

A photograph of three business professionals (two men and one woman) sitting at a long table in a modern office or cafe at night. They are all looking at their laptops. The woman is on the left, wearing a grey blazer. The man in the middle is wearing a light blue sweater. The man on the right is wearing a dark red shirt and has a beard. They are all smiling and appear to be in a collaborative work environment. The background shows a large window with a view of a city at night, with lights visible outside. The overall atmosphere is professional and productive.

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Unfair Dismissal Masterclass

24 September 2026

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Session overview



Key ERA changes



Dismissal and the effective termination date



Fair reasons for dismissal and fair process



Tricky issues relating to reasons



Tricky issues relating to process



Remedies

ERA



1 October 2026: the unfair dismissal claim limitation period increases from three to six months



1 January 2027: the qualifying period for ordinary unfair dismissal reduces from two years to six months



1 January 2027: the unfair dismissal compensatory cap is lifted

Effective date of termination (EDT)

- The EDT is when notice expires, summary termination takes effect or an unrenewed limited-term contract ends.
- Fresh dismissal during notice period brings forward the EDT
- It ends continuous employment, affecting qualifying service and the basic award.
- It starts the unfair dismissal limitation period.

Fairness of the dismissal



The employer shows that the reason (or principal reason) for the dismissal was one of the five potentially fair reasons for dismissal.

The tribunal finds that, in the circumstances (including the employer's size and administrative resources), the employer acted reasonably in treating that reason as a sufficient reason for dismissal.

Potentially fair reasons for dismissal

Five potentially fair reasons:

- Capability or qualifications,
- Conduct,
- Redundancy,
- Statutory restriction
- Some other substantial reason (SOSR).

More than one may apply, so identify every applicable reason when defending a claim.

Fair procedure

Once a potentially fair reason is established, the tribunal asks whether the employer reasonably treated it as a sufficient reason for dismissal, considering resources, equity and the merits.

Fairness usually requires both a fair procedure and a reasonable dismissal decision.

Acas Code:

- applies to conduct and performance dismissals.
- may apply where SOSR is cited but the underlying issue is misconduct or poor performance.

Procedural unfairness may lead to a Polkey reduction if a fair process could still have produced dismissal.

Fair procedure

Investigate, set out concerns in writing, hold a meeting, confirm the decision in writing and offer an appeal.

The employee must understand that they are at risk of dismissal and why.

They should have an opportunity to respond, usually at a meeting or hearing.

At the hearing, explain the complaint and evidence; allow questions, evidence and relevant witnesses.

Offer an appeal where appropriate; the Acas Code requires it for misconduct and poor performance dismissals.

Failure to allow an appeal can undermine procedural fairness.

Range of reasonable responses



The tribunal must not substitute its own decision for the employer's.



The range of reasonable responses test applies to both dismissal and investigation.



The question is whether the employer acted reasonably - not how much injustice the employee experienced.



Only facts known to the employer at dismissal may be considered.

Tricky Issues - Reasons



- SOSR
- Conduct Outside Work
- Pending Criminal Proceedings
- Conduct or Capability?

Some Other Substantial Reason (SOSR)

- SOSR is a catch-all for dismissals outside the other statutory categories.
- The employer must show a substantial reason capable of justifying dismissal for the employee's position.
- The tribunal separately assesses fair procedure and whether dismissal was within the range of reasonable responses.
- ACAS Code?
- Is the reason really SOSR? Overlapping reasons. Do you have to get the reason right?

Some Other Substantial Reason (SOSR)

- Common SOSR situations:
 - Business reorganisation
 - Expiry of Fixed Term Contract
 - Failure to accept changes to terms and conditions

Some Other Substantial Reason (SOSR)

- Common SOSR situations:
 - Third party pressure
 - *Henderson v Connect (South Tyneside) Ltd*
 - Personality clashes
 - Breakdown in Trust and Confidence
 - *Leach v OFCOM*
 - How bad does it have to get?

Conduct outside the workplace

- Conduct outside of the workplace may justify dismissal if it affects the work, employment relationship or the employer's reputation.
- Social media use, violence, sexual misconduct and dishonesty are especially fact sensitive.
- Assess actual or potential reputational harm proportionately and consider the guidance given to employees.
- When judging reasonableness, weigh seriousness, the employee's response, work record and mitigating circumstances.



Conduct outside the workplace

- Two conflicting cases regarding social media
- [Weeks v Everything Everywhere Ltd](#)
 - referred to his workplace as "Dante's Inferno" on Facebook
 - *refused to stop as was in his personal capacity*
 - *Dismissal was fair – employer taken reasonable steps to prevent repetition and threatening action towards employee who reported the matter*
- [Whitham v Club 24 Ltd \(t/a Ventura\)](#)
 - *Derogatory comments on Facebook "I think I work in a nursery and I do not mean working with plants".*
 - *Dismissal was unfair – relatively minor. No evidence of harm to reputation. Employee had exemplary record.*
- Cases are fact sensitive. Employer may need to make efforts to assess the potential damage

Criminal Proceedings

ACAS Code (paragraph 31)

- "If an employee is charged with or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers".

There is no fixed rule requiring employers to await outcome criminal proceedings.

The employer should investigate independently and properly consider the options.

Dismissal may be fair without a conviction if the conduct fundamentally conflicts with the role or creates severe reputational risk.

Conduct or Capability?

Not always easy to distinguish

Negligence situations can be both

Philander v Leonard Cheshire [2018]

- “dividing line between conduct and capability can be paper thin”
- Reason for dismissal does not have to be correctly labelled
- Must be clear what the allegations is
- Must be appropriate investigation

Tricky Issues - Process



- Who to involve
- Reasonable adjustments
- Sickness during process
- Overlapping grievance
- Covert recording
- Companion
- Expired warnings

Who to involve

- ACAS Code – *“in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing”*
- Plan at the outset who will investigate, chair disciplinary, conduct appeal
- Independence and impartiality are key
- In small organisations – if necessary, consider external investigator
- Consider seniority of appeal chairperson – should be more senior
- Notetaker/Recording at each stage
- HR advisers – advice on law and process only

Reasonable adjustments

Employers must make reasonable adjustments for disabled employees



Failure to do so does not automatically make a dismissal unfair but can give rise to claims for disability discrimination in addition to unfair dismissal
Knightley v Chelsea & Westminster Hospital NHS Foundation Trust [2022] EAT 63

The right to be accompanied

Employees and workers have a legal right to be accompanied at meetings where formal action or dismissal may result

The right applies regardless of length of service

A company may be:

- A work colleague
- A certified trade union representative
- A trade union official

There is no statutory right to accompaniment at investigatory or informal meetings, although employers may permit this

Unreasonably refusing a valid request may make the process unfair

Unavailability of companion – right to alternative time within 5 working days

Employees on sick leave



Dismissal during sick leave may be fair where there is a potentially fair reason and a fair process is followed.



Employers should:

Obtain medical evidence.
Consider likely return to work.
Assess and implement reasonable adjustments where disability may apply.



Where an employee is unfit to attend meetings, employers should consider:

Postponement, Remote attendance, Written representations, and/or
Further medical advice.



Proceedings do not need to be delayed indefinitely; employers may proceed in the employee's absence where reasonable adjustments have been considered and participation is unlikely within a reasonable timeframe.

Overlapping Grievances

Not uncommon for an employee to raise a grievance during a disciplinary process

ACAS Code not much assistance:

- disciplinary process "may be temporarily suspended".
- where disciplinary and grievance issues are related, it may be appropriate to deal with them "concurrently".

ACAS Guide suggests suspending disciplinary where:

- The grievance relates to a conflict of interest that the manager holding the disciplinary hearing is alleged to have.
- Bias is alleged in the conduct of the disciplinary hearing.
- Management has been selective with the evidence it has supplied to the manager holding the disciplinary hearing.
- There is possible discrimination

Covert Recording

General rule –
recording
admissible if
relevant

Private
deliberations
are
inadmissible
on grounds of
public policy

Best practice –
ask to confirm
at outset of
meeting that
they are not
recording

Won't impact
on
admissibility of
evidence but
might amount
to misconduct
in own right

ON AIR

Warnings



Starting point – take into account any live warnings

Expired warnings cannot be relied on as the reason for dismissal.

Can be relevant when assessing reasonableness of the dismissal

ACAS Guide

- "a decision to dismiss should not be based on an expired warning but the fact that there is an expired warning may explain why the employer does not substitute a lesser sanction"

Automatically unfair dismissals

Automatically unfair reasons include pregnancy or childbirth, health and safety activity, whistleblowing, statutory time off and asserting statutory rights.



Redundancy selection for an automatically unfair reason is also automatically unfair.



Most claims need no qualifying service, so protection starts on day one.



The compensatory cap does not apply to certain health and safety or whistleblowing dismissals; the usual cap applies otherwise.

Remedies

- The tribunal considers reinstatement, re-engagement and compensation
- Reinstatement or re-engagement depends on the employee's wishes, practicability and contribution to dismissal
- Compensation usually comprises a basic award and a compensatory award for attributable loss, subject to the duty to mitigate
- Compensatory award cap: the lower of 52 weeks' pay or £123,543; this will be removed where the EDT is on or after 1 January 2027

Key Takeaways

1

Review all cases of underperformance

2

Prioritise now any cases where less than 2 years service

3

Consider whether need to fast track any other cases in light of damages cap being removed

4

Review processes and train managers on how to conduct fair disciplinary and capability processes in readiness for 2027 changes

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