

Letting your nanny go

Dismissal is a serious matter that needs careful handling. Here we:

- Explain the key concepts behind wrongful, unfair and constructive dismissal
- Explore automatically unfair reasons for dismissal and the qualifying conditions for bringing an unfair dismissal claim
- Give an overview of permissible reasons for fair dismissal and how fairness is judged

(See also Factsheets “Managing Performance” and “Investigatory & Disciplinary Procedure Guide”).

Before taking any action, you need to establish the facts. And before considering dismissal, you should also see if a more positive approach is likely to be effective. Poor performance may be a result of inadequate leadership, bad management or defective systems of work and, if so, remedies (often involving learning and development) can be put in place. Many cases of misconduct and poor performance can be dealt with by informal advice, coaching and counselling. Improvements can often be achieved through continuing feedback and joint discussion between you and your nanny to identify the problem, establish the reasons for under-performance and agree the action to be taken. If all this fails, disciplinary action – possibly including dismissal - may need to be taken.

Dismissal of an employee occurs when:

- The employer terminates the contract, either with or without giving notice
- A fixed term contract ends and is not renewed
- The employee leaves, with or without giving notice, in circumstances in which they are entitled to do so because of the employer’s conduct.

According to ACAS, among the commonest reasons for dismissal are misconduct, inability to do the job and redundancy.

A dismissal will normally be ‘fair’ provided you have a good reason for the dismissal and have acted ‘reasonably’ in carrying it out. When somebody is dismissed, they often say they will claim ‘unfair’ or ‘wrongful’ dismissal. The terms are often used interchangeably, particularly in media reports, but in fact they arise from very different concepts.

Wrongful dismissal

Wrongful dismissal is a long-standing concept, which is basically a claim for breach of contract. All employment contracts can be ended by, either the employer or the employee giving notice. The period of notice is a matter for agreement between the parties, but is subject to minimum periods prescribed by law. Wrongful dismissal claims will generally be for the payment due for the notice period.

Unfair dismissal

Over a relatively recent period, successive governments have given employees additional protection to that given by the law of contract. One of the earliest protections, dating from 1971, is the right of an employee not to be unfairly dismissed - it introduces a concept of ‘fairness’ into most dismissals. Understanding this important concept is key to understanding the difference between unfair dismissal and wrongful dismissal.

The law on unfair dismissal is principally contained in The Employment Rights Act 1996 (as amended). The basis of unfair dismissal law is that employees have the right not to be unfairly dismissed. All that the employee needs to prove at an employment tribunal is that they have been dismissed: the employer must then prove that the dismissal was fair.

The key points are:

- Does the employee qualify to bring a claim?
- Is the dismissal automatically unfair?
- Was the dismissal for one of six ‘potentially fair’ reasons for dismissal?
- Did the employer act fairly and reasonably in treating that reason as sufficient reason to dismiss the employee?
- Did the employer follow the disciplinary and dismissal guidelines when dismissing the employee?
- Does the employee qualify to bring an unfair dismissal claim?

To balance the interests of employers and employees, there is a short period at the start of employment when employees do not enjoy protection from unfair dismissal: this is known as the ‘qualifying period’ and it is currently two years.

There are exceptions to the requirement for two years' service in order to bring a claim, for example, dismissals for:

- Pregnancy: including all reasons relating to maternity
- Family reasons: including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependants
- Representation: including acting as an employee representative
- Trade union membership grounds and union recognition
- Part-time and fixed-term employees
- Pay and working hours: including the working time regulations, annual leave and the national minimum wage.

These are also examples of automatically unfair reasons for dismissal.

Is the dismissal automatically unfair?

The next step is to check whether the employee's dismissal was automatically unfair under the law. Examples of automatically unfair reasons for dismissal include those listed above, although there are others.

The six potentially fair reasons for dismissal

An employer must first prove the dismissal was for one of these reasons:

- Capability or qualifications
- Conduct
- Illegality or contravention of a statutory duty
- Some other substantial reason
- Redundancy
- Retirement

'Fairness'

After showing that the dismissal was for one of the six potentially fair reasons given, an employer must show that they acted fairly and reasonably in taking that reason as sufficient for dismissing the employee. This is more complex than it sounds, although it should always be borne in mind that an employment tribunal still has wide discretion on what it considers 'fair'.

ACAS, the independent conciliation service, produces guidance in their Code of Practice on dealing with disciplinary and dismissal and grievance matters. Although employment tribunals need only to have regard to the ACAS Code and it does not have the force of law, in practice employers must follow the Code, otherwise: -

- They will have difficulty convincing a tribunal that they acted fairly,

And

- Failure to follow the revised ACAS code may result in an order to pay compensation increased or decreased by 25%, depending on whether the employer or employee failed to comply. In addition, an employer must follow any contractual or customary disciplinary process or procedure for a dismissal to be 'fair'.

Constructive dismissal

A 'constructive dismissal' occurs when an employee leaves a job of their own accord, but subsequently alleges that the employer's behaviour forced them out.

Constructive dismissal would need to be brought as an unfair or wrongful dismissal claim. The employee needs to prove that the employer's behaviour entitled them to end the contract of employment without notice.

Dismissing your nanny is sometimes necessary. But it should be considered only when other options have failed. Where dismissals cannot be avoided, compliance with law and codes of practice is essential.