



# Employment Rights Act 1996

## 1996 CHAPTER 18

### PART X

#### UNFAIR DISMISSAL

#### CHAPTER I

##### RIGHT NOT TO BE UNFAIRLY DISMISSED

##### *The right*

#### **94 The right**

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

##### *Dismissal*

#### **95 Circumstances in which an employee is dismissed**

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—
  - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
  - (b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or
  - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

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- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
- (a) the employer gives notice to the employee to terminate his contract of employment, and
  - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
- and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

## **96 Failure to permit return after childbirth treated as dismissal**

- (1) Where an employee who—
- (a) has the right conferred by section 79, and
  - (b) has exercised it in accordance with section 82,
- is not permitted to return to work, she shall (subject to the following provisions of this section) be taken for the purposes of this Part to be dismissed for the reason for which she was not permitted to return with effect from the notified day of return (being deemed to have been continuously employed until that day).
- (2) Subsection (1) does not apply in relation to an employee if—
- (a) immediately before the end of her maternity leave period (or, if it ends by reason of dismissal, immediately before the dismissal) the number of employees employed by her employer, added to the number employed by any associated employer of his, did not exceed five, and
  - (b) it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit her to return to work under section 79 or for him or an associated employer to offer her employment under a contract of employment satisfying the conditions specified in subsection (4).
- (3) Subsection (1) does not apply in relation to an employee if—
- (a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to work under section 79,
  - (b) he or an associated employer offers her employment under a contract of employment satisfying the conditions specified in subsection (4), and
  - (c) she accepts or unreasonably refuses that offer.
- (4) The conditions referred to in subsections (2) and (3) are—
- (a) that the work to be done under the contract is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
  - (b) that the provisions of the contract as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had returned to work under section 79.
- (5) Where on a complaint of unfair dismissal any question arises as to whether the operation of subsection (1) is excluded by the provisions of subsection (2) or (3), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

- (6) Where subsection (1) applies to an employee who was employed as a shop worker, or a betting worker, under her contract of employment on the last day of her maternity leave period, she shall be treated for the purposes of this Act as if she had been employed as a shop worker, or a betting worker, on the day with effect from which she is treated as dismissed.

## 97 Effective date of termination

- (1) Subject to the following provisions of this section, in this Part “the effective date of termination” —
- (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
  - (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
  - (c) in relation to an employee who is employed under a contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires.
- (2) Where—
- (a) the contract of employment is terminated by the employer, and
  - (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
- for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
- (3) In subsection (2)(b) “the material date” means—
- (a) the date when notice of termination was given by the employer, or
  - (b) where no notice was given, the date when the contract of employment was terminated by the employer.
- (4) Where—
- (a) the contract of employment is terminated by the employee,
  - (b) the material date does not fall during a period of notice given by the employer to terminate that contract, and
  - (c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)),
- for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
- (5) In subsection (4) “the material date” means—
- (a) the date when notice of termination was given by the employee, or
  - (b) where no notice was given, the date when the contract of employment was terminated by the employee.
- (6) Where an employee is taken to be dismissed for the purposes of this Part by virtue of section 96, references in this Part to the effective date of termination are to the notified date of return.

*Fairness*

**98 General**

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
  - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
  - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a)—
  - (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
  - (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
  - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.
- (5) Where the employee is taken to be dismissed for the purposes of this Part by virtue of section 96, subsection (4)(a) applies as if for the words “acted reasonably” onwards there were substituted the words “would have been acting reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee if she had not been absent from work, and”.
- (6) Subsections (4) and (5) are subject to—
  - (a) sections 99 to 107 of this Act, and
  - (b) sections 152, 153 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

## 99 Pregnancy and childbirth

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
  - (a) the reason (or, if more than one, the principal reason) for the dismissal is that she is pregnant or any other reason connected with her pregnancy,
  - (b) her maternity leave period is ended by the dismissal and the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child,
  - (c) her contract of employment is terminated after the end of her maternity leave period and the reason (or, if more than one, the principal reason) for the dismissal is that she took, or availed herself of the benefits of, maternity leave,
  - (d) the reason (or, if more than one, the principal reason) for the dismissal is a relevant requirement, or a relevant recommendation, as defined by section 66(2), or
  - (e) her maternity leave period is ended by the dismissal, the reason (or, if more than one, the principal reason) for the dismissal is that she is redundant and section 77 has not been complied with.
- (2) For the purposes of subsection (1)(c)—
  - (a) a woman takes maternity leave if she is absent from work during her maternity leave period, and
  - (b) a woman avails herself of the benefits of maternity leave if, during her maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by section 71 during that period.
- (3) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if—
  - (a) before the end of her maternity leave period she gave to her employer a certificate from a registered medical practitioner stating that by reason of disease or bodily or mental disablement she would be incapable of work after the end of that period,
  - (b) her contract of employment was terminated within the period of four weeks beginning immediately after the end of her maternity leave period in circumstances in which she continued to be incapable of work and the certificate remained current, and
  - (c) the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child.
- (4) Where—
  - (a) an employee has the right conferred by section 79,
  - (b) it is not practicable by reason of redundancy for the employer to permit her to return in accordance with that right, and
  - (c) no offer is made of such alternative employment as is referred to in section 81,the dismissal of the employee which is treated as taking place by virtue of section 96 is to be regarded for the purposes of this Part as unfair.

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## **100 Health and safety cases**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
  - (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
    - (i) in accordance with arrangements established under or by virtue of any enactment, or
    - (ii) by reason of being acknowledged as such by the employer,
 the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
  - (c) being an employee at a place where—
    - (i) there was no such representative or safety committee, or
    - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
 he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
  - (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
  - (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
- (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
- (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

## **101 Shop workers and betting workers who refuse Sunday work**

- (1) Where an employee who is—
- (a) a protected shop worker or an opted-out shop worker, or
  - (b) a protected betting worker or an opted-out betting worker,
- is dismissed, he shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he refused (or proposed to refuse) to do shop work, or betting work, on Sunday or on a particular Sunday.

- (2) Subsection (1) does not apply in relation to an opted-out shop worker or an opted-out betting worker where the reason (or principal reason) for the dismissal is that he refused (or proposed to refuse) to do shop work, or betting work, on any Sunday or Sundays falling before the end of the notice period.
- (3) A shop worker or betting worker who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the shop worker or betting worker gave (or proposed to give) an opting-out notice to the employer.
- (4) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the effective date of termination.

## **102 Trustees of occupational pension schemes**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.
- (2) In this section “relevant occupational pension scheme” means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.

## **103 Employee representatives**

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being—

- (a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or
- (b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,

performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

## **104 Assertion of statutory right**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
  - (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
  - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
- (2) It is immaterial for the purposes of subsection (1)—
  - (a) whether or not the employee has the right, or
  - (b) whether or not the right has been infringed;

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but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

- (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
- (4) The following are relevant statutory rights for the purposes of this section—
  - (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an industrial tribunal,
  - (b) the right conferred by section 86 of this Act, and
  - (c) the rights conferred by sections 68, 86, 146, 168, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off).

## **105 Redundancy**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
  - (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
  - (b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
  - (c) it is shown that any of subsections (2) to (7) applies.
- (2) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in any of paragraphs (a) to (d) of subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section (and any requirements of the paragraph, or subsection, not relating to the reason are satisfied).
- (3) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 100 (read with subsections (2) and (3) of that section).
- (4) This subsection applies if either—
  - (a) the employee was a protected shop worker or an opted-out shop worker, or a protected betting worker or an opted-out betting worker, and the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in subsection (1) of section 101 (read with subsection (2) of that section), or
  - (b) the employee was a shop worker or a betting worker and the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in subsection (3) of that section.
- (5) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 102(1).
- (6) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103.



- (7) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104 (read with subsections (2) and (3) of that section).
- (8) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the effective date of termination.
- (9) In this Part “redundancy case” means a case where paragraphs (a) and (b) of subsection (1) of this section are satisfied.

## **106 Replacements**

- (1) Where this section applies to an employee he shall be regarded for the purposes of section 98(1)(b) as having been dismissed for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) This section applies to an employee where—
  - (a) on engaging him the employer informs him in writing that his employment will be terminated on the resumption of work by another employee who is, or will be, absent wholly or partly because of pregnancy or childbirth, and
  - (b) the employer dismisses him in order to make it possible to give work to the other employee.
- (3) This section also applies to an employee where—
  - (a) on engaging him the employer informs him in writing that his employment will be terminated on the end of a suspension of another employee from work on medical grounds or maternity grounds (within the meaning of Part VII), and
  - (b) the employer dismisses him in order to make it possible to allow the resumption of work by the other employee.
- (4) Subsection (1) does not affect the operation of section 98(4) in a case to which this section applies.

## **107 Pressure on employer to dismiss unfairly**

- (1) This section applies where there falls to be determined for the purposes of this Part a question—
  - (a) as to the reason, or principal reason, for which an employee was dismissed,
  - (b) whether the reason or principal reason for which an employee was dismissed was a reason fulfilling the requirement of section 98(1)(b), or
  - (c) whether an employer acted reasonably in treating the reason or principal reason for which an employee was dismissed as a sufficient reason for dismissing him.
- (2) In determining the question no account shall be taken of any pressure which by calling, organising, procuring or financing a strike or other industrial action, or threatening to do so, was exercised on the employer to dismiss the employee; and the question shall be determined as if no such pressure had been exercised.

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### *Exclusion of right*

#### **108 Qualifying period of employment**

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
- (2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words “two years” there were substituted the words “one month”.
- (3) Subsection (1) does not apply if—
  - (a) section 84 or 96(1) applies,
  - (b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,
  - (d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (e) section 102 applies,
  - (f) section 103 applies,
  - (g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
  - (h) section 105 applies.

#### **109 Upper age limit**

- (1) Section 94 does not apply to the dismissal of an employee if on or before the effective date of termination he has attained—
  - (a) in a case where—
    - (i) in the undertaking in which the employee was employed there was a normal retiring age for an employee holding the position held by the employee, and
    - (ii) the age was the same whether the employee holding that position was a man or a woman,that normal retiring age, and
  - (b) in any other case, the age of sixty-five.
- (2) Subsection (1) does not apply if—
  - (a) section 84 or 96(1) applies,
  - (b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,
  - (d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (e) section 102 applies,
  - (f) section 103 applies,

- (g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
- (h) section 105 applies.

## 110 Dismissal procedures agreements

- (1) Where a dismissal procedures agreement is designated by an order under subsection (3) which is for the time being in force—
  - (a) the provisions of that agreement relating to dismissal shall have effect in substitution for any rights under section 94, and
  - (b) accordingly, section 94 does not apply to the dismissal of an employee from any employment if it is employment to which, and he is an employee to whom, those provisions of the agreement apply.
- (2) Subsection (1) does not apply if—
  - (a) section 84 or 96(1) applies,
  - (b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (c) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
  - (d) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
  - (e) section 105(1) and (4) applies.
- (3) An order designating a dismissal procedures agreement may be made by the Secretary of State, on an application being made to him jointly by all the parties to the agreement, if he is satisfied that—
  - (a) every trade union which is a party to the agreement is an independent trade union,
  - (b) the agreement provides for procedures to be followed in cases where an employee claims that he has been, or is in the course of being, unfairly dismissed,
  - (c) those procedures are available without discrimination to all employees falling within any description to which the agreement applies,
  - (d) the remedies provided by the agreement in respect of unfair dismissal are on the whole as beneficial as (but not necessarily identical with) those provided in respect of unfair dismissal by this Part,
  - (e) the procedures provided by the agreement include a right to arbitration or adjudication by an independent referee, or by a tribunal or other independent body, in cases where (by reason of an equality of votes or for any other reason) a decision cannot otherwise be reached, and
  - (f) the provisions of the agreement are such that it can be determined with reasonable certainty whether or not a particular employee is one to whom the agreement applies.
- (4) If at any time when an order under subsection (3) is in force in relation to a dismissal procedures agreement the Secretary of State is satisfied, whether on an application made to him by any of the parties to the agreement or otherwise, either—
  - (a) that it is the desire of all the parties to the agreement that the order should be revoked, or

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- (b) that the agreement no longer satisfies all the conditions specified in subsection (3),  
the Secretary of State shall revoke the order by an order under this subsection.
- (5) The transitional provisions which may be made in an order under subsection (4) include, in particular, provisions directing—
  - (a) that an employee—
    - (i) shall not be excluded from his right under section 94 where the effective date of termination falls within a transitional period which ends with the date on which the order takes effect and which is specified in the order, and
    - (ii) shall have an extended time for presenting a complaint under section 111 in respect of a dismissal where the effective date of termination falls within that period, and
  - (b) that, where the effective date of termination falls within such a transitional period, an industrial tribunal shall, in determining any complaint of unfair dismissal presented by an employee to whom the dismissal procedures agreement applies, have regard to such considerations as are specified in the order (in addition to those specified in this Part and section 10(4) and (5) of the Industrial Tribunals Act 1996).