include regular overtime payments and some commission payments. The further 1.6 weeks of holiday and any additional contractual holiday can be paid at the worker's basic rate and does not have to include regular overtime payments or commission.

The holiday pay of workers without normal hours (such as zero-hour workers) is calculated by reference to the amount that they received during the previous weeks. Weeks in which they did not receive any pay are not counted.

14 Enforcement

Workers do not have to opt out of the regulations and should not be penalised for refusing to do so. If workers suffer a detriment related to the regulations, a claim may be made to the Employment Tribunal.

In addition, abuse of the regulations can be investigated by the local authority health and safety executive.

Employees who are dismissed as a result of seeking to enforce their statutory rights under the Working Time Regulations may have the right to claim automatic unfair dismissal.

Workers who have been prevented from taking breaks or rest periods can make a claim to an Employment Tribunal and may receive a declaration and compensation.

Workers who have not received their full holiday entitlement, or any holiday pay at all, may issue a claim for unlawful deductions from wages and/or a breach of the Working Time Regulations.

Time limits for bringing claims

Under the Working Time Regulations employees must bring their claims within three months of the employer's failure to pay holiday pay or failure to permit leave to be taken. This is known as the "primary limitation date".

However a claim for unlawful deduction from wages may be made up to three months after the last in a series of deductions. This is subject to important limitations which are outside the scope of this factsheet.

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation ('Early Conciliation'). Employees are required to contact ACAS **on or before the primary limitation date** to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

Early Conciliation enables the employee and employer to try and resolve the dispute without the need to bring a claim in the Tribunal. If the parties agree, an ACAS conciliator will act as a 'go between' and try and reach agreement. There is no need for the employee to communicate directly with their employer unless they wish to do so.

This process usually lasts for six weeks. If Early Conciliation fails, the employee will be issued with an Early Conciliation certificate which the employee needs before he/she can issue a claim in the Employment Tribunal.

Limitation is paused from the day after the employee submits the Early Conciliation form until the date the employee receives an Early Conciliation certificate. Generally, the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk.

Disclaimer

This factsheet has been prepared on the basis of what is required by law at April 2023, what is good practice, and our understanding of common issues. It is a guide and not intended to be a comprehensive reference book. It may not take into account changes in the law after the last review date noted on the fact sheet. It may not be suitable for your circumstances and should not be considered as a substitute for the advice of a lawyer. You agree to use this document at your own risk in these respects.

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