



Dismissal NEU guidance for members

Usually the decision to leave a job is taken by the employee, having secured a new job elsewhere. Sometimes, however, the employer decides to dismiss the employee. Probably the most stressful events an employee can face is the termination of employment. The NEU is here to support members whatever the circumstances that lead to a disciplinary procedure and potential dismissal.

What should I do if I am told that I may face dismissal?

If you are informed that you may be subject to a disciplinary or capability procedure which could lead to dismissal, you should seek advice from the NEU straight away. Even if the sanction is unlikely to be dismissal (ie you may be placed on an informal support plan, or you may receive a verbal or written warning) you should still seek advice and support from the union.

When is an employee to be treated as dismissed?

A dismissal occurs when an employer terminates an employee's contract of employment with or without notice.

When may a dismissal be fair?

There are five possible fair reasons for dismissal.

1. Capability

This relates to the employee's ability to perform the kind of work they were employed to do, having regard to "skill, aptitude, health or any other physical or mental quality". Most cases involve members who are dismissed following a capability procedure or who have been absent on long-term sick leave.

The employer must produce evidence of poor performance, but need not prove that the employee was incapable of performing all their duties. An employer is expected to conduct a proper investigation/appraisal of the employee's performance, identify the problem, provide training, supervision and encouragement, monitor progress, give them a reasonable chance to improve and warn them of the consequences of not doing so.

In cases of long-term ill health, the employer should discuss matters with the employee at the start of the illness and periodically throughout it, and consider the employee's opinions on their condition. A medical investigation should be undertaken and adjustments to the existing job or alternative employment should also be considered. Employers should be mindful of their responsibilities towards disabled employees under the Equality Act 2010.

2. Conduct

An employee may be dismissed for various kinds of wrongdoing (including, but not limited to, theft, drug misuse, safeguarding concerns and exam malpractice). It may be deemed misconduct or gross misconduct. If the allegation is deemed to be gross misconduct, the employee can be summarily dismissed; that is without working or being paid for the notice period.

If the employee is found to be guilty of misconduct the union would ordinarily expect this to result in a lesser sanction than dismissal.

Before dismissing for misconduct, the employer should conduct a thorough investigation into the allegations as a result of which it should be reasonable for the dismissing officer (or panel) to believe that on the balance of probabilities the employee committed the act(s). The employer is expected to be fair and inform the employee of what is being said against them by others, of the evidence available, and give them the opportunity to respond to the allegations.

3. Redundancy

Redundancy occurs where there is a closure of a business or the employee's workplace, or a diminishing need for employees to do the available work. Employers are expected to:

- warn the workforce of the possibilities of redundancy and consult recognised trade unions as early as possible
- establish objective criteria for selecting staff for redundancy
- apply these objectively so that fair selections are made
- take reasonable steps to find alternative employment for staff.

4. Statutory ban

This situation arises where the employer dismisses the employee because the law makes it impossible for them to carry on in the same job. Cases frequently involve loss of a driving licence, when the worker's job involves driving. However, consideration needs to be given to the duration of the ban, whether it affects the whole or only part of the employee's work, and the possibility of redeployment before a decision to dismiss is taken.

A more significant statutory ban would be if the employee had no right to work in the UK.

5. Some other substantial reason

This is a 'catch-all' category that can cover a broad range of reasons such as business re-organisation, bringing the employer into disrepute, frictions at work between two colleagues or situations where, due to actions of the employee, the employer has lost trust and confidence in them. The employer should show what the reasons were and that they were substantial.

Whatever the reason for the dismissal, the employer must have reasonable grounds for treating the reason as sufficient for dismissal and must follow a fair procedure before dismissing the employee.

When may a dismissal be procedurally unfair?

A dismissal may be procedurally unfair where the employer has failed to meet the minimum requirements of a fair disciplinary/dismissal procedure, as set out in the [Advisory, Conciliation and Arbitration Service \(ACAS\) code of practice on disciplinary and grievance procedures](#). The code requires the employer to:

- establish the facts of each case
- inform the employee of the problem
- hold a meeting with the employee to discuss the problem
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- provide employees with an opportunity to appeal.

The ACAS code does not apply to redundancy dismissals but an employer is expected to consult with individuals, carry out fair selection procedures, consult with recognised trade unions and consider alternative employment.

In addition, an employer who fails to follow the procedures set out in a policy negotiated with the unions (eg a misconduct, sickness absence management, capability or redundancy policy etc) may be subject to a claim for unfair dismissal. If dismissal would have been fair even if the right procedures had been followed, an employment tribunal can, despite

concluding the dismissal procedurally unfair, decide that the individual should receive no compensation.

Written reasons for dismissal – your rights

If you are dismissed after being continuously employed for at least two years, whether on a full-time or part-time basis, you are entitled to a written explanation of the reason for the dismissal.

An employer is not obliged to provide written reasons for dismissal unless the employee has made a request orally or in writing. A request can be made at any time after dismissal or within the notice period if the employee has been dismissed with notice.

If you are dismissed while pregnant, or on maternity or adoption leave, you are entitled to receive written reasons, irrespective of length of service and without having to make a request.

Once requested, the employer has to provide written reasons within 14 days. The employer is not required to go into great detail about the reasons for dismissal but the underlying reasons need to be made clear. It is good employment practice for the employer to let the employee know in writing the reasons for dismissal, without being specifically requested to do so.

The employee has the right to bring a claim in the employment tribunal if the employer fails to provide written reasons for dismissal once they have been requested. Claims must be lodged within three months of the date on which the employment ended. Where an employment tribunal has ruled in favour of the employee, it can make a declaration as to what it considers were the employer's reasons for the dismissal. The employment tribunal can also order the employer to pay the employee a sum equal to two weeks' pay.

When will a dismissal be automatically unfair?

Dismissal will be automatically unfair if a teacher is dismissed for a number of prescribed reasons. This means that an assessment of the dismissal by an employment tribunal is not subject to the reasonableness test. If the dismissal is because of one of the reasons below, it will be unfair regardless of the surrounding circumstances. It is automatically unfair to dismiss an employee because:

- they are pregnant, or have exercised or sought to exercise their right to maternity leave, parental leave or time off for urgent family reasons
- they are a trade union member, or because of their trade union activities
- they represented a colleague at a grievance/disciplinary hearing, or because they asked to bring a fellow worker or trade union rep to such a hearing
- they are dismissed for asserting a statutory right, eg the right to request adoption leave and pay
- they have taken action on health and safety grounds
- they have 'blown the whistle'
- they have taken part in protected industrial action.

If the reason for dismissal is automatically unfair, it is not necessary for the employee to have two years' service in order to bring a claim.

What is constructive dismissal and when may I be able to say that I have been constructively dismissed?

Constructive dismissal is the legal term used to describe what happens when an employee resigns because their employer has broken the employment contract in a very serious way. The breach must be so serious that it leaves the employee with no choice but to resign.

By resigning, the employee treats themselves as having been 'dismissed' by the employer. This is why it is called 'constructive' dismissal. It is very important to spell out clearly in any resignation letter that the resignation is because of the contract breach.

Resigning with a view to claiming constructive dismissal is a very high risk strategy that should only ever be considered after careful thought and after taking legal advice from the NEU. Separate guidance on constructive dismissal is available on the union website.

What should I do next?

If further advice is needed, contact your NEU workplace rep in the first instance. If there is no NEU rep in your workplace, or the peripatetic nature of your employment makes contact with a workplace rep difficult, contact the NEU Adviceline in England on 0345 811 8111 or NEU Cymru in Wales on 029 2049 1818.

Further contact details may be found at: neu.org.uk/contact-us

Further information

NEU guidance, available at: neu.org.uk

- Employment Contracts
- Constructive Dismissal
- Notice Periods
- Fixed-term Contracts
- Express and Implied Contract Terms

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