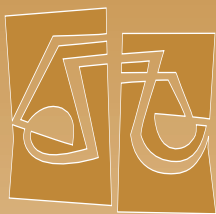


# unfair dismissals



**flac**

promoting access to justice

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## 1 Introduction

The Unfair Dismissals Acts 1977-2007 set up a system of complaint by which the fairness of an employer's decision to dismiss an employee may be contested by that employee and adjudicated by an independent body. The Acts do not actually prevent the dismissal taking place. They allow the employee to challenge the fairness of the dismissal after it has happened. If the employee is successful in the claim, he/she is entitled to redress (see paragraph 10 for more detail).

## 2 Types of dismissal

For the purposes of the Acts, there are three types of dismissal. These are:

- The dismissal of the employee by the employer.
- The resignation of the employee from their job, but in circumstances where the employee alleges that the employer's conduct is responsible for the resignation (known as *constructive dismissal* – see point 7).
- Where a contract of employment for a fixed term or for a specified purpose comes to an end (see point 8).

### 3 Qualifying to claim

The employee must prove that he/she qualifies to claim under the Acts. The requirements are as follows:

- **Service** – The employee must have **one year** of continuous service. There are some exceptions to this rule and these include where the dismissal is due to the employee's pregnancy or exercise of maternity rights or the employee's trade union membership or activities. Note that service must be **continuous**. The basic rule is that service is only broken by the dismissal of the employee or their resignation. (See point 8).
- **Time limits** – The employee must bring his/her claim within **six months** of the date of dismissal. This may be extended to 12 months but only in exceptional circumstances. It is very difficult for an employee to get this extension.
- **Excluded categories** – A number of categories of employee are excluded from bringing a claim under the Acts. By and large, these are state employees such as officers of the Health Service Executive, VECs, Defence Forces and Gardai. Persons employed outside the State are also excluded as are employees who work for relatives where the workplace and dwelling place are the same.

- **The fact of dismissal** – Apart from the particular area of constructive dismissal, the employee must show that a dismissal took place. The fact of dismissal is sometimes disputed in claims under the Acts.

Until 2001, an employee was also required to work at least eight hours per week as well as have the necessary service. **This is no longer necessary.**

#### 4 Where to claim

An employee may choose whether to bring his/her claim before a Rights Commissioner (RC) located in the Labour Relations Commission or to the Employment Appeals Tribunal. (See page 14 for further details). However, it is important to note that the employer concerned can object to a RC hearing in writing within three weeks of receiving the claim form. In either case, the appropriate form must be filled out and these will be sent on request or can be downloaded.

The local Citizens Information Centre (CIC) may be able to help you with these forms (see the Citizens' Information website at: [www.citizensinformation.ie](http://www.citizensinformation.ie) or see Golden Pages listing).

Employees often ask which of these two procedures is the better option when bringing a claim. There is no straightforward answer to this question. However in general, it can be said that a RC hearing is less legalistic and works with written submissions, whereas the EAT is more like a court and takes sworn evidence.

## 5 Fair reasons to dismiss and fair procedures

Once the employer accepts that a dismissal has taken place and the employee satisfies the requirements to make a claim, the Acts make it clear that the employer must show that the dismissal was fair. To do this, the employer must show that the dismissal fits into one or a combination of the so called 'fair' grounds set out in the Acts.

These are as follows:

- **Capability** – This refers to the employee's attendance at work and dismissals on this ground are usually related to persistent lateness, absenteeism or extended sick leave.
- **Competence** – This refers to the employee's ability on the job and dismissals on this ground relate to issues such as poor work performance and failure to meet set targets.

- **Qualifications** – A seldom-used heading, this refers to the employee's failure to obtain qualifications, misleading the employer in relation to qualifications or losing essential qualifications for the job such as a driving licence.
- **Conduct** – A frequently-used category, this refers to instances of misconduct ranging from persistent minor offences to gross misconduct matters such as theft, substance abuse or violence at work.
- **Redundancy** – Here, it is the job rather than the employee performing it that is at issue. A redundancy usually involves the loss of the job for economic reasons, but can also involve the replacement of the employee where the work has changed and the employee is no longer qualified to carry it out.
- **Other substantial grounds** – This is a catch-all category. Examples that have arisen here include health and safety grounds and third-party pressure to dismiss.

As well as having fair grounds to dismiss, an employer must also show that the rules of **fair procedures** were followed in carrying out the dismissal. For this purpose, the employer must have a **disciplinary procedure** in writing and must follow its terms. Such a procedure must include a clear system of warnings and a right of representation and appeal for employees. Many dismissals are found to be unfair on procedural grounds.

## 6 Unfair grounds for dismissal

The Acts also set out a list of grounds that are considered to be **automatically unfair** if they are to be found to be the reason for the dismissal. These include:

- Dismissal for taking part in a strike or industrial action.
- Dismissal for trade union membership or activity.
- Dismissal due to the employee's religious or political opinions, race, colour, age, sexual orientation or membership of the traveller community. (Other discriminatory reasons for dismissal such as gender, marital status or disability are covered by the Employment Equality Acts 1998 and 2004).

- Dismissal on grounds of pregnancy or matters connected with it, such as the exercise of maternity rights.
- Dismissal for being involved in a civil or criminal case against the employer, whether as a party or a witness.

## 7 Constructive dismissal

In general, the employee must show that a dismissal has taken place in order to be able to claim. However, where an employee resigns from the job but argues that it was caused by the employer's unreasonable conduct, a claim of constructive dismissal may arise. In this situation, the employee must show that **his/her resignation was justified**. For this reason, the employee should use every avenue open to him or her to resolve the problem before resigning. This will include using a grievance procedure if there is one.

A **grievance procedure** is a system for dealing with complaints by employees about their treatment at work. So, for example, if the employee is unhappy at how he/she is being treated by a supervisor, the employer should be informed and given the opportunity to sort the matter out. If there is no written grievance procedure, the employee should still consider putting his/her complaint in writing in order to have evidence that a complaint was made. Resignation should be a last resort.

## 8 Anti-avoidance rules

In point 2, it was explained that a contract for a **fixed term** (i.e. for a stated length of time) or a **specified purpose** (i.e. one that will end when the stated purpose ends) qualifies as a dismissal under the Acts. However, in relation to these types of contract only, an employer may avoid a claim by putting a clause in the contract **excluding** the operation of the Acts and getting the employee to sign the contract.

This has led to the exploitation of some employees, with employers rolling over this type of contract and avoiding claims, even though the employee concerned may have a long period of service in total. To challenge this practice, an employee dismissed at the end of two or more such contracts may argue that the service under the contracts should be 'deemed to be continuous' and that a claim should be allowed to go ahead. There must be a gap of less than three months between the contracts.

Some employers may also dismiss an employee on an **open-ended** contract (i.e. one without a time limit) before he/she reaches one year's continuous service and then rehire and dismiss again. At the point of dismissal, the employee may have over one year's service but because continuity of service is broken by dismissal, the employer may argue that there is no claim. Again, the employee may seek to have the periods of

employment 'deemed to be continuous' for a claim to go ahead. In this case, there must be a gap of less than 26 weeks between the periods of service.

## **9 Representation and Legal Aid**

Generally the employee must fund any legal representation from their own resources. It is also important to understand that legal costs cannot be recovered in these cases, win or lose. However, employees may be represented in these claims by another person of their choosing (even a friend or relative), provided the RC or EAT is notified. If you are a member of a trade union, the union may assist you. Your local Citizens Information Centre may also be able to help.

If you are a person of moderate means, legal advice may be available from a Legal Aid Board solicitor on a matter of unfair dismissal, although the Legal Aid Board cannot provide representation before the EAT.

However, a Legal Aid Board solicitor can represent you in the case of a new hearing in the Circuit Court, where the employer appeals a decision that was made in your favour.

The Board's offices are called Law Centres and are located around the country. For the location of your nearest Law Centre and for further information, call 1890 615 200.

As of 1 September 2006 the new **disposable income** limit of a person applying for legal aid has been increased from €13,000 up to €18,000 per year.

All those who are granted legal advice and/or legal aid must pay a fee called a contribution to the Board. The minimum contribution is €10 for legal advice and €50 for legal aid. The law centre staff will advise a person of the actual contribution in each individual case.

The maximum allowance (this is an expense which the rules allow you to deduct when calculating your disposable income) on childcare facilities if you are working is €6,000 per child per year. The maximum allowance on accommodation costs (e.g. rent) is now €8,000 per year.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property), as are the value of the tools of an applicant's trade.

For details of other allowances, contact the Legal Aid Board or your local Law Centre.

## 10 Forms of redress

Three types of redress can be awarded. It is up to the employee when filling out their claim form to choose the preferred remedy, although the view of the employer is always asked for at the end of a hearing. The choices are as follows:

- **Re-instatement** – the first of the job-back remedies, reinstatement is very rare and will only be awarded where it is felt that the employee is completely blameless. The reinstated employee is entitled not just to their job back but to any loss of earnings between the dismissal and the hearing.
- **Re-engagement** – a more flexible remedy, generally awarded where the relationship between employer and employee is intact though the employee is considered to have contributed in some way to the dismissal. It can take effect from a date the RC or EAT chooses and may even involve a different job.
- **Compensation** – By far the most common award, compensation is limited to loss of earnings only, although the reasonableness of the employer's conduct can be taken into account in assessing compensation. The principal headings of loss are **present loss** (loss from date of dismissal to date of hearing), **future loss** (potential loss beyond the date of hearing) and **pension loss** (the

effect of the dismissal on the pension rights of the employee, if any). The award is limited to a maximum of two years salary. An amount may be **deducted** from the award for the employee's contribution to their dismissal. Finally, the employee is obliged to '**mitigate their loss**', that is, he/she must bring evidence of his or her attempts to find work during the present loss period.

## 11 Appeals

Either side may appeal from the RC to the EAT or from the EAT to the Circuit Court within **six weeks** of the issuing of the decision. If an employer fails or refuses to carry out a recommendation of a RC or the determination of the EAT but does not appeal, the employee can look to have that decision enforced in the EAT or the Circuit Court, as the case may be. An employee can also apply to the Department of Enterprise Trade and Employment to enforce an order on his/her behalf.

## 12 Alternative complaints

An employee who does not have the required one year's service may make a complaint in relation to the manner of their dismissal under the industrial relations legislation. A Rights Commissioner also hears this complaint. There is a right of appeal to the Labour Court. However, there are some practical difficulties enforcing a decision under this Act.

An employee may also pursue a wrongful dismissal claim in the courts instead of an unfair dismissal claim, but the question of legal costs arises here and detailed legal advice must be sought in relation to this option.

### **The Labour Relations Commission**

Tom Johnson House,  
Haddington Road, Dublin 4, Ireland  
Lo-Call: 1890 220 227  
Tel: (01) 613 6700  
e-mail: [rightscomm@lrc.ie](mailto:rightscomm@lrc.ie)

### **Employment Appeals Tribunal**

Davitt House, 65a Adelaide Road, Dublin 2  
Lo-Call: 1890 220 222  
Tel: (01) 631 3006  
e-mail: [eat@entemp.ie](mailto:eat@entemp.ie)  
web: [www.eatribunal.ie](http://www.eatribunal.ie)

## **National Employment Rights Authority (NERA)**

O'Brien Road, Carlow

Lo-Call: 1890 80 80 90

– Lines open Monday-Friday, 9.30-5pm

e-mail: [info@employmentrights.ie](mailto:info@employmentrights.ie)

web: [www.employmentrights.ie](http://www.employmentrights.ie)

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## FLAC Mission Statement:

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

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