Employment Rights Act 1996

1996 CHAPTER 18

PART X

UNFAIR DISMISSAL

CHAPTER I

RIGHT NOT TO BE UNFAIRLY DISMISSED

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) Subsection (4) is subject to—
   (a) sections 98A to 107 of this Act, and
   (b) sections 152, 153, 238 and 238A 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).

Annotations:

Amendments (Textual)

F1 S. 98(2)(ba) inserted (1.10.2006) by The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031), regs. 1(1), 49(1), Sch. 8 para. 22(2) (with regs. 44-46)
F2 S. 98(2)(ba)(A)(3A) omitted (6.4.2011) by virtue of The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (S.I. 2011/1069), reg. 3(2)(a) (with regs. 5, 6, 9)
F3 S. 98(2A) inserted (1.10.2006) by The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031), regs. 1(1), 49(1), Sch. 8 para. 22(3) (with regs. 44-46)
F4 S. 98(3A) inserted (1.10.2006) by The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031), regs. 1(1), 49(1), Sch. 8 para. 22(4) (with regs. 44-46)
F5 Word in s. 98(4) substituted (6.4.2011) by The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (S.I. 2011/1069), reg. 3(2)(b) (with regs. 5, 6, 9)
F6 S. 98(5) repealed (15.12.1999) by 1999 c. 26, ss. 9, 44, Sch. 4 Pt. III para. 15(a), Sch. 9(2); S.I. 1999/2830, art. 2(2)(3), Sch. 1 Pt. II, Sch. 2 Pt. II (with Sch. 3 paras. 10, 11)
F7 Words in s. 98(6) substituted (15.12.1999) by 1999 c. 26, s. 9, Sch. 4 Pt. III para. 15(b); S.I. 1999/2830, art. 2(2), Sch. 1 Pt. II (with Sch. 3 paras. 10, 11)
F8 Word in s. 98(6) substituted (1.10.2004) by Employment Act 2002 (c. 22), ss. 53, 55(2), Sch. 7 para. 32(a); S.I. 2004/2185, art. 2
F9 Word in s. 98(6)(a) substituted (1.10.2004) by Employment Act 2002 (c. 22), ss. 53, 55(2), Sch. 7 para. 32(b); S.I. 2004/2185, art. 2
F10 Words in s. 98(6)(b) substituted (6.4.2005) by Employment Relations Act 2004 (c. 24), ss. 57(1), 59(2)-(4), Sch. 1 para. 30; S.I. 2005/872, arts. 4, 5, Sch. (subject to arts. 6-12)
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

\[ \text{F11} \text{(c) it is shown that any of subsections (2A) to (7J) applies.} \]

\[ \text{F12} \]

\[ \text{F13} (2A) \text{ This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 98B (unless the case is one to which subsection (2) of that section applies).} \]

(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.

\[ \text{F14} (4A) \text{ This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in section 101A.} \]

(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.
[F15](6A) 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 103A.

(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).

[F16](7A) 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 104A (read with subsection (2) of that section).

[F17](7B) 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 104B (read with subsection (2) of that section).

[F18](7BA) 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 section 104C.

[F19](7C) This subsection applies if—

(a) the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the reason mentioned in section 238A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (participation in official industrial action), and

(b) subsection (3), (4) or (5) of that section applies to the dismissal.

[F20](7D) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation).

[F21](7E) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) of regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (unless the case is one to which paragraph (4) of that regulation applies).

[F22](7F) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) of regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (unless the case is one to which paragraph (4) of that regulation applies).

[F23](7G) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 (read with paragraphs (4) and (7) of that regulation).

[F24](7H) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation).

[F25](7I) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph 5(3) or
(5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule).]

[^F26](7IA) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that he—

(a) exercised or sought to exercise his right to be accompanied in accordance with paragraph 9 of Schedule 6 to the Employment Equality (Age) Regulations 2006, or

(b) accompanied or sought to accompany an employee pursuant to a request under that paragraph.

[^F27](7J) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 31 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (read with paragraphs (4) and (7) of that regulation).

(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.

Annotations:

Editorial Information

X1 The insertion of the new heading "Other dismissals" in Pt. X Ch. I on 1.10.2006 gives rise to a change in the structure of this legislation on SLD which breaks the continuity of historical versions of the existing provisions which are now brought under that new heading.

Amendments (Textual)

F11 S. 105(1)(c) substituted (18.8.2006) by The European Cooperative Society (Involvement of Employees) Regulations 2006 (S.I. 2006/2059), reg. 32(1)(a)

F12 S. 105(2) repealed (15.12.1999) by 1999 c. 26, ss. 9, 44, Sch. 4 Pt. III para. 17, Sch. 9(2); S.I. 1999/2830, arts. 4, 5, Sch. (subject to arts. 6-12)

F13 S. 105(2A) inserted (6.4.2005) by Employment Relations Act 2004 (c. 24), ss. 40(5), 59(2)-(4); S.I. 2005/872, arts. 4, 5, Sch. (subject to arts. 6-12)

F14 S. 105(4A) inserted (1.10.1998) by S.I. 1998/1833, reg. 32(3)

F15 S. 105(6A) inserted (2.7.1999) by 1998 c. 23, s. 6; S.I. 1999/1547, art. 2

F16 S. 105(7A) inserted (11.1.1999) by 1998 c. 39, s. 25(2); S.I. 1998/2574, art. 2(1), Sch. 1 (with art. 3)

F17 S. 105(7B) inserted (5.10.1999) by 1999 c. 10, ss. 7, 20(2), Sch. 3 para. 3(2) (which amending Act was repealed (in part on 27.8.2002 and 4.12.2002, otherwise prosp.) by Tax Credits Act 2002 (c. 21), s. 60, Sch. 6; S.I. 2002/1727, art. 2) and insertion continued (1.9.2002 for certain purposes, otherwise prosp.) by Tax Credits Act 2002 (c. 21), s. 27, Sch. 1 para. 3(3); S.I. 2002/1727, art. 2

F18 S. 105(7BA) inserted (6.4.2005) by Employment Relations Act 2004 (c. 24), ss. 41(4), 59(2)-(4); S.I. 2005/872, arts. 4, 5, Sch. (subject to arts. 6-12)

F19 S. 105(7C) inserted (24.4.2000) by 1999 c. 26, s. 16, Sch. 5 para. 5(3); S.I. 2000/875, art. 2 (with transitional provision in art. 3)

F20 S. 105(7D) inserted after subsection (7C) (15.1.2000) by virtue of S.I. 1999/3323, reg. 29(1)

F21 S. 105(7E) inserted (1.7.2000) by S.I. 2000/1551, reg. 10, Sch. para. 2(1)

F22 S. 105(7F) inserted (1.10.2002) by The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (S.I. 2002/2034), reg. 11, Sch. 2 Pt. 1 para. 3(10) (with regs. 13-20 and subject to transitional provisions in Sch. 2 Pt. 2)
Employment Rights Act 1996 (c. 18)
Part X – Unfair dismissal
Chapter I – Right not to be unfairly dismissed

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Employment Rights Act 1996. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

F24 S. 105(7H) inserted (6.4.2005) by The Information and Consultation of Employees Regulations 2004 (S.I. 2004/3426), regs. 1(1), 31(1)(b) (with reg. 3)
F25 S. 105(7I) inserted (6.4.2006) by The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (S.I. 2006/349), regs. 1(3), 17, Sch. para. 6(1)(b)
F26 S. 98(7IA) inserted (6.4.2007) by The Employment Equality (Age) (Consequential Amendments) Regulations 2007 (S.I. 2007/825), reg. 3
F27 S. 105(7J) inserted (18.8.2006) by The European Cooperative Society (Involvement of Employees) Regulations 2006 (S.I. 2006/2059), reg. 32(1)(b)
### Changes to legislation:
There are outstanding changes not yet made by the legislation.gov.uk editorial team to Employment Rights Act 1996. Any changes that have already been made by the team appear in the content and are referenced with annotations.

### Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Pt. 8 Ch. 4 inserted by 2018 c. 24 Sch. para. 2
- s. 1(4)(d)(iiia) inserted by S.I. 2018/1378 reg. 3(b)(iii)
- s. 1(4)(l)-(m) inserted by S.I. 2018/1378 reg. 3(b)(vii)
- s. 1(4)(da) inserted by S.I. 2018/1378 reg. 3(b)(iv)
- s. 1(4)(ga) inserted by S.I. 2018/1378 reg. 3(b)(v)
- s. 1(6) inserted by S.I. 2018/1378 reg. 3(b)(viii)
- s. 8(2)(c) and word inserted by S.I. 2018/147 art. 2(b)
- s. 27(1)(cd) inserted by 2018 c. 24 Sch. para. 21
- s. 43K(1)(ca) and word omitted by 2013 c. 24 s. 20(5) (This amendment not applied to legislation.gov.uk. The insertion of s. 43K(1)(ba) by S.I. 2006/1056, Sch. para. 7 is to come into force on the day on which 2005 asp 13, s. 20 comes into force and that provision has never been brought into force)
- s. 43K(2)(ba) omitted by 2013 c. 24 s. 20(6) (This amendment not applied to legislation.gov.uk. The insertion of s. 43K(1)(ba) by S.I. 2006/1056, Sch. para. 7 is to come into force on the day on which 2005 asp 13, s. 20 comes into force and that provision has never been brought into force)
- s. 47C(2)(cb) inserted by 2018 c. 24 Sch. para. 22
- s. 47AA inserted by 2008 c. 25 s. 37
- s. 49C inserted by 2017 c. 16 s. 32(4)
- s. 75I(3)(f) inserted by 2018 c. 24 Sch. para. 23(b)
- s. 80C(2)(bb) inserted by 2018 c. 24 Sch. para. 24(2)
- s. 80C(4)(bb) inserted by 2018 c. 24 Sch. para. 24(3)
- s. 99(3)(cb) inserted by 2018 c. 24 Sch. para. 27
- s. 101B inserted by 2008 c. 25 s. 38
- s. 105(4B) inserted by 2008 c. 25 s. 39(3)
- s. 108(3)(de) inserted by 2008 c. 25 s. 39(4)
- s. 110(3A) inserted by 2002 c. 22 s. 44
- s. 166(8ZA) inserted by S.I. 2019/146 Sch. para. 253(2)(b)
- s. 183(4ZA) inserted by S.I. 2019/146 Sch. para. 253(3)(b)
- Sch. 2 para. 7A7B inserted by S.I. 2018/1378 reg. 9(3)