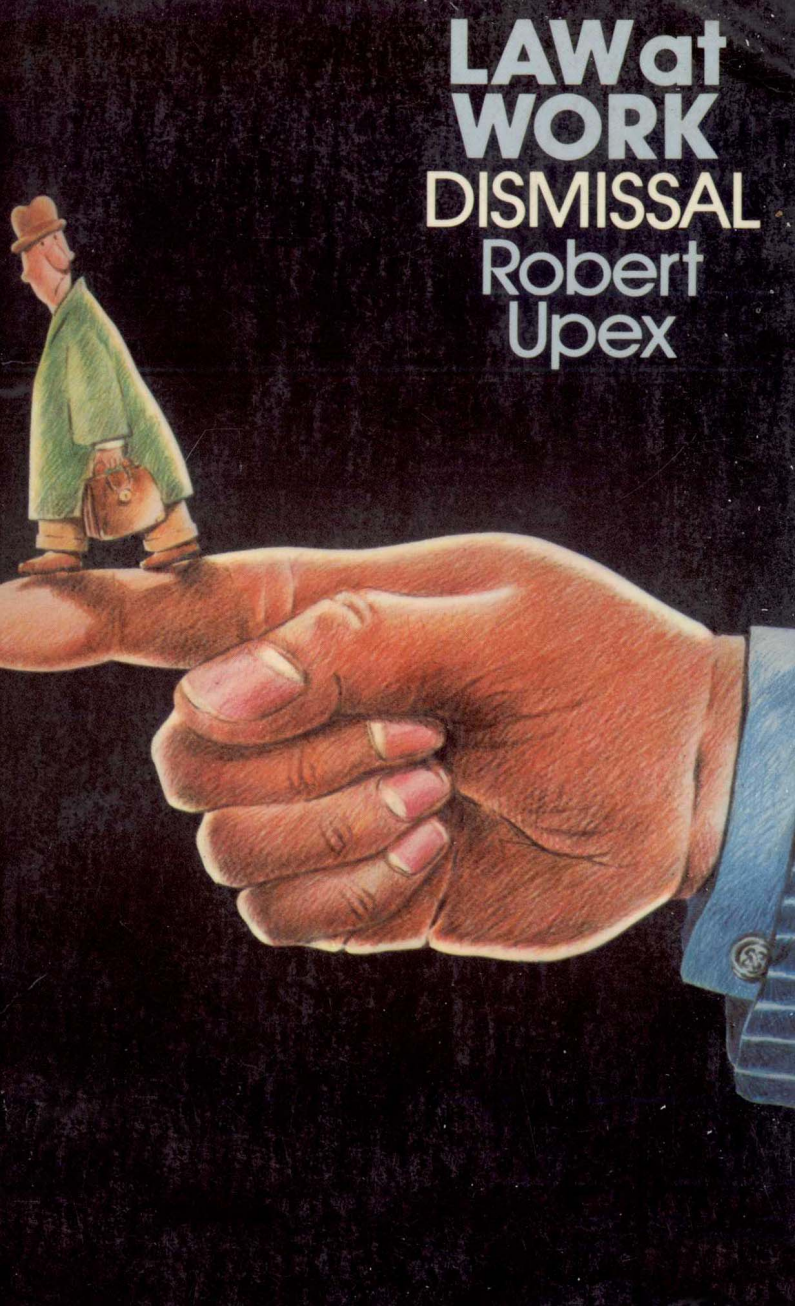
# LAW at WORK

## DISMISSAL

Robert Upex



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# Abbreviations

| | |
|---|---|
| ACAS | Advisory, Conciliation and Arbitration Service |
| EA | Employment Act 1980 |
| EAT | Employment Appeal Tribunal |
| EPA | Employment Protection Act 1975 |
| EPCA or "the 1978 Act" | Employment Protection (Consolidation) Act 1978 |
| RRA | Race Relations Act 1976 |
| SDA | Sex Discrimination Act 1975 |
| TULRA | Trade Union and Labour Relations Act 1974 |

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# Contents

# 1 Introduction

"Getting fired," "getting the sack," "being dismissed"—these are all ways of describing what happens when an employee's job is ended by his boss. Getting the sack is something we all know about and probably dread. The papers often have headline stories about sacked employees, like the one about an employee who regularly went to sleep during the night shift and then, when he got sacked, was awarded a lot of money by the industrial tribunal. But being put out of a job is serious, and the law has laid down rules to protect employees, which an employer must keep to when giving them the sack.

There are in fact various types of dismissal. Most of this book will cover *unfair* dismissal, which is far more important than a second type, *wrongful* dismissal; but a few words will be said about the difference between them later on in this chapter. A third type of dismissal—redundancy—is dealt with in another book in this series, Colin Bourn, *Job Security*.

Most of the law on these topics is contained in the Employment Protection (Consolidation) Act 1978, which will be called "the EPCA 1978" or "the 1978 Act"; but there is also, now, the Employment Act 1980 ("the EA 1980"), which has made some changes to the existing law.

## 1. How to use this book

This chapter introduces some of the things that will be discussed more fully later on. It covers the difference between unfair and wrongful dismissal; and then sets out the basic rules on unfair dismissal. Also mentioned are some of the people and institutions involved (*e.g.* ACAS and

conciliation officers); and finally, there is guidance on how to claim.

Chapters 2-4 set out more fully some important basic rules. Chapter 2 explains when someone is qualified to claim, and when he does not have the right to claim. Once it is clear that he *is* qualified, and that he does not come within certain categories of "excluded" employees, he will still be able to claim *only* if he has been dismissed (not, for example, if he resigns); so Chapter 3 sets out the rules on what dismissal actually is. But even when we know the employee has indeed been dismissed, we must still know when his employment ended; for he has only three months to claim that he has been unfairly dismissed, and the three months starts when his employment ends. Chapter 4 sets out the rules on when the employment actually ends.

Chapters 5 and 6 set out the general rules which an employer must keep to when he sacks an employee. If he does not keep to them, that will be an unfair dismissal. In addition to the general rules, there are rules for special situations, *e.g.* where there has been strike action, or where a woman's employment ceases because she is pregnant. These rules are discussed in Chapters 7 and 8.

Finally, Chapter 9 sets out the remedies available to an employee whose claim of unfair dismissal is successful.

## 2. Wrongful dismissal and unfair dismissal

We have already said that there is a difference between these two types of dismissal, and that unfair dismissal is a more important right than wrongful dismissal.

### (a) *Wrongful dismissal*

An employer dismisses his employee wrongfully if he sacks him in breach of the contract of employment. So if the employee is entitled to a month's notice and is sacked on the spot, the dismissal will be wrongful. But it will not be wrongful if the employee has broken his contract so seriously that the employer is entitled to sack him. If, for example, the employee steals from the employer and is

sacked on the spot, his dismissal will not be wrongful.

So wrongful dismissal occurs when the employer sacks the employee and, in doing so, breaks his contract with the employee. If the employer gives the employee the proper notice he is entitled to, there *cannot* be a wrongful dismissal, provided also that the employer goes strictly through the *procedure* for sacking an employee laid down in the contract. If the employee himself breaks the contract and that causes the employer to sack him on the spot, he will only be able to claim wrongful dismissal if the court says that what he did was not serious enough to justify the employer in dismissing him.

If the employee wants to claim wrongful dismissal, he must sue his employer in the county court. He will rarely be able to get his job back, and will only get compensation to cover the wages he would have earned if his employer had given him proper notice.

(b) *Unfair dismissal*

Unfair dismissal is a fairly new right. It started in the Industrial Relations Act 1971 and was continued by the Trade Union and Labour Relations Act 1974. Now it is in the 1978 Act.

The basic point about unfair dismissal is that the law is concerned with the *way* in which the employer sacks the employee, as well as the *reason* for the dismissal. So if the employee gets proper notice, but his employer sacks him in a way which is unfair to him, he will be able to claim unfair dismissal. He cannot claim *wrongful* dismissal, because he has had proper notice—the employer has not broken the contract of employment.

This means that the employer must treat the employee fairly in the way in which he sacks him. If, for example, the employee gets into a fight with some other employees, that does not mean that the employer can sack him on the spot. If he does, the dismissal may be unfair. Nor, as I have already said, does a dismissal have to be wrongful to be

unfair. If the employee who gets into a fight gets proper notice, the dismissal may still be unfair.

If the employee wants to claim unfair dismissal, he must complain to an industrial tribunal. If he wants his job back, the tribunal may order his employer to take him back in the same job or a similar job. If it does not order his employer to take him back, it will award compensation. Chapter 9 discusses these remedies more fully.

(c) *The differences between the two*

To claim unfair dismissal, the employee must have been employed for a year, and must not be excluded by the 1978 Act (see Chap. 2). There is no minimum qualifying period of employment for a wrongful dismissal claim; any employee who is not given his proper notice can sue.

Wrongful dismissal claims take place in the county court (or High Court). They involve going through a formal court procedure and may not be worth it in the end. Unfair dismissal claims go to industrial tribunals, and the whole thing is less formal and quicker.

The employees who will most likely need to think of suing for wrongful dismissal will be people who earn a lot, people who have not been employed for one year, or those who have a contract for a fixed term (*e.g.* for five years) which gets cut short. For others, an unfair dismissal claim will probably be best.

## 3. The basic rules on unfair dismissal

(a) *The general rules*

If the employee qualifies for the protection against unfair dismissal provided by the law, and does not come within one of the "excluded" categories of employees (see Chap. 2) then, provided the employee really was dimissed (see Chap. 3), the employer at a tribunal must show that he followed certain rules in sacking him. The employer must show that he had a reason for sacking him and that the reason is one allowed by the 1978 Act (see Chap. 5). He

must also have acted reasonably in sacking the employee (see Chap. 6). This means that, however good he thought his reason, he must still have treated the employee fairly. If he cannot show a reason or acted unfairly, the dismissal will be unfair, so that, unless the employee was largely to blame for the dismissal, the employer will either be told to re-employ him or pay him compensation.

The procedure by which an employee who has been sacked can ask his employer to tell him the reason for dismissal, is described at the end of this chapter.

(b) *The special rules*

Certain situations make it necessary for the employer to keep to special rules. Some of the rules are to do with trade union membership, union activities, and especially strikes (see Chap. 7). Other rules concern, for example, dismissing employees in a redundancy situation, or dealing with pregnant employees. These are dealt with in Chapter 8.

If the employee is sacked for joining a union or refusing to join a trade union which is not "independent," he does not have to have been employed for a year, nor does he have to be under the retirement age (1978 Act, s. 64 (2); see p. 45).

(c) *Contracting-out*

Section 140 of the 1978 Act says that the employer and employee may not enter into any agreement which tries to stop the Act from operating. If they do, the agreement will be void—that is, of no effect. So if, for example, the employer sacks the employee and then tries to bribe him to agree not to take a complaint to an industrial tribunal, that agreement will not have any effect. The employee may still take his case to the tribunal.

There are two exceptions to this rule: first, if a "dismissal procedures agreement" is in force between an employee's union and the Company, then the employee may have to use the procedures in the agreement and may not be able to rely on his rights and remedies under the 1978 Act

(see s. 65). But the employee will only be bound by the agreement if the Secretary of State for Employment makes an order that the employees covered by the agreement must in fact abide by it. This he will only do if he is satisfied that the employees covered by the agreement will not be at a disadvantage because they cannot use their rights under the 1978 Act. The Act defines a "dismissal procedures agreement" as an agreement "with respect to procedures relating to dismissal" made between one or more independent trade unions and one or more employers or employers' associations. This procedure does not appear to have been used so far. It is not the same as the procedure by which an employer provides for appeals and grievances to be dealt with inside the organisation (see Chap. 4).

The second exception to the rule is where a conciliation officer has become involved (see below).

**4. The people involved in unfair dismissal**

Three institutions which an employee with an unfair dismissal claim is almost certain to meet are The Advisory, Conciliation and Arbitration Service (ACAS), conciliation officers and industrial tribunals.

(a) *Conciliation officers*

The employee is most likely to meet a conciliation officer first, once he has started his claim (see Procedure below). The job of the conciliation officer is to try to get the parties to settle the case without it being heard by an industrial tribunal (see s. 134). He will either try to get the employer to take the employee back in a suitable job or try to get agreement on a figure of compensation to be paid by the employer to the employee. Conciliation officers are employed by ACAS and anything said to them by the employer or the employee may not be used in the industrial tribunal proceedings, unless whoever said it agrees. If the conciliation officer gets the parties to agree, the agreement is not subject to the contracting-out provisions mentioned earlier.

(b) *Industrial tribunals*

If the employee's claim is not settled with the help of the conciliation officer, it will go on to be heard by an industrial tribunal. See John McIlroy, *Going to Law*, in this series. Industrial tribunals are held in all big towns and cities up and down the country. They consist of three people: the chairman, who has to be a qualified lawyer, and two "wingmen," one appointed from a panel of people nominated by the TUC (Trades Union Congress) and the other from a panel nominated by the CBI (Confederation of British Industry). Both "wingmen" must have experience of industrial relations.

Proceedings in industrial tribunals are informal and it is not necessary for either party to be represented by lawyers. Legal aid, however, is not available.

If either side is not happy with the industrial tribunal's decision, he may ask the tribunal to review the decision, or may appeal against it to the Employment Appeal Tribunal (EAT). From there, it is possible to appeal to the Court of Appeal and the House of Lords. Appeals to the EAT and the higher courts (where legal aid *is* available) are only possible if a point of law is involved. This means that the person who wants to appeal must show that the tribunal applied the law wrongly; dissatisfaction with the industrial tribunal's decision is not enough.

The Appendix contains the address of the Central Office of Industrial Tribunals, to which an employee who thinks he has been unfairly dismissed should write.

(c) *ACAS*

ACAS is short for the "Advisory, Conciliation and Arbitration Service." Although it has been mentioned once or twice, it does not really affect employees except through its conciliation officers. It is mainly concerned with industrial relations between trade unions and employers. Its address is also in the Appendix.

**5. Procedure**

If an employee thinks he has been sacked unfairly, he should start his claim by filling in an "Originating Application" on a form called an IT 1. These IT 1's can be got from local Employment Offices, Job Centres or Unemployment Benefit Offices. It is not vital to use IT 1, but any other kind of written application should give the kind of information requested in that form. The employee should also ask his employer to give him a written statement of the reasons for his dismissal (see below).

The IT 1 must be sent to the Central Office of the Industrial Tribunals *within three months* of the ending of his employment (see Chap. 4). If he is sacked *with notice*, the employee may also send in the IT 1 before his notice runs out. If he does not get in the IT 1 in time, the employee may be prevented from taking his claim any further. This problem is dealt with more fully in Chapter 2.

Once the IT 1 has been through the Central Office, it will then be sent to a Regional Office of Industrial Tribunals (ROIT). From then on, both the employee and the employer will deal with the Regional Office, and they will probably be called the "complainant" or "applicant" (the employee), and the "respondent" (the employer). The Regional Office will send a copy of the IT 1 to the employer, who will also be sent a "Notice of Appearance" form which is called an IT 3. the employer should fill in the IT 3 and send it back to the Regional Office within 14 days of receiving his copy of the IT 1. The purpose of this form is to give the employer a chance to say why he is resisting the employee's claim. The Regional Office will send a copy of the IT 3 to the complainant/employee. Copies of the IT 1 and IT 3 and any correspondence will also go to ACAS. Both sides will be told that they can make use of a conciliation officer.

After these steps have been taken, a number of other procedures may become necessary before the industrial tribunal hears the case. For an account of these, see John McIlroy, *Going to Law*. Such procedures enable each side to

prepare his case as fully as he can (*e.g.* to make sure he has all relevant documents available for the tribunal, and has arranged for his witnesses to be there on the day of the hearing).

**6. Written statements of reasons for the dismissal**

An employee who gets the sack may ask his employer for a written statement of the reasons for his dismissal (see EPCA 1978, s. 53). The employer must give the statement within 14 days of being asked to do so by the employee. The employee is not entitled to this statement unless he has been employed for 26 weeks counting up to the end of the last complete week before his employment ended.

If the employer unreasonably refuses to give a written statement, or if he gives one which is not sufficient or is untrue, the employee should make a claim to this effect to the industrial tribunal. Since he will probably be claiming also that he was unfairly dismissed, his best course is to put this claim on the IT 1 as well. This means that the industrial tribunal will deal with the two claims at the same time.

If this claim concerning the written statement succeeds, the tribunal will award the employee two weeks' pay, to be paid by the employer. It may also declare what it finds to be the employer's reasons for sacking the employee.

Although this particular right may not seem important, the effect of a written statement given by an employer may be to pin him down to the reasons which he puts in the statement. So if, for example, he puts in the statement "bad time-keeping" and then at the tribunal hearing tries to argue that the real reason was something else, he will probably not be allowed to change the reason. The tribunal may also suspect his honesty.

# 2 Qualifications and Exclusions

**1. Introduction**

As was said in Chapter 1, an employee is only entitled to the right not to be unfairly dismissed if he qualifies (see 2. below) and is not excluded (see 3. below). He must also make sure that he makes his claim in time (see 4. below). If he does not qualify, or is excluded, or claims out of time, he will not be able to claim that his dismissal was unfair. But he will still have no claim if he was not *dismissed*. So he must make sure that the rules in Chapter 3 apply as well as those in this chapter.

**2. Is the employee qualified?**

Only certain types of people have the right not to be unfairly dismissed. If a person is not an employee (for example, if he is self-employed) he will not qualify. Even if he is an employee, he will still not be able to claim unfair dismissal if he has not been employed for 52 weeks (one year). So something must be said at this stage about what an employee is; and then something about the 52-week qualifying period. Finally, we must look at part-time employees, because special rules apply to them.

(a) *Who is an "employee"?*

The 1978 Act only applies to employees (see s. 54); so self-employed people (like self-employed builders or window-cleaners) have no protection against unfair dismissal.

The first point to note is that a person does not become self-employed just because he is given a bit of paper which *says* he is self-employed. The courts have often said that an

employer cannot decide the status of a person whose services he uses in that way. On the other hand, if there is an agreement by which a person becomes self-employed, courts and tribunals are prepared to go along with this, if they think that the person concerned really is self-employed (see *Massey* v. *Crown Life Insurance*, 1978). If neither side says anything about it, then the industrial tribunal will have to look at the evidence and decide.

The difference between being employed and being self-employed is important. Employees have income tax deducted from their wages before they get paid; self-employed people do not have tax deducted from what they earn but account for their tax to the Inland Revenue. Employees have their social security contributions deducted from their wages and their employers also have to pay a contribution. Self-employed people have to pay their own contributions out of what they earn, and are entitled to fewer benefits than employees. In addition, the laws which give people rights in their employment (like the 1978 Act) usually apply only to employees.

If there is a dispute as to whether a person is an employee or is self-employed, the industrial tribunal will have to deal with that first, before it hears the unfair dismissal claim. It will have to look into the evidence and see how the employee was treated. It will look at any written document, but, as has been said, a bit of paper is not conclusive. The tribunal will also look at the way the person was paid—whether tax had been deducted already or the money was paid "gross"—but again that will not necessarily give the answer. The tribunal must look at all the facts and then decide whether they point to the person being employed or self-employed. Other relevant factors will be how he pays social security contributions, how much freedom he has during working hours, and how much control the employer has over him.

This question has cropped up in quite a few recent cases. In *Massey* v. *Crown Life Insurance*, 1978, the Court of Appeal said that a manager of one of the company's branch offices

was self-employed. He had been treated as an employee, but the company and the Inland Revenue allowed him to change. This also happened with a driving instructor who changed from being employed to self-employed (see *B.S.M. (1257)* v. *Secretary of State for Social Services*, 1978). But in *Tyne and Clyde Warehuses* v. *Hamerton*, 1978, the EAT said that a sales representative was an employee, even though he had always been treated as self-employed. It also said that an outworker was an employee (see *Airfix Footwear* v. *Cope*, 1978). Directors are not necessarily employees; it all depends on their agreement with the company (see *Parsons* v. *Parsons*, 1979). More recently, the EAT has said that a researcher was an employee (see *Thames Television* v. *Wallis*, 1979). Again, it did not matter that her employers had treated her as self-employed.

(b) *Has the employee been employed long enough?*

Even if a person *is* an employee, he may still not be protected again unfair dismissal because he has not been employed long enough. Until 1979, an employee had to be employed for 26 weeks to qualify. From November 1979 this was changed to 52 weeks (one year). Employees who had been employed for 26 weeks before the law changed will lose their rights until they have been employed for 52 weeks. It also means that someone taken on on a temporary basis will not have any protection unless he actually is employed for more than 52 weeks.

This qualifying period of 52 weeks has exceptions. One particular exception is where an employee is dismissed because he is (or proposes to become) a member of an independent trade union or refuses to become a member of a non-independent trade union; he is not then subject to any minimum period of employment (for the meaning of "independent" and "non-independent" trade unions, see Chap. 7). Say, for example, the employee starts a new job and two weeks later tells his employer he wants to join a union. The employer immediately sacks him. Although he's