

# UNFAIR DISMISSAL

The Unfair Dismissals Act 1977 - 2007 lays down the criteria by which dismissals are to be deemed unfair. It protects employees from unfair dismissal in providing for reinstatement, re-engagement or financial compensation for those unfairly dismissed from their jobs.

## Summary Points

- The Act covers full-time and part-time employees with at least one year's continuous service. Contractors and commission agents are not employees.

**However the requirement of one years-continuous service does not apply where the dismissal results from the following:**

- an employee's pregnancy, giving birth or breast-feeding or any matters connected therewith.
  - the exercise or proposed exercise by an employee of a right under the Maternity Protection Acts, 1994 & 2004.
  - the exercise or contemplated exercises by an employee of the right to Adoptive Leave or Additional Adoptive Leave under the Adoptive Leave Acts 1995 & 2005.
  - an employee's trade union membership or activities.
- The Acts do not cover employees on fixed term or fixed purpose contracts who are let go when the contract expires or the purpose ceases provided the contract of employment, signed by both parties, specifies that the Unfair Dismissals Acts do not apply.

**Note:** If a series of two or more of these contracts between which there was no more than a 3 month break, is considered to have existed for the purpose of avoidance by the employer of liability under the Acts, they will be added together in calculation of continuous service of an employee for eligibility under the Acts.

- The Acts do not cover employees on fixed term or fixed purpose contracts who are let go - when the contract expires or the purpose ceases, provided the contract of employment,
  - is signed by both parties, **and**
  - specifies that the Unfair Dismissals Acts do not apply.
- Every dismissal of an employee is presumed to have been unfair unless the *employer* can demonstrate that there were substantial grounds to justify the dismissal.
- An employer may be able to justify a dismissal on the following grounds:
  - the capability, competence or qualifications of the employee (e.g. absence/ability);
  - the conduct of the employee (e.g. acts of violence, theft);
  - redundancy;

- where the continuation of employment would be unlawful (e.g. the employee is discovered to be under age) *or*
- other substantial grounds.

**Note:** If a series of two or more contracts (that are not fixed term or fixed purpose) which there was no more than 26 weeks of a break, is considered to exist for the purpose of avoidance of liability by the employer under the Acts, the length of the various contracts may be added together in calculation of continuous service of an employee for eligibility under the Acts.

- Dismissal will be deemed automatically unfair where it is demonstrated that it resulted from any of the following:
  - trade union membership/activity, either outside working hours or during working hours with the employer's permission.
  - the religious or political opinions of the employee.
  - civil or criminal proceedings against the employer to which the employee is a part or witness.
  - civil or criminal proceedings against the employee to which the employer is a part or witness.
  - the race or colour of the employee.
  - the pregnancy or the taking of Maternity Leave by an employee including natal care absences (under the Maternity Protection Acts, 1994 & 2004).
  - the exercise or contemplated exercise of the right to Adoptive Leave or Additional Adoptive Leave by the employee (under the Adoptive Leave Act 1995).
  - redundancy, where selection is unfair or when agreed procedure has been contravened or where the employer cannot demonstrate a genuine redundancy.
  - age of the employee.
  - sexual orientation.
  - employee's membership of the travelling community.

**Note:** In the case of dismissal on grounds of pregnancy/maternity/adoptive leave or trade union membership, an employee need not have one year's continuous service to claim redress for unfair dismissal.

### **Constructive Dismissal**

A dismissal can occur when an employee resigns from or leaves employment due to the unreasonable conduct of the employer, e.g., refusal to provide work, false accusations of theft, etc. The termination must be in response to the employer's conduct, for instance, if an employee is harassed by other employees, this will not give rise to constructive dismissal unless the employer condoned the behaviour or, having been informed of it, failed to take reasonable steps to prevent its reoccurrence. In the case of constructive dismissal the burden of proof falls to the employee to prove that they were constructively dismissed.

### **Probation/Training/Apprenticeship**

Employees on probation or undergoing training are not covered by the Act if the contract of employment is in writing, the duration of the probation or training is one year and is specified in the contract. The Act does not apply to FAS trainees or apprentices where the employee is let go in the month following completion of the apprenticeship provided the employee is not absent from work on protective leave.

Should a probation period be specified, this should be incorporated into the contract of employment. A probationary period allows for protection for the employer to ensure that the candidate selected for employment meets the requirements as outlined in their contract. Should the candidate not prove to be meeting the requirements the employer must bring this to his/her attention before the probationary period ends in order for the employee to improve. The employer may also have the option to extend the period of probation to allow for the employee to improve. At all times the employer must notify the employee of what is required of them and to ensure that the employee fully understands, this should be reviewed, tested and recorded and the employee informed of progress.

### **Notice to Employees of Procedure for Dismissal**

- The employer must, within 28 days of employment commencement, provide the employee with a notice in writing setting out the procedure, which the employer will observe before and for the purpose of dismissing an employee. The employer must also provide the employee with an altered procedure in writing within 28 days after the alteration takes effect.
- An employer who has dismissed an employee must, if asked, furnish in writing within 14 days, the reason for the dismissal.

### **Dismissal Procedure**

(The text given below does not form part of the Unfair Dismissal Act 1977-2007)

- The procedure, which the employer observes prior to dismissal, should afford the employee a genuine opportunity to change. In other words, the objective of any such procedure is not dismissal, but instead, to bring about positive change so that dismissal is not necessary.
- It is vital that the procedure adopted up to and including dismissal demonstrates basic fairness. Some fundamental rules apply.
  - Advise the employee in advance that it is a disciplinary meeting;
  - Advise the employee in advance what the meeting is about;
  - Offer the opportunity for the employee to be **represented**;
  - Always outline the nature and seriousness of the problem;
  - Always provide the employee with an opportunity to respond.

- It is important that the employer keeps a record of his interventions so that if dismissal takes place, he will have evidence of a fair and reasonable procedure having been exhausted.

**Note: Investigation must be carried out by the Employer**

- The onus is on the employer to show that the dismissal was “**Fair**”. The employer will be expected to show:
  - The employee was aware of all allegations and complaints that formed the basis of the proposed dismissal;
  - The employee had adequate opportunity to deny the allegations or explain the circumstances of the incident;
  - Evidence of witnesses or other involved parties was sought where the allegations were denied or the facts were in dispute;
  - **Remember that all employees have the right to representation during an investigation, if a request is denied this would be likely to affect the fairness of the decision to dismiss.**
- Except in the cases of gross misconduct, in particular, cases in which the safety of other employees is perceived to be at risk, the employer should see dismissal as the very last option available.
- A decision to dismiss should not relate entirely to the employee's immediate offence. Due regard must be given to the employee's past record.
- Complaints should be considered as having lapsed after an appropriate period of satisfactory performance and should not affect the employer's view of future complaints or omissions.

**Redress for Unfair Dismissal:**

- Where an employee has been found to be unfairly dismissed s/he shall be entitled to redress consisting of one of the following:
  - *Re-instatement* by the employer of the employee in the position which s/he held immediately before his/her dismissal on the same terms and conditions. The employee's service is unbroken.
  - *Re-engagement* by the employer of the employee either in the position which s/he held immediately before his/her dismissal or in a different position, which would be reasonably suitable for him/her.
  - *Payment* by the employer to the employee of compensation (not exceeding the sum of 104 week's remuneration in respect of the employment from which the employee was dismissed).

# REDUNDANCY

The Redundancy Payment Acts 1967-2007 provide for an employee to receive a lump-sum payment in the event of losing his/her job through redundancy.

The Protection of Employment Act 1977 provides for the protection of groups of workers faced with redundancy. It obliges the employer (normally employing more than 20 persons) to consult with employees and to notify the Minister for Enterprise, Trade & Employment of the proposed redundancies at least 30 days in advance of the first dismissal taking effect.

## Summary Points

- The employee is entitled to a lump sum of 2 weeks statutory redundancy payment for every year of service regardless of age *plus* one additional week's pay. (A week's pay is a normal week's pay subject to a maximum of €600.00 as outlined in the legislation.) All excess days should be calculated as a portion of 365 days i.e. 4 years 192 days equates to 4.52 years.
- The employer pays the lump sum to the employee. The employer may then be entitled to a 15% (from 1<sup>st</sup> January 2012) rebate from the **Social Insurance Fund**. (This must be claimed within six months of the date of redundancies).
- The entitlement to a lump sum payment applies to full-time and regular part-time employees who have been in continuous employment for at least 104 weeks, not counting employment prior to the employee's 16th birthday.
- An employee is considered redundant when dismissed from his/her employment for reasons such as closure of the company or the company continuing in business with a requirement for fewer employees.
- The entitlement to a lump-sum payment does not apply to an employee dismissed for reasons such as misconduct or inefficiency.
- An employee must not be made redundant for reasons such as trade union membership/activities, religious or political convictions, race or colour or pregnancy.

## Selection for Redundancy

A redundancy situation in general means that the job no longer exists and the person is not replaced. The emphasis is on the job and not the person in contrast, for example, to a

situation where a person is dismissed for alleged misconduct or where a person voluntarily resigns.

When selecting those who will be made redundant an employer is required to do so with clear objective criteria, such as last in first out. Where a selection criteria has been agreed between the employer and a union then they must be followed unless exceptional circumstances exist. When selecting, an employer should also consider alternative positions in the company or work pattern, before making anyone redundant.

Failure to act fairly may result in an employee maintaining they were unfairly dismissed as they were “unfairly selected” for redundancy.

### **Offers of Employment on the right to Redundancy Payments**

- If the employer offers the employee who is to be made redundant a renewal of his contract or to re-engage him under a new contract, whose terms and conditions are the same as the previous contract, and will come into effect before the date of dismissal, then should the employee accept this offer, the employee will be looked upon as never being dismissed and his service will be continuous.
- If the employee refuses the offer, his/her dismissal will take effect and may lose the entitlement to redundancy payment.
- If an employer makes an offer in writing to the redundant employee to renew or re-engage the employee under a new contract which differs wholly or in part from those of the previous contract and if the new/renewed contract takes effect not later than four weeks after the date of dismissal and the employee accepts the offer then his/her employment will be seen as continuous.

Should the employee refuse the offer, his/her dismissal will take effect but the employee will only be entitled to a redundancy payment if it can be shown that the refusal of the offer was not unreasonable. (The employer’s offer of employment must constitute an offer of suitable employment in relation to the employee).

- If an employee whose job is no longer available and is offered alternative work by the employer, the employee is entitled to take it for a trial period of not more than four weeks. If during that period the offer is refused, this temporary acceptance will not operate to make the employees refusal as unreasonable.

### **Change of Ownership**

- Where there is a change in ownership and the employee by arrangement continues to work for the new owner without a break in employment, he/she is not entitled to a

redundancy payment but his/her continuity of employment is preserved for the purposes of a redundancy payment in the event the employee is dismissed by means of redundancy by the new employer at any future date.

- An employee cannot be made to accept employment with a new employer but any unreasonable refusal of employment will effect his/her entitlement to a redundancy payment. The fact of a change of owner of the business will not be seen in itself as a good reason for refusal.
- Should a new owner merely buy the property, this will not constitute a change in ownership, and the former employer will be liable to pay redundancy payment which might be due to the employee for the loss of the job.

### **Calculating Service**

- The following absences do not count as service for the purpose of calculating the lump sum. Please note however that these absences only apply to the final 3 years of service ending on the date of termination of employment. For example, if an employee was working in a company for a period of 10 years the absences referred below only apply to the final 3 years and all absences in the previous 7 years are deemed to be fully reckonable.
  - More than 52 consecutive weeks due to occupational accident or disease;
  - More than 26 consecutive weeks because of illness due to some other cause;
  - Periods spent on strike. (absence due to lock-out is counted as service);
  - Absence due to lay-off by employer.

### **Calculation of Redundancy Payment**

- Two weeks pay for each year of service (Max €600 per week) irrespective of age (All excess days should be calculated as a portion of 365 days in the final year), plus
- One additional week's pay

Claims for redundancy payment must be made within 26 weeks of the date that the employee was dismissed.

### **Lay-offs and Short-time**

- Only if there is a provision in the contract of employment to lay off or place on short time, or agreement between the employer and the employee(s) concerned or a union

representing the employees, can an employer legally take this action. Short-time is defined as working less than half the normal weekly working hours or for less than half the normal weekly earnings.

- An employee may be entitled to redundancy payments when laid off or put on short time for either four weeks running or six weeks in a thirteen week period and may make a claim for such a payment. To claim a redundancy payment the employee must serve a written notice (Form RP9) stating that he/she intends to claim.
- If the employer has grounds for believing that within four weeks he will take the employee back for at least 13 weeks full working, then a counter notice may be served on the employee. This counter notice must be served within 7 days of receipt of the employees notice. Form RP9 may be used for this purpose.

### **Minimum Period of Notice**

- The employee must be given a minimum period of two weeks notice with the RP50 form (this form can be downloaded from the Department of Enterprise, Trade & Employment website at [www.entemp.ie](http://www.entemp.ie)). A shorter period of notice may reduce the amount of the rebate to the employer. The employee may be entitled to additional notice under the Minimum Notice and Terms of Employment Acts 1973 - 2001 and Terms of Employment (Amendment) Act 1994, or by the employees contract of employment.

### **Time off to Look for Work**

- During the final two weeks of redundancy notice, the employee is entitled to paid time off to look for work.

### **Collective Redundancy**

- In the event of collective redundancies, the employer is obliged to consult with employee representatives, provide employees with specified information and notify the Minister for Enterprise, Trade & Employment at least 30 days in advance of the first dismissal taking effect.
- A Collective Redundancy arises where an employer proposes to make :
  - 5 redundancies in an establishment normally employing 21 - 49 persons, or
  - 10 redundancies in an establishment normally employing 50 - 99 persons, or
  - 10% or more of workforce in an establishment normally employing 100 - 299, or
  - 30 or more redundancies in an establishment normally employing 300 or more.

### **Consultation with Employees' Representatives**

- In collective redundancy situations, the employer must consult the representatives of the employees at the earliest opportunity but no later than 30 days in advance of the first dismissal. Where there is no union involved the employees must be advised that they are entitled to elect from within the group of workers affected representatives.



- The consultation with the employee's representatives, for the purpose of reaching agreement, must address the following points:
  - The possibility of avoiding the proposed redundancies **or** of reducing the number;
  - The basis of selecting the individuals to be made redundant.

### **Provision of Information to Employees**

- The employer must provide the following information in writing to the employees' representatives:
  - The reason/s for the proposed redundancies;
  - The proposed number and categories of employees to be made redundant;
  - The number of employees normally employed;
  - The period of time during which the proposed redundancies will take effect;
  - The criteria for selection of employees for redundancy;
  - The method of calculating any redundancy payments.

### **Redundancy Panel**

Please note that under the Protection of Employment (Collective redundancies & related matters) Act 2007 a redundancy panel is being set up by the Department of Enterprise, Trade & Employment in accordance with the partnership agreement 'Towards 2016'. The panel will deal with collective redundancies to ensure that they are genuine redundancies as opposed to a situation where workers are replaced by new workers doing the same job for lower wages.

### **Notification to Minister for Labour**

- The employer must notify the Minister for Enterprise, Trade & Employment in writing of the proposed collective redundancy. This information must be given at the earliest opportunity but no later than 30 days in advance of the first dismissal.
- This notice should contain details such as the reasons for the proposed redundancies, the number of redundancies, description and categories of employees affected, the number of employees normally employed and the period during which the proposed redundancies are to take place.
- A copy of this notice must be supplied promptly to the employee's representatives.
- It is unlawful for the first dismissal to take effect before the expiry of the 30 days beginning on the date of notification to the Minister.
- The Minister may request the employer to consult with him/her or with an authorised officer of the Department, with the objective of seeking solutions to the problem caused by the proposed redundancies.

## **MINIMUM NOTICE**

The Minimum Notice and Terms of Employment Acts 1973 - 2001 specifies the minimum period of notice to be given by employers to employees when employment is to

end. It also sets out the minimum period of notice, which must be given by the employee to the employer.

### **Summary Points**

- The Act covers all employees with continuous service for a period of 13 weeks or more.
- The Act specifies the following period of notice that must be given by the employer to the employee according to length of service:

<i><b>Length of Service:</b></i>	<i><b>Minimum Notice:</b></i>
- Thirteen weeks to two years	One week
- Two years to five years	Two weeks
- Five years to ten years	Four weeks
- Ten years to fifteen years	Six weeks
- More than fifteen years	Eight weeks

- Service may be broken by strikes, lockout, and lay-off.

### **The Right to Notice**

- The employer is entitled to not less than one week's notice from the employee who has been in his continuous employment for thirteen weeks or more. However, if the employee's contract states that a longer period of notice shall apply then that is the period of notice that should be used.
- The employer cannot alter the employee's right to a minimum period of notice specified in the Act. Any term or provision contained in a contract of employment for longer periods will apply.
- The employer and employee are not, however, precluded from waiving the right to notice or accepting payment in lieu of notice, (should an employee accept payment in lieu of notice). In those cases, the date of termination of that person's employment will be deemed to be the date of which notice if given would have expired.
- Notice must be certain and specify the expiry date.

### **Calculating Service**

- To calculate the period of service of an employee, every week in which he/she is expected to work is counted.
- The following absences count as service:
  - Service with the Reserve Defence Forces
  - Up to 26 weeks between consecutive periods of employment due to lay-offs, sickness or injury or when taken with the agreement of the employer.
  - A week, or part of a week, when locked out by the employer or when absent due to a trade dispute in another business.

- Any period of absence during which the employee was taking part in a strike relating to the business in which s/he is employed does not count as service.

### **Continuity of Service**

- The employee's service is continuous unless he/she is either dismissed or voluntarily leaves the job.
- Continuity of service may not be affected by the following breaks:
  - Strikes
  - Lay-off
  - Lock-out
  - Dismissal followed by immediate re-employment.
- The transfer of a trade or business does not break continuity of service. The employee's service with the new employer includes continuous service with the previous owner.
- An employee who gives notice of his/her intention to claim redundancy payment because of lay-off or short time is considered to have voluntarily left the employment.

### **Rights of the Employee during the period of Notice**

Where the employer or employee wishes to terminate the employment, during the period of notice the employee shall be entitled to the same wages and the same rights i.e. sick pay, holidays, etc, as he/she would have if notice of termination of his/her contract of employment had not been given.

### **Misconduct**

- The right of an employer to dismiss without notice due to misconduct is not affected by the Act.

### **Lay off / Short time working**

The employer may not place a person on Lay off or short time working during a period of notice, if the employee is available to work.

### **Disputes**

Under the Acts any dispute regarding notice may be referred to the Employment Appeals Tribunal. No time limit is laid down by the Acts for such claims.