

Day-one rights and probationary periods

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ER Bill - Day one
rights and the
probationary
period

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Overview

Focus of this session is on

- Day one right for employees to claim unfair dismissal; and
- How the right to claim unfair dismissal will apply to those employees who are in the “initial period of employment”
- Impact of the changes

Unfair dismissal – recap - 1

Current position – Employment Rights Act 1996

- Have to have 2 years continuous service as at the date of dismissal (S. 108 ERA 1996)
- 5 fair reasons for dismissal (s. 98 (1) and (2) ERA 1996)
 - Capability or qualifications – performance or ill health
 - Conduct
 - Redundancy
 - Statutory ban
 - Some other substantial reason – “must be of a kind such as to justify the dismissal of an employee holding the position which the employee held”
- Right to written statement of reasons for dismissal (s92 ERA 1996):

Unfair dismissal – recap on the test

Section 98 (4) ERA 1996 ‘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

Employment Rights Bill

- Schedule 2 (1) of the ERB repeals section 108 of the ERA 1996 - the effect of this is that the two-year qualifying period is abolished
- Employees who have accepted a contract of employment but have not yet started work will not be able to claim unfair dismissal unless one of the exceptions applies - new s. 108A ERA 1996 Sch 2 (2)
- Introduces a power for the Secretary of State to modify the test for claiming unfair dismissal where the date of dismissal is within “the initial period of employment” s 98ZZA
- Removes the two year qualifying period for an employee to request written reasons for when they have been unfairly dismissed and replaces it with a new requirement that the dismissal must have taken place after the end of the employee’s “initial period of employment”

Employees who have accepted a contract of employment but who have not started work

Cannot claim unfair dismissal if an employer withdraws the contract employment before the employee starts work, except in the following circumstances:

- The reason for the dismissal is an automatically unfair reason e.g. whistleblowing, trade union membership or activities, pregnancy
- The reason relates to the employee's political opinions or affiliation
- Where the dismissal is for a spent conviction

Right to claim unfair dismissal during the initial period of employment

- The right to claim unfair dismissal from day one is modified where:
 - a) The dismissal occurs during an “initial period of employment” or the employer gives notice of termination before the end of the initial period of employment and the date of dismissal is within 3 months of the day after the last day of the initial period of employment – s. 98ZZA (2)
 - b) The principal reason for dismissal is capability, conduct, breach of a statutory duty or for some other substantial reason relating to the employee

The principal reason for dismissal during the initial period of employment

Two things to note about the principal reason for dismissal during the initial period of employment:

1. If the principal reason is redundancy the modified approach to dismissal does not apply;
2. If the principal reason is some other substantial reason (SOSR) this appears to be a different test because the SOSR reason must be “related to the employee”

How is the right to claim unfair dismissal during the initial period of employment modified?

S. 98ZZA (1) provides that:

“The Secretary of State may make regulations modifying the application of section 98(4) in relation to the dismissal of an employee that meets the conditions in subsections 2 and 3”

S. 98ZZA (5) (c) provides that provision for the dismissal of an employee to be treated as fair if, or only if, the employer has taken any steps specified in the regulations

“As a starting point, the Government is inclined to suggest it should consist of holding a meeting with the employee to explain the concerns about their performance (at which the employee could choose to be accompanied by a trade union representative or a colleague).”

paragraph 30 of the Next Steps to Make Work Pay

Right to request written reasons

Current position s. 92 ERA 1996

- An employee with 2 years continuous service is entitled, on request, to a written statement from their employer giving particulars of the reasons for dismissal

- Proposed change new s. 92 (3A)
- Removal of the requirement to have two years service
- Replaced with a requirement that the dismissal must have occurred after the end of the employee's initial period of employment

What about compensation?

“The Government also intends to consult on what a compensation regime for successful claims during the probation period will be, with consideration given to tribunals not being able to award the full compensatory damages currently available.”

Impact of the changes

Employers practices and the Unions approach

Employer practices

- Review probationary periods to bring more employees under the modified lighter touch approach
- More rigorous probationary reviews
- Changes to notice periods
- More rigorous recruitment practices

Unions approach

- Consider if there is a variation to the contract and if the reason for dismissal is automatically unfair/redundancy
- Ensure employees are accompanied at probationary reviews where this may lead to dismissal
- Check to see if the notice period extends beyond three months after the end of the initial period/breach of contract
- Check for discriminatory recruitment practices and the use of pre-employment health checks

Conclusion

- While the day one right to claim unfair dismissal is not due to come into force until Autumn 2026 Unions will need to be vigilant as employers seek to review pre-employment screening, probationary periods and notice periods
- Thompsons briefing on the Employment Rights Bill is available [here](#)
- Thompsons [webinar on the Employment Rights Bill on 6 November 2024](#)

Any questions?

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