



Important – Not to be Dismissed

Unfair Dismissals Act, 1977

In light of the recent judgment in [Bus Átha Cliath \(Dublin Bus\) v. McKeivitt](#) [2018] IEHC 78 (Unreported, High Court, Ní Raifeartaigh J, 29 January 2018) it is timely to review the provisions of the [Unfair Dismissals Act, 1977](#) (“the Act”) and remind employers and employees of the rights and obligations that arise under this legislation.

The Unfair Dismissals Act, 1977 has been amended over time by various pieces of legislation. The Act contains some very detailed and complex provisions. The purpose of this article is to describe the main provisions of the Act. It does not purport to deal with all of the exceptions.

Application of the Act

Generally speaking, with exceptions, the Act applies to employees who have been employed by their employer for at least twelve months. If an employee is dismissed and re-employed within six months, the service will be counted as continuous if the purpose of the dismissal was wholly or partly to avoid liability under the Act. The Act does not apply to the dismissal of an employee within the first six months of, or one month following the end of, a statutory apprenticeship, or to an employee who is serving an express period of probation or training of less than one year. The Act generally does not apply to employees who ordinarily worked outside the State, although there are certain circumstances where the Act might apply. Any attempt to contract out of the provisions of the Act is void.

Where an employee is employed through an employment agency, it is the party for whom they work, not the agency, which is their

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employer for the purposes of the Act, regardless of who actually pays the employee. If an employee wishes to claim arising out of their dismissal either at common law for wrongful dismissal or under some other Act, they must elect whether to pursue the alternative right or their rights under the Act but they cannot do both.

The Act deals with dismissals which follow a 'lock out' or a strike or other industrial action. Such dismissals may be deemed to be unfair in certain circumstances, in particular where some employees are dismissed and others who took part in the same action are not dismissed.

Non-application of the Act

The Act does not apply to the termination of a fixed term contract or a specified purpose contract if the dismissal merely consists of the expiry of the fixed term or the ending of the specified purpose provided that there is a written contract, signed by both parties, which expressly excludes the application of the Act. Where an employee is re-employed in a similar capacity on a fixed term contract within three months of the expiry of a previous fixed term contract, the Act may apply if this was done by the employer wholly or partly to avoid liability under the Act. In those circumstances, the terms of previous contracts may be added together to establish the employee's period of continuous service.

The Act does not apply to a dismissal which results from the return to work of an employee who was on protective leave (for example, maternity leave, adoptive leave or carer's leave), provided that the employer had informed the employee at the start of their employment, in writing, that the other employee's return would bring their contract to an end.

Written procedure / reason for dismissal

An employer must provide its employees with a written procedure which will be followed in the event of a dismissal. The employer must, if requested to by a dismissed employee, provide a written statement of the principal grounds for the dismissal. In the event of a claim, other grounds may be taken into account. The date of dismissal is either the date on which notice, properly given, expires or the date on which notice would have expired if it had been properly given.

Dismissal / Constructive dismissal

Actual dismissal occurs when the employer terminates the contract, whether or not prior notice was given to the employee. 'Constructive dismissal' occurs, whether or not prior notice was given, when an employee terminates the contract where the conduct of the employer is such as to render it reasonable for the employee to terminate the contract.

Dismissals deemed unfair

Where the Act applies, a dismissal is deemed to be unfair unless there are substantial grounds justifying it. Certain reasons are specifically identified as ones which will result in a dismissal being deemed to be unfair if it results wholly or mainly from one of them. Examples of such reasons are:

trade union activities, religious or political opinions, pregnancy-related reasons, the making of a protected disclosure, or the taking of proceedings by the employee against the employer. If any of the prohibited reasons are used as a basis for making an employee redundant then that dismissal may be deemed to be unfair.

Dismissals deemed not unfair

A dismissal will be deemed not to be unfair if it results wholly or mainly from the employee's capability, competence, qualifications, conduct, redundancy or some statutory provision which prohibits the employee from working. The onus is on the employer to establish that the dismissal was due wholly or mainly to one of those reasons or that there were other substantial grounds justifying it. In practice, in an unfair dismissal claim, in contrast to a court case, the employer goes first and has to establish its justification for the dismissal. This does not happen in a constructive dismissal claim in which the onus is on the employee to prove their case.

Time Limit

Claims for unfair dismissal must be lodged by the employee with the Workplace Relations Commission within six months of the date of dismissal or up to twelve months if the employee can establish to the satisfaction of the Adjudication Officer that he was prevented from lodging the claim within six months due to reasonable cause. An employee may bring a claim under the Act even where there may have been a breach of the Income Tax Acts or the Social Welfare Acts but in such cases the Adjudication Officer is obliged to notify Revenue or the Minister. There is a possibility of a claim being struck out if it is not pursued within one year but it is expected that that would only happen in very exceptional cases.

Hearing

The Claim will be allocated to an Adjudication Officer for hearing but there is a possibility of mediation and/or disposing of the claim based on written submission only but if both parties are agreeable. In determining a claim for unfair dismissal, regard may be had to the reasonableness of the employer's conduct, the extent to which the employer complied with its own disciplinary procedure or any relevant Code of Practice.

Claims are heard in private and the Adjudication Officer will send both parties a written, reasoned decision which is also notified to the Labour Court.

Redress

If an employee succeeds in a claim for unfair dismissal, they may be awarded one of three forms of redress. The employee can express a preference but it is up to the Adjudication Officer to decide what form of address is appropriate in each particular case. The options are as follows:

1. **Re-instatement** to the position from which he was dismissed on the same terms and conditions and the re-instatement is deemed to have commenced on the date of dismissal.

One very significant effect of this is that the employee would be entitled to back-pay from the date of dismissal and that could be a very considerable amount. This form of redress is seldom awarded.

2. **Re-engagement**, either to the previous position or a different, reasonably suitable, position on such terms and conditions as are reasonable in the circumstance. This form of redress is seldom awarded.
3. **Financial Compensation**. This is by far the most common form of redress awarded. If an employee has suffered financial loss due to their dismissal the compensation can be up to two years' remuneration. If there has been no financial loss then the maximum compensation is four weeks. However, if a dismissal is as a result of the employee having made a protected disclosure under the [Protected Disclosures Act 2014](#), the compensation could be up to 260 weeks' remuneration. Increased awards may be made in certain circumstances arising from exceptional collective redundancies. Financial loss includes actual or estimated prospective loss of income and the value of any diminution of the employee's rights under redundancy legislation or in relation to superannuation. Remuneration includes allowances in the nature of pay and benefits in lieu of or in addition to pay. (see Regulations on weekly pay [here](#))

Where an employee is re-instated or re-engaged they must repay to the employer any statutory redundancy lump sum payment which had been paid to them. It should be noted that a dismissed employee is under a duty to mitigate their loss and will be required to give evidence as to what efforts they have made to obtain employment since their dismissal. In deciding the level of compensation, the Adjudication Officer will consider the conduct of both the employer and the employee.

Appeal

Either party may appeal the decision to the Labour Court which will re-hear the case. The labour Court's decision is final but there is a possibility of an appeal to the High Court on a point of law.

Conclusion

The Act serves as the framework within which dismissal decisions will be evaluated. In most cases the onus will be on the employer to justify its decision to terminate and to prove the fairness of its procedures. It must also be remembered that employees also have a duty to act reasonably and if dismissed, make efforts to mitigate their loss. The advice to employers and employees in this context is to act with caution and to be reasonable.

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