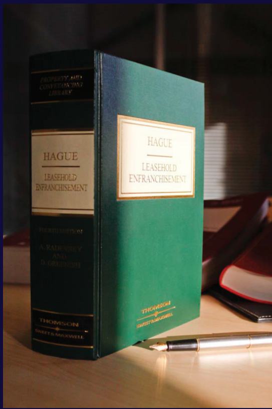
Guide to Employment Tribunal Proceedings



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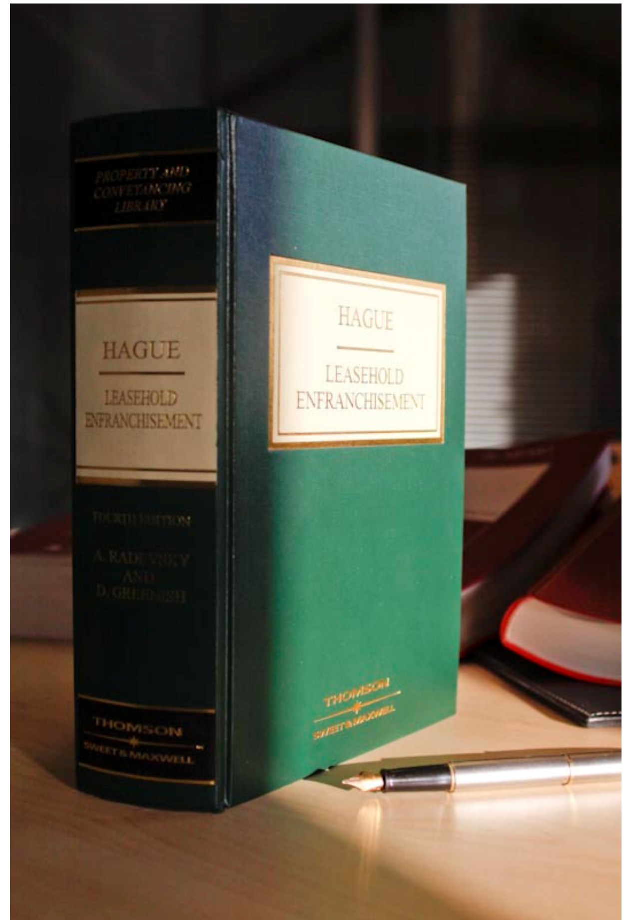
INTRODUCTION

This guide is the second in our series of articles explaining various aspects of contentious legal work. It looks at the legal options available to people with problems at work.

This guide will briefly discuss the options open to people who are still in work, and then go on to consider the remedies available to people who have been dismissed.

Please note that employment law is a vast, changing field with many vagaries and technical elements. This guide is therefore only intended as a brief overview of the process.



GRIEVANCES

It can be very difficult for people who are having problems in work.

Unreasonable demands or intimidation and harassment from management, bullying by colleagues or discrimination from anyone at work can make people's lives miserable.

Recourse to the law should obviously be the last resort. It is usually far easier, quicker and cheaper to resolve any employment problems informally, but in the event that this cannot be achieved then there are legal remedies available.

However, this is not always possible, and unfortunately the law only offers limited remedies for people in these situations.

If a problem cannot be resolved privately then the next step is to raise a formal grievance. Employers are under a statutory duty to investigate any formal grievances raised, and to do so in a timeous manner. The employer then has to hold a meeting with the complainant to listen to their concerns, and then come to a decision about how best to resolve the issue.

The problem with this system however, is twofold. Firstly, a worker could be in a situation where the only person available to complain to is the person causing the problem, or that this person can influence the outcome of the grievance. This is particularly the case in smaller businesses. The second problem is that, except in the case of discrimination, the grievance is the only remedy available to a disgruntled worker. Unfortunately, if a worker does not agree with the outcome of the grievance procedure then there is little that they can do to challenge this.

Even if the grievance hearing is decided in a worker's favour then the problem may not be resolved. You could still be working on a day to day basis with the people who you complained about, and even if they have been warned about their future conduct an unpleasant and unworkable atmosphere may remain.

The only other option available is for a worker to leave their job.

In certain circumstances this may give rise to a claim for constructive dismissal.

CONSTRUCTIVE DISMISSAL

Constructive dismissal is where a worker resigns from their job as a result of their employer's conduct.

Technically, what happens is that it is the employer who breaks the contract of employment by their own bad behaviour, and the worker then latterly quits.

If a worker can successfully argue that they have been constructively dismissed then the remedies for unfair dismissal are available to them. These remedies (and the procedure involved) will be discussed later in this guide.

Claims for constructive dismissal are usually difficult to win. The employer's bad conduct has to be sufficiently serious to warrant the worker walking away and Employment Tribunals do not grant remedies lightly.

This guide will now discuss in what circumstances one can bring a claim against their former employer if they have been dismissed, how such a claim is brought and what remedies are available if such a claim is successful.

UNFAIR DISMISSAL

Employees have a legal right not to be unfairly dismissed from their employment. If an employer wants to get rid of an employee they are only allowed to do so if their reason for this dismissal is one of the potentially admissible reasons as defined by statute.

These potentially fair reasons include the employee's capability and their conduct, so employers are allowed to dismiss employees who are simply not up to the job or who behave badly. Redundancy is also a potentially fair reason for dismissal, and this

will be discussed in greater detail later. If it becomes illegal to employ an individual then an employer is allowed to dismiss that person. Finally, there exists a final “catch all” category whereby an employer is allowed to dismiss an employee for “some other substantial reason” provided that that reason can justify the employee’s dismissal, and his category is most commonly used by employers seeking to protect legitimate business interests. For example, an employer could use this category to fairly dismiss an employee if the employer had to substantially reorganise their business and the employee refused to accepted new terms of employment, or if a employee refused to agree to a new term in their contract of employment preventing them from disclosing confidential information to a competitor.

Employees are also granted further protection under the relevant legislation. In addition to only being allowed to dismiss employees for one of the potentially fair reasons, employers must also act reasonably in the circumstances when dismissing an employee. This means that even if an employer has a potentially fair reason for dismissing an employee the employer must consider what a reasonable course of action would be. A reasonable employer might, for example, issue a warning or offer additional training rather than simply dismiss an underperforming employee.

If an employer dismisses an employee without a potentially fair reason, or if an employer fails to act reasonably when dismissing an employee then the employee will have a claim for unfair dismissal.

Note that this right is not available to all workers. Only employees who have been continuously employed for a period of twelve months are protected by this legislation. Independent contractors and employees who have worked for an employer for less than a year are therefore not eligible to bring a claim for unfair dismissal.

The situation is different if someone is the victim of discrimination. If someone has been discriminated against then the twelve month qualifying period does not apply, so you can bring a claim even if you have never actually even been offered a job if you are discriminated against at interview.

It is very important to bring a claim for unfair dismissal quickly. The rules state that any claim must be started within three months from the date of dismissal, the Tribunal enforces this rule strictly.

REDUNDANCY

Employees have a right to a redundancy payment if they are made redundant.

An employee is made redundant is the dismissal is due to

- the employer ceasing to carry out the business for which the employee was employed or at the place where the employee was employed; or
- the employer’s requirements for employees to carry out work of a particular kind or at a particular place diminishing.

Redundancy is one of the potentially fair reasons for dismissal, so an employer who makes an employee redundant will not face a claim for unfair dismissal if the redundancy is handled fairly.

The employer will have to make a redundancy payment, which is essentially payment which rewards employees for their past service. The redundancy payment is based on the length of the employee’s service and their age at the date of dismissal.

Redundancy payments are usually far lower than compensation for unfair dismissal.

If an employer has decided to make redundancies then again they have to act reasonably in the circumstances and consult with their employees before making any redundancies. If they fail to do so, or if the employer does not follow a fair selection process to decide which employees are made redundant then any affected employees may be able to bring a claim for unfair dismissal.

Furthermore, if a redundancy situation is not genuine and merely a mechanism to get rid of an employee then the employee is eligible to

bring a claim for unfair dismissal rather than simply accept the redundancy payment.

As with unfair dismissal, there is a qualification period before an employee becomes eligible for a redundancy payment. Employees must have worked for an employer for a continuous period of two years to become eligible and, if the employer fails to make the redundancy payment, the employee must bring their claim within six months from the date of dismissal.

TRANSFER OF UNDERTAKINGS

If an one business is bought by another, or if one particular contract is taken over by another business, then legislation exists to protect the workers of that original business.

The contracts of any workers automatically transfer across to the new business, and the new business must offer the existing workers terms **at least** as favourable as their existing terms.

If any workers are dismissed as a result of a transfer then they may have a claim for unfair dismissal against the new business.

TRIBUNAL PROCESS

If an employee has been unfairly dismissed then they must begin any claim within three months from the date of dismissal.

The claimant employee must then show the Tribunal that they have actually been dismissed (including constructive dismissal) rather than having resigned.

Once this has been done then the employer has to show that the dismissal was for one of the potentially fair reasons, and that they acted reasonably both in coming to the decision to dismiss the employee and in how the dismissal was handled.

The Tribunal will then make a decision as to whether or not the employer's decision to dismiss the employee was in the range of reasonable responses open to the employer.

As the employee is the one bringing the claim any benefit of the doubt will fall on the side of the employer – the Claimant has to prove their case.

If the Tribunal decides that the employee has been unfairly dismissed then a range of remedies are available.

REMEDIES

There are three remedies available to employees who are successful in any claim for unfair dismissal, namely reinstatement, reengagement and compensation.

An order for reinstatement is an order that the employee is given the same job back on exactly the same terms.

Reengagement is where the Tribunal orders that the employer offer the employee a job on different terms. This may be in a different department or at a different location.

These two awards are relatively rare, and compensation is bar far the most common remedy awarded.

The compensation award is made up of several elements. The employee receives a basic award based upon their length of service and age. This award is exactly the same as the redundancy payment.

The employee also receives a small amount to compensate them for the fact that when they start any new job they no longer have the twelve month qualifying period for unfair dismissal in that new job.

By far the largest element of unfair dismissal awards is usually the compensatory award. This award is to compensate the employee for the earnings that they have lost as a result of their dismissal. The Tribunal will essentially order that the employer to make a payment to the employee equal to the earnings that they have lost during their period of unemployment. If the employee is still unemployed at the date

of the final hearing, the Tribunal will estimate how long it would reasonably take for the claimant to find a new job and award lost earnings for that period.

The employee is under a duty to mitigate their losses, which means that they are not entitled to receive any compensatory award unless they actively attempt to find alternative work.

The unfair dismissal award is currently capped at £64,800.

If the employee has been discriminated against then they will receive an additional payment and the damages are not capped.

COSTS

Legal costs are very rarely awarded in Employment Tribunal claims.

This is in stark contrast to court claims, where the usual rule is that the loser must make a contribution (usually in the region of 70-80%) of the winner's legal spend.

This means that, win or lose, the claimant will have to pay their own legal costs but will not be called upon to pay the defendant's costs.

Many firms of solicitors offer contingency fee agreements to claimant employees. These agreements provide that the solicitors will not charge in the event that the claim is lost but agree to keep a percentage of any money recovered (to a maximum of 35% inclusive of VAT). These agreements are not normally offered to defendants in employment cases, as if a defendant is successful there is usually no award for the for the

In addition to solicitors' costs it can be necessary for a barrister to represent a party at any final hearing, and the barrister's charges will usually be separate to the solicitors' costs.

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