

Wrongful Dismissal

A ‘wrongful dismissal’ is a common-law tort (‘tort’ being ‘a wrong’) that is entirely different and separate from an ‘unfair dismissal’ that is a statutory tort (being a breach of a statutory right not to be unfairly dismissed), that came into being as a result of legislation enacted by Parliament as part of its fairness of employment legislation. The common-law tort of wrongful dismissal is part of contract law that is, to a large extent, still based on the common law (being judge-made case-law that has been developed over the centuries).

At one time, claims for wrongful dismissal could only be made in the County or High Court as they still can. But, from 12 July 1994, employment tribunals were also given the jurisdiction to hear wrongful dismissal claims which are ‘... arising or outstanding on termination of the employee’s employment.’ Article 3, Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623. The time limit within which a claim for wrongful dismissal (or breach of contract action) must be brought in the County or High Court is six years; whereas a wrongful dismissal claim must be made to an employment tribunal within three months less one day from the effective date of termination of the contract of employment; but damages awarded by an employment tribunal are limited to a maximum of £25,000.

A claim for wrongful dismissal will often be made by an employee who has been dismissed without notice but asserts that he or she is entitled to be paid by the employer for the period of statutory and/or contractual notice whichever is the longer. If the employee is successful, an employment tribunal or a Court will award damages which will be limited to the net amount (after notional deductions for tax and National Insurance) that the employee would have earned during the minimum period of notice that the employer could have lawfully given under the terms of the contract. The deductions are notional because the first £30,000 paid as damages (or compensation) for wrongful (or unfair) dismissal is normally exempt from tax and NI contributions.

A ‘wrongful dismissal’ is one species of a range of matters which can constitute ‘breach of contract.’ Apart from a wrongful dismissal, a breach of contract can occur if an employer conducts itself in such a way so as to cause damage or injury during the course of the employment relationship to one of its employees by failing to take reasonable care of the employee’s health and safety while at work: *Gab Robins (UK) Ltd v Triggs* (2008) EWCA Civ 17 (such a claim can only be made in the County or High Court).

If an employee has been continuously employed by the employer for less than one year, he or she cannot make a claim for unfair dismissal (unless the dismissal constitutes an automatically unfair dismissal (e. g. the reason being maternity-related, disability discrimination, etc), but such an employee will be able to make a claim for wrongful dismissal if he or she has been dismissed, without just

cause, with less contractual or statutory notice than he or she was entitled to or/and if he she was entitled to any other outstanding contractual benefits such as unpaid bonus payments.

Some employees or office holders have contracts which provide for long notice periods (e.g. six years). If they are dismissed before the end of the contractual periods, such employees and office holders are nonetheless contractually entitled to be paid for the remaining periods of their contracts and can bring actions for wrongful dismissal if their employers fail or refuse to pay.

Dismissal without notice or the correct period of contractual notice is not the only way in which a wrongful dismissal can occur. If an employer is in breach of any significant term of the employment contract, whether express or implied, the employee so affected may be statutorily entitled under s.95(1)(c), Employment Rights Act 1996, to terminate the contract, with or without notice, and make a claim to an employment tribunal for unfair constructive dismissal. If employed for less than one year, the employee is restricted to making a claim for wrongful constructive dismissal being for the notice period and for any other outstanding contractual benefits to which he or she is entitled.

When a breach of contract occurs, it does not always necessarily result in a dismissal. For example, where an employer makes an unlawful deduction from wages that could consist of a failure to pay a part of the wages due or no wages at all, a dual claim can arise, being a common-law breach of contract as well as a statutory breach of contract (being an infringement of a statutory right) under s.23 of the Employment Rights Act 1996. If the employer refuses to reimburse the unlawful deduction(s), the employee's remedy is to make a claim to an employment tribunal but in doing so it need not necessarily mean the end of the contract of employment if the employee nonetheless still wants to continue working for the employer. But if the employer dismisses the employee for the reason that the employee made such a claim, being an assertion of a statutory right, the dismissal would be automatically unfair.

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