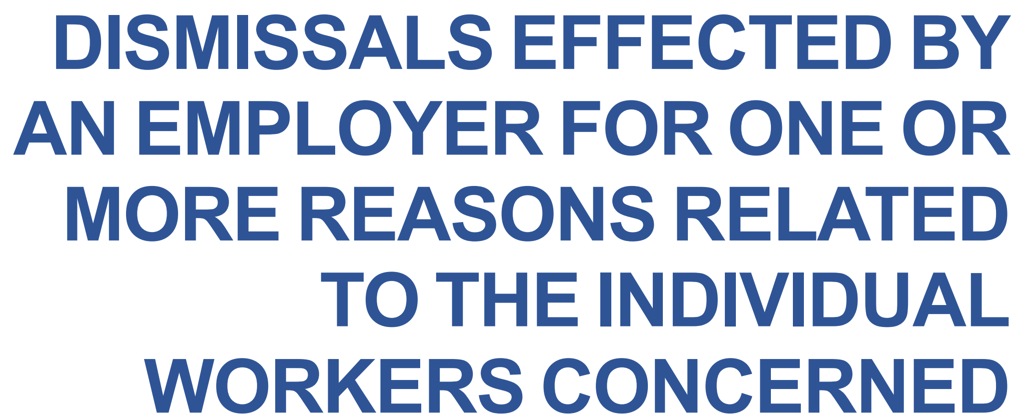

DISMISSALS EFFECTED BY AN EMPLOYER FOR ONE OR MORE REASONS RELATED TO THE INDIVIDUAL WORKERS CONCERNED

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1. DEFINITION

Does your country have a system that defines the grounds on which a worker can be dismissed? If so, mention the grounds. If not, explain when it is possible to dismiss a worker.

A dismissal involves an employer ending the employment of an employee. This can be done with or without notice to the employee and can be for many reasons. In English law, dismissal is regulated in two main ways, via the law of unfair and wrongful dismissal.

Unfair dismissal concerns the fairness of a dismissal whilst wrongful dismissal concerns a dismissal based on an employer's breach of contract. This means that the employer must actively breach a term or condition in the contract of employment for a wrongful dismissal claim whereas in an unfair dismissal claim, the reason for dismissal may be legitimate or not and /or the procedural requirements may not have been met, making it unfair. Therefore, dismissal law in the United Kingdom (UK) attempts to balance the power dynamic between employer and employee, recognising that employees need to be protected.

For the purposes of this report and its focus on dismissals for reasons related to the individual worker concerned, unfair dismissal will be the focus with an overlap of wrongful dismissal. Some of the cases referred to in this report are from UK Employment Tribunal (ET) decisions which are not binding and are here simply illustrative of the type of situations that may arise in dismissals.

Section 98 of the Employment Rights Act 1996 (ERA 1996) governs the law on dismissals. The right not to be unfairly dismissed[1] is subject to the potentially fair reasons in section 98 ERA 1996. They are potentially fair because the onus of proof is on the employer[2] to show that the reason or principal reason[3] for dismissing the employee falls into one of the following permitted categories;

i. Lack of capability or qualifications for performing work of the kind which the employee was employed to do[4].

[1] ERA 1996, s 94.
[2] *Adams v Derby City Council* [1986] IRLR 163 (EAT).
[3] ERA 1996, s98(1)(a)
[4] ERA 1996, s 98 (2) (a).

ii. Conduct of the employee[5].

iii. Inability of the employee to continue working without contravention of a duty or restriction imposed by or under law (either on his part or on that of his employer)[6]. This refers to situations where the employer dismisses an employee because they are unable to keep employing them without breaking the law.

For example, an employer is justified in dismissing an employee they reasonably believe no longer has the right to work in the UK[7].

iv. Some other substantial reason of a kind such as to justify the dismissal[8].

Dismissal can either be actual or constructive.[9] Constructive dismissal simply refers to a situation where the employee themselves resigns because they believe the employer provoked them to do so due to a serious breach by the employer. In *Western Excavating Ltd v Sharp*[10], the breach by the employer needs to be a repudiatory breach and not a minor one. in other words, the breach must go to the root of the contract and be fundamental. Examples of such a breach includes a variation of an express term of the employment contract[11], a reduction of one's pay without permission[12] or a breach of the implied term of trust, duty and confidence (such as the use of abusive language).[13] Under actual dismissal, a summary dismissal may be carried out. This refers to an immediate dismissal without notice and as will be explored later, can be justified when the employee commits an act of gross misconduct.

A dismissal that falls outside of these categories is unfair and the employee will be able to pursue redress in the Employment ET (ET) or civil courts if they have the requisite tenure and are not otherwise statutorily barred from doing so.

Even if the employer can show a reason falling under section 98 (2) ERA 1996 or any other substantial reason for dismissal, the employer must have acted reasonably in deciding that the reason is sufficient for dismissal under section 98 (4) ERA 1996.

[5] ERA 1996, s 98 (2) (b).
[6] ERA 1996, s 98 (2) (d).
[7] *Bouchaala v Trusthouse Forte Hotels Ltd* [1980] IRLR 382 (EAT).
[8] ERA 1996, s 98 (1) (b).
[9] ERA 1996 s.95 (1) (a-c).
[10] [1978] QB 761.
[11] *Land Securities Trillium Limited v Thornley* [2005] IRLR 765 [EAT].
[12] *Cantor Fitzgerald International v Callaghan and others* [1999] IRLR 234.
[13] *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942.

An employer's reason for dismissal can be classed as either fair or unfair based on the circumstances and facts of the case. It is important to note, that before this burden shifts to the employer, the employee needs to prove that there was in fact a dismissal.

1.1 Misconduct of the employee

Conduct refers to the employee doing something wrong such as dishonesty, fighting, harassment, lateness or absences without permission. In establishing the fairness of the dismissal on this ground, it is not simply the truthfulness of the action being alleged that is important, but rather how reasonable the employer's response was. In other words, was dismissal a reasonable option for the employer considering the allegation being made against the employee? If so, then the dismissal may be considered fair.

BHS v Burchell[14] sets out three criteria that must be met in proving that a conduct dismissal was fair. These are whether the employer has a genuine belief in the employee's guilt; there must be reasonable grounds to believe in the employee's guilt and if a reasonable investigation has been carried out.

This ground permits a summary dismissal (without notice). It is important to note that summary/immediate dismissal will be considered fair if the misconduct constitutes gross misconduct[15]. This can include actions like 'theft or fraud, physical violence, gross negligence or serious insubordination'[16].

Under this ground, ruling a dismissal as fair or unfair is not based on the accuracy of the allegation because the ET is only concerned with beliefs and procedures carried out at the time of the dismissal. This was reiterated by the Court of Appeal in *Taylor v Alidair Limited*[17] saying 'if a man is dismissed for stealing, as long as the employer honestly believes it in reasonable grounds, that is enough to justify dismissal. It is not necessary for the employer to prove that he was in fact stealing.'[18]

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[14] [1978] IRLR 379 (EAT).
[15] ACAS Code, para 23.
[16] ibid para 24.
[17] [1978] IRLR 82.
[18] ibid.

1.2 Capability and qualifications

The statute defines capability as being assessed 'by reference to skill, aptitude, health or any other physical or mental quality'[19] whilst qualification is defined as 'any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.'[20]

Like the requirements in proving misconduct, the employer must make sure that they genuinely believe that the employee is incapable of doing the job before dismissing them. Therefore, the focus in proving this ground for dismissal is largely on the procedure followed by the employer in relation to the facts of the case. The Advisory, Conciliation and Arbitration Service[21] (ACAS) publishes the Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code)[22] which requires the employer to focus on its guidelines when thinking of dismissing an employee based on capability.

'Some other substantial reason of a kind as to justify the dismissal of an employee holding the position which the employee held'[23] otherwise known as SOSR, covers other reasons that the statutory list does not cover. The most common example of such a dismissal falling under this category is when the employer reorganises their business and is forced to make contract variations as a result. In such a situation, if an employee fails to accept the new contracts, their dismissal could be classed as potentially fair under SOSR. Another recent example is about reputational damage to the company. In *Leach v OFCOM*[24], the employee was accused of child sexual assault and so the employer had to show why such accusation meant that they could no longer employ the claimant. For institutions such as OFCOM, the court accepted that the breakdown of trust and confidence was a valid reason for dismissal along with reputational risk. Such reasons do not fall under the statutory list and would be classed under SOSR.

The other grounds for dismissal includes redundancy which is beyond the scope of this report as it concerns the business not the employee.

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[19] ERA 1996 s.98 (3)(a).
[20] ibid s.98 (3)(b).
[21] See an explanation of ACAS in Question 3.
[22] ACAS 'Code of Practice on Disciplinary and Grievance Procedures' < http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf> accessed 18/02/2018
[23] ERA 1996, s.98 (1)(b).
[24] [2012] EWCA Civ 959.

Together with the automatically fair reasons and redundancy[25], these are the only reasons for which an employer can lawfully dismiss an employee.

The law permits any reason given for dismissal that relates to the attributes of the employee or the exercise of a right they may have, to constitute automatic unfair dismissal. The ACAS Code lists such unfair reasons to be those relating to maternity, family reasons, acting as an employee representative, trade union membership grounds and union recognition, part-time and fixed-term employees and reasons relating to pay and work hours.[26]

[25] ERA 1996, s 98 (2) (c).
[26] ibid (n22). This is further developed in Question 9.

2. RELEVANT FACTORS FOR ALLOWING DISMISSALS

Is the number of workers employed relevant or the type of contract, or the duration of the employment relation, or whether the employer is a public or private legal person, or any other factors.

There are specific exceptions to the right of employees' protection from unfair dismissal. These exceptions are mostly in relation to specific types of jobs and sometimes the type of contract. The number of workers employed is not relevant to allowing dismissals that relate to the individual themselves, but it may be relevant in a redundancy dismissal.

There are certain people who are unable to bring a claim for unfair dismissal.[27] These are listed as self-employed people, independent contractors, members of the armed forces[28], employees who have reached a settlement with their employer through ACAS[29], employees who have reached a settlement with their employer through a 'settlement agreement' after taking legal advice, employees employed under an illegal contract (as under the common rules of contract, an illegal document is not enforceable in law), employees covered by a dismissal procedure agreement that has been legally exempted from the unfair dismissal rules- this is covered in section 110 ERA 1996 which explains that an application can be made jointly by the parties to the secretary of state for an order to designate a dismissal procedure agreement subject to certain conditions listed.[30] Where this occurs, such agreement replaces the right found in section 94 ERA 1996.[31] Furthermore, there may be certain situations where the employee is a shareholder and has chosen to opt out of their right to bring a claim for unfair dismissal.

Additionally, employees taking part in unofficial industrial action (explored below), police officers and those working on a fishing vessel (due to reasons of practicality) cannot claim unfair dismissal.[32]

In relation to police officers, they enjoy greater protection against dismissal of any sort due to the separate disciplinary procedures they have under the Police Conduct Regulations 2012.

[27] ERA 1996, s.191-192.
[28] *Booley v British Army MOD* UKEATPA/1821/11/LA.
[29] See description of ACAS in Question 3.
[30] ERA 1996 s.110 (3) (a-f).
[31] ERA 1996 s.110 (1).
[32] UK Government Website <https://www.gov.uk/dismiss-staff/eligibility-to-claim-unfair-dismissal> accessed 1 February 2018.

Additionally, if they are dismissed by their special quasi-judicial body, that body enjoys judicial immunity from claims against them[33].

However, both an employee and a police officer have a right to claim unfair dismissal if based on discrimination[34], a health and safety reason[35] or where there has been a protected disclosure.[36]

Section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) gives a specific circumstance where an employee loses the right to complain of unfair dismissal. This loss of right occurs when the employee takes part in an unofficial strike or other unofficial industrial action.[37] If they are dismissed as a result, then they do not have the right to claim for unfair dismissal. Official strikes or industrial action are those that are authorised or endorsed by a trade union the employee is or is not a part of.[38] Therefore, in this circumstance, the employee's dismissal is allowed.

Furthermore, the duration of employment is relevant in an employee being able to exercise their right to not be unfairly dismissed. An employee can only bring an unfair dismissal case if they have been employed for two years[39] except in certain specific situations classed as 'automatic unfair dismissals' (dismissed for being pregnant or for union membership or activities) where the qualifying period does not apply.

Regarding the type of contract, dismissals are also allowed for employees employed under fixed term contracts. These are contracts specifying the duration of employment for that position. Once it comes to the end of the duration, they end automatically, and the employer is not required to give notice. If the contract is not renewed, then it is considered a dismissal of the employee.[40]

In instances of employment for more than two years in a fixed term contract, the employer needs to give a fair reason for not renewing the contract[41] so that the dismissal is not unfair.

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[33] *Heath v Commissioner of Police for the Metropolis* [2005] IRLR 270 CA.
[34] ERA 1996, s.126.
[35] ERA 1996, s.100.
[36] ERA 1996, s. 103A.
[37] Trade Union and Labour Relations (Consolidation) Act 1992, s.237 (1).
[38] ibid s.237 (2).
[39] ERA 1996, s.108 (1).
[40] UK Government Website: Fixed- Term Contracts <https://www.gov.uk/fixed-term-contracts/renewing-or-ending-a-fixedterm-contract> accessed 1 February 2018.
[41] ibid.

In *Royal Surrey County NHS Foundation Trust v Drzymala*[42], the ET held that it was not the law that an employer who complies with the non-discrimination policy under the Fixed-Term Employees Regulations 2002, necessarily acts fairly in dismissing an employee and not renewing their fixed-term contract under section 98 (4) ERA 1996. The fairness of the dismissal is now dependent on the facts of the case and the application of the fairness test under section 98 (4) ERA 1996. In this case, the claimant was employed in a series of fixed-term contracts until it was eventually not renewed. The locum position was then made permanent and after an appointment procedure, she was not the successful candidate. Though the ET rejected the notion that she was to be the preferred candidate to the rest, they nevertheless held that the employer should have discussed possible alternative employment and offered her the right to appeal before her fixed-term contract ended. This made the dismissal unfair.

[42] UKEAT/0063/17/BA.

3. SOURCES OF LAW

Specify the sources of the regulation of dismissal (Constitution, Acts, Case-law, Collective Labour Agreements, impact of International and European law).

The most important source of Employment Law on dismissals are statutes. The common law also contributes to the law and its practical application in dismissal cases, establishing precedents to be followed by subsequent cases.

3.1 Statute

ERA 1996 is an important statute that sets out the law on dismissals and contains most of the law on individual employment rights. Part X of the Act contains the law on dismissal. Section 94 sets out the employee's right not to be unfairly dismissed by his employer subject to some exceptions that will be highlighted later.

Sections 95 and 136 explain the circumstances in which an employee would be considered dismissed highlighting the difference between actual dismissal and constructive dismissal.

The statute further mentions the importance of the employer conforming to notice periods before terminating the employment and the employees' right to a written statement of reasons for dismissal.[43] Additionally, section 97 explains when the effective date of termination is, to make sure the notice period is met in the case of dismissal and to avoid technical ambiguity.

Section 98 states when a dismissal is considered fair or unfair as explored under question 1. It also indicates that the burden of proof is on the employer. All the employee needs prove is that there has been a dismissal under section 95.

Sections 111- 127B concerns the enforcement of the right not to be unfairly dismissed and the remedies available to the employee if the right is breached.

[43] ERA 1996, Part IX.

Employment Rights Act 1996	Unfair Dismissal Provisions
Section 94 (1)	Right not to be unfairly dismissed and corresponding right to complain of an unfair dismissal.
Section 95 (1) (a-c)	Circumstances in which dismissal takes place- actual or constructive
Section 98 (1)	Burden on employer to show that the dismissal was fair and fell under reasons in section 98(2) or SOSR
Section 98 (2)	Lists 4 Potentially fair reasons for dismissal
Section 98 (3)	Definition of capability and qualifications
Section 98 (4)	Factors the ET is to look at in deciding if the employer acted reasonably or not
Section 108 (1)	Qualifying period for bringing an unfair dismissal claim before the ET
Section 110 (1)	Where dismissal procedure agreement is reached between the parties, then it substitutes the section 94 right not to be unfairly dismissed
Section 111 (1)	Complaints of unfair dismissal can be brought to the ET
Section 112	Lists the remedies available to the ET if a claim is successful- either make and order or compensation
Section 113-115	Making orders of reinstatement or re-engagement
Section 117-118	When an award of compensation can be made and what it is made up of (basic and compensatory award)

Another legislation that may be useful in dismissal law is the Equality Act 2010. This is mainly in relation to dismissals that may occur for a reason that relates to one of the nine

protected characteristics listed in the Act.[44] In such cases, the dismissal would mostly likely be considered automatically unfair.

TULRCA 1992 also contains most of the law on collective employment rights. Section 152 deals with the dismissal of employees on grounds related to their union membership or activities. Under this section employees are protected from such dismissals. Furthermore, as already mentioned, sections 237- 239 concern when an employee may lose the right to protection from unfair dismissal.[45]

3.2 The ACAS Code

The ACAS Code[46] is a document relevant to the law on dismissal. ACAS[47] is an impartial and independent non-departmental public body. It was established to promote and facilitate strong industrial relations practice between employers and employees. ACAS does this through alternative dispute resolution, advise and training, as well as the publication of Guides and Codes of Practice[48].

As established, procedural fairness plays a significant role in the law on dismissals. Therefore, making sure the employers are following sufficient and correct procedures before dismissing staff and upholding the employee's right to be treated fairly is essential. The ACAS Code contains 'practical guidance for employers, employees and their representatives, setting out principles for handling disciplinary and grievance situations in the workplace.'[49]

It is important to note that the ACAS Code simply contains guidelines and employers are not obliged to follow it, but ET's do take the ACAS Code into consideration when deciding cases, so it is advisable to follow it.

An employer's failure to adhere to the ACAS Code may constitute a 25% increase in compensation if unfair dismissal is found and conversely[50]. The ACAS Code could therefore be described as persuasive soft law.

[44] Equality Act 2010, s.4.
[45] Relevant provisions of TULRCA 1992 are further explored in Question 9.
[46] ibid (n22).
[47] ibid (n21).
[48] TULRCA 1992, s.199.
[49] ibid (n22).
[50] ibid.

3.3 Common law

The common law is also a source of dismissal law. It is derived from decisions made in cases by judges after considering the relevant legislation. Any landmark cases are regarded as precedent and are to be adhered to in similar future cases.

In employment dismissal law the important cases include *Polkey*[51] which established the importance of procedural fairness, *Burchell*[52] which set out the test to be followed in establishing how fair a dismissal was in relation to the reason(s) the employer gives, *British Leyland Ltd v Swift*[53] which established the foundation of the range of reasonable responses test which was later developed in *Iceland Frozen Foods v Jones*[54] and *Sainsbury Ltd v Hitt*[55] which extended the application of this test to not just the act of dismissal itself but the disciplinary investigations that occurs before. Besides these landmark cases, there are others mentioned throughout this report that cover many instances and facts which help explain the law on dismissals in the UK.

3.4 Collective agreements

Collective agreements between employers and trade unions are another source of dismissal laws in the U.K. They are unenforceable unless the parties agree otherwise. While collective agreements are not binding on the parties, the, conduct, capability and dismissal procedures may have become integrated in the contract of employment making them enforceable.

Where employers recognise trade unions and bargain collectively, there are likely to be procedures that regulate conduct and capability dismissals.

Establishing a disciplinary policy and procedure gives the employer assurance of how to be procedurally fair. Such policies can have procedures and rules relating to disciplinary steps before dismissal and acceptable notice periods. Additionally, as mentioned above under section 110 ERA 1996, it is possible to negotiate a special collective agreement with its own

[51] [1988] AC 344 (HL).
[52] [1978] IRLR 379 (EAT).
[53] [1981] IRLR 91 (CA).
[54] [1982] IRLR 439 (EAT).
[55] [2002] EWCA Civ 1588.

dismissal rules, effectively excluding the right not to be unfairly dismissed in section 94 ERA 1996 in rare cases.

The employer must adhere to its internal policies and procedures for a dismissal to be fair[56]. Policies and procedures cannot contain less than the procedural requirements of the ACAS Code but can contain more. The employer's policy and procedure forms part of the evidence that an employer can show the court to prove that it has acted reasonably within the requirements of section 98(4) ERA 1996. Where the policies and procedures are contained in the employment contract, non-adherence by the employer would additionally be in breach of contract.

3.5 International and European Law

International and European Law does not have an impact on this area of law as individual dismissals are not regulated by EU law. International conventions do not have an impact on national law because of the dualist system of international law. The exception is the ECHR which has been transposed into UK law by The Human Rights Act 1998 (HRA 1998). HRA 1998 incorporates certain rights and freedoms set out in the European Convention on Human Rights [57](ECHR) into UK law. The ET must take any judgment, decision or opinion of the European Court of Human Rights or European Commission into account if it is relevant to the proceedings[58].

The ET must read and give effect to primary legislation in a way which is compatible with ECHR rights[59], and it is unlawful for the ET as a public authority to act in any way which is incompatible with the ECHR[60].

This means that the ET must consider whether the dismissal was fair having regard to ECHR rights. In *X v Y*[61] the Court of Appeal stated that where an HRA 1998 matter is raised, the ET should consider the effect the human rights aspect might have on the reasonableness of the dismissal. In this case, the claimant was convicted of a sexual offence in a public toilet.

[56] *Welsh National Opera Ltd. v Johnston* [2012] EWCA Civ 1046, [2012] UKEAT/0015/11/LA.
[57] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 8 March 1951, entered into force 3 September 1953) ETS No. 005.
[58] HRA 1998, s 2.
[59] HRA 1998, s 3.
[60] HRA 1998, s6(1) & (3)
[61] [2004] EWCA Civ 662, [2004] IRLR 625.

The Court of Appeal held that Article 8 of the convention was not engaged as the conduct in question took place in public, making it a public offence and not a private one involving private life. Despite dismissing the claimant's appeal and deciding the case on section 98 ERA 1996 dismissal rules rather than human rights arguments, the Court still explained that where a convention right of the kind that imposes a duty on the state is engaged, then dismissal rules must be applied consistently with the convention.

4. CRITERIA FOR ALLOWING THE DISMISSALS

Is there a need for a valid reason for termination? How is the reason defined and what criteria apply? Can dismissal be considered as an ordinary tool of company management or is it an instrument that can be used only if there is no other real alternative?

a. Is there a need for a valid reason for termination?

This question is partly covered by Question 1. The employer must establish that the reason for dismissal is one of the designated reasons set out in section 98 ERA 1996. Here, a more detailed assessment of those grounds/reasons is provided, considering in turn capability or qualifications, conduct, statutory restriction or bar and some other substantial reason (SOSR).

Capability or Qualifications

A dismissal is potentially fair if the reason 'relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do'.[62]

Capability

An employee's lack of capability for performing work of the kind which he was employed to do, is assessed by the employer with reference to the employees 'skill, aptitude, health or any other physical or mental quality'[63]. Under this category, an employee who fails to reach the employer's standards will be held to have been fairly dismissed, even if those expected competencies are higher than those of similar employees[64], as will an inflexible and unadaptable worker[65]. It has also been successfully applied to an efficient employee who was so abrasive that his behaviour negatively affected the work of his colleagues[66].

Dismissal for ill-health is potentially fair if the employee is unable to work for an extended duration, and the illness is not a disability under the Equality Act 2010.

In *Spencer v Paragon Wallpapers Ltd*[67] it was held that in dismissing an employee for reasons of ill-health, there is a need to look at all relevant factors as every case depends on its own circumstances. 'Relevant factors included the nature of the illness, the likely length of

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[62] ERA 1996, s. 98 (2) (a).
[63] ERA 1996, s. 98(3) (a).
[64] *Fletcher v St Leonards School* [1987] UKEAT 25/87 (EAT).
[65] *Abernethy v Mott, Hay and Anderson* [1973] IRLR 123 (CA).
[66] *Bristow v Inner London Education Authority* [1979] UKEAT 602/79 (EAT).
[67] [1976] IRLR 373 (EAT).

the continuing absence, the need of the employers to have done the work which the employee was engaged to do.'[68]

The employer must also ensure that the long-term illness is not one which may be defined as a disability under the Equality Act 2010. The Equality Act 2010 makes it unlawful to discriminate against a disabled employee and imposes a duty on the employer to make reasonable adjustments[69] for disabled workers. An employer may be liable for unlawful disability discrimination even if it is a fair capability dismissal under section 98 ERA 1996. These are all relevant considerations and factors the court will look at in determining if a dismissal on the ground of incapability through illness, is fair.

In *Nikola-Erotokritou v Hertfordshire County Council*,[70] the employee developed tendinitis and would have been able to return to work if the employer had provided assistance with heavy lifting. The employer did not make this adjustment and dismissed her for lack of capability. The ET found that the dismissal was unfair because the employer had failed to make the recommended reasonable adjustments.

The courts have acknowledged that there are exceptional circumstances where reasonable adjustments cannot be made, and a capability dismissal would therefore be fair. In *Dyer v London Ambulance NHS Trust*[71], the employee developed a severe allergic reaction to aerosols and after extended sickness absence she was dismissed for capability when the employer concluded that it was not possible to make reasonable adjustments. The Employment Appeal Tribunal (EAT) held that providing an aerosol-free environment was not a reasonable adjustment that the Trust should be expected to make, and the employee's dismissal was therefore fair.

Qualifications

Dismissal is fair where the reason relates to the employee's lack of any 'degree, diploma or other academic, technical or professional qualification'[72] relevant to the employee's position. This definition also includes qualifications that are directly awarded by the employer, thus in

[68] ibid.
[69] Equality Act 2010, s 20.
[70] ET Case No. 3302508/10.
[71] [2014] UKEAT 0500/13/LA (EAT).
[72] ERA 1996, s 98(3) (b).

Blackman v Post Office[73] the employee was a post and telegraph officer with five years tenure.

When he was dismissed for failure to pass an aptitude test after three attempts, the court held that he had been fairly dismissed for a reason relating to 'qualifications' or for 'some other substantial reason'.

Qualifications can be inferred from the job advertisement or implied from the nature of the job and not necessarily mentioned in the employment contract. In *Tayside Regional Council v McIntosh*[74], the employee was recruited as a motor mechanic via an advertisement which stated that possession of a clean current driving licence was essential. When the employee was dismissed for losing his licence through disqualification, the EAT held that the dismissal was fair. Possession of a driving licence was clearly an essential and continuing condition of the employee's employment. Loss of his driver's licence was a lack of qualification to do the job for which he was employed.

Qualifications that applied at the beginning of the employment relationship may become outmoded, and the employer can reasonably require the employee to gain new qualifications and fairly dismiss if the employee is unable to do so.

The ET found the dismissal fair in *Rooney v Davic Engineering Ltd*.[75] where the employee had worked as a welder for the employer satisfactorily for a period. A customer insisted that only those welders who had obtained a specific qualification be allowed to work on components intended for him. The employee failed the test three times and was dismissed because the employer did not have enough work to keep him fully occupied.

Conduct

It is potentially fair to dismiss an employee for a reason that 'relates to the conduct of the employee'[76]. The employer is required to carry out a proper investigation into the incident and give the employee a chance to explain before dismissing them.

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[73] [1974] IRLR 46 (NIRC).
[74] [1982] IRLR 272 (EAT).
[75] ET Case No. 14518/79.
[76] ERA 1996, s 98 (2) (b).

In practice, misconduct can either be a single act of serious misconduct (which is sometimes termed gross misconduct) or a series of less offensive acts, which if continued will ultimately lead to dismissal.

An employee can be dismissed for misconduct occurring outside the workplace 'so long as in some respect or other it affects the employee or could be thought to affect the employee when he is doing his work[77]'.

Though gross misconduct is not defined, the ACAS Code[78] advises employers to 'give examples of acts which the employer regards as acts of gross misconduct. This may vary according to the nature of the organisation'[79]. It is important to note that summary dismissal (where the employee is dismissed immediately and without notice), will be considered fair if the misconduct constitutes gross misconduct.[80] Gross misconduct can include actions such as 'theft or fraud, physical violence, gross negligence or serious insubordination'[81]. In cases of minor misconduct, a summary dismissal may not be appropriate. However, where there are repeated minor offences, the accumulation of these misconducts may justify a dismissal.

The fairness or unfairness of a conduct dismissal is not based on the accuracy of the allegation, but rather the employer's reasonableness in deciding to dismiss. In *Trust House Forte Leisure Ltd v Aquilar*[82] it was held that the employer only needs to prove that they acted reasonably in dismissing the employee.

The employer can illustrate the reasonableness of their actions by showing that they established the employee's guilt following a reasonable investigation during which the employee was given an opportunity to respond to the allegations.

A later discovery of the employee's innocence will not be relevant in deciding if the dismissal was fair or not as the ET is only concerned with beliefs and procedures carried out at the time of the dismissal. This was reiterated by the Court of Appeal in *Taylor v Alidair Ltd.*[83] where the court stated, 'if a man is dismissed for stealing, as long as the employer

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[77] *Singh v London Country Bus Services Ltd.* [1976] IRLR 176 (EAT).
[78] ACAS 'Code of Practice on Disciplinary and Grievance Procedures' < http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf> accessed 18/02/2018
[79] ACAS Code of Practice para 24.
[80] ACAS Code of Practice para 23.
[81] ACAS Code of Practice para 24.
[82] [1976] IRLR 251.
[83] [1978] IRLR 82.

honestly believes it on reasonable grounds, that is enough to justify dismissal. It is not necessary for the employer to prove that he was in fact stealing.'[84]

Additionally, in *Devis & Sons Ltd v Atkins*[85], it was held that the employer can only rely on the facts and evidence available to them at the time of the dismissal and not subsequent evidence that may come to light which may reiterate the employee's guilt or subsequent misconduct in order to justify a dismissal.

Criminal offences in or outside the workplace may justify a dismissal depending on the definition of gross misconduct in the organisation. A distinction is made between offences that take place in the workplace and those occurring outside the workplace. Where the misconduct occurs in the workplace, the employer has a discretion to dismiss the employee even before a criminal investigation is concluded. The employer is required to show its reasonable belief in the facts and the reasons for dismissal.

Where the alleged misconduct occurs outside the workplace, the employer must wait for the outcome of the criminal investigation and conviction. This was confirmed in *Securicor Guarding Ltd v R*[86] where a security guard was held to be unfairly dismissed when he was charged for alleged past sexual offences, as the employer did not know or have access to the evidence establishing his guilt. The ACAS Code reiterates this general rule by stating, 'if an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action.'[87] It goes on to say that any exceptions to this rule should only arise when consideration has been 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'.[88]

In *Nottinghamshire County Council v Bowly*[89], the employer was held to be right in straying from the general rule and dismissing the employee for their criminal conduct of gross indecency with another man in a public lavatory outside the workplace.

Although the conduct was not considered serious enough to warrant a dismissal, in the context of his job as a teacher, the employer had not acted unreasonably in dismissing the employee after conviction.

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[84] ibid.
[85] [1977] IRLR 314 (HL).
[86] [1994] IRLR 633 (EAT).
[87] ACAS Code of Practice para 31.
[88] ibid.
[89] [1978] RLR 252 (EAT).

Statutory restriction or statutory bar

A dismissal is potentially fair if the reason 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'.[90] The word 'enactment' covers primary and secondary legislation. In *Woodcock v University of Cambridge*[91] the employee was employed as a demonstrator. The University statutes (which are approved under the Universities of Oxford and Cambridge Act 1923), state that a demonstrator cannot be employed for more than 5 years. When the employee was dismissed after five years, he complained of unfair dismissal. The EAT said that his dismissal was fair because there was a statutory ban on his employment beyond 5 years.

In *Bouchaala v Trusthouse Forte Hotels Ltd*.[92] the employee came to the UK from Tunisia as a student. He was subsequently employed by Trusthouse Forte as a trainee manager. The employer was informed that because the employee was no longer a student he did not qualify for a work permit. His employment was therefore illegal, and the employer accordingly dismissed him. A few weeks later the Home Office informed the employer that the employee had been given indefinite leave to remain in the UK and did not need a work permit. The employee sued for unfair dismissal. In dismissing his appeal, the EAT held that a genuine belief by an employer that it is impossible to continue the employment of an employee because there is an enactment prohibiting further lawful employment of that employee is fair and can also constitute 'some other substantial reason' within the terms of section 98(1) ERA 1996.

Dismissal for some other substantial reason

Dismissal for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held[93]', is abbreviated to SOSR. The law does not provide an explanation of the phrase 'some other substantial reason'. In *RS Components Ltd. v Irwin*[94] however, the court explained that although Parliament may well

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[90] ERA 1996, s 98(2) (d).
[91] [1979] UKEAT 332/79 (EAT).
[92] [1980] IRLR 382 (EAT).
[93] ERA 1996, s 98(1) (b).
[94] [1973] IRLR 239 (NIRC).

have intended to set out common reasons for a dismissal in section 98 ERA 1996, it was not possible for them to 'produce an exhaustive catalogue of all the circumstances in which an employer would be justified in terminating the services of an employee'.

SOSR is a catch-all potentially fair reason for dismissal if the reason does not fall within any of the other categories. SOSR has been used to justify varying dismissals such as re-organisation that does not entail loss of jobs, change of terms and conditions which have been refused by employees or when employers try to protect their reputation or business interests. It can be used when senior employees do not perform or get along with management or when employees do not get along with each other. However, this category cannot be used liberally, especially instead of a capacity or conduct reason.

In *Harper v National Coal Board*[95], the dismissal was held to be fair either for capability or SOSR. The EAT held that an employer can only claim SOSR if the reason for dismissal is substantial and not if it is a whimsical or capricious reason which no ordinary person would entertain.

As an example of SOSR, in the case of *Gilham & ors v Kent County Council (No.2)*[96], the employee was offered a new contract with less pay, during a cost reduction exercise. The Court of Appeal stated that it was impossible to argue that the employer's need to reduce expenditure by restructuring was not SOSR that could potentially justify dismissal.

Automatically fair reasons for dismissal

Certain reasons for dismissal are automatically fair. If one of the following reasons is established by the employer, the ET must find the dismissal fair (valid);

i. Dismissal 'for the purpose of safeguarding national security[97]'. In *B v BAA plc*[98] however, the EAT warned that the ET should not reject an employee's unfair dismissal claim simply on the basis that the dismissal was carried out for safeguarding national security. The employer must prove that the dismissal was for that specific purpose.

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[95] [1980] IRLR 260 (EAT).
[96] [1985] ICR 233 (CA).
[97] Employment Tribunals Act 1996, s10 (1).
[98] [2005] UKEAT/O557/04/LA, [2005] ICR 1530.

ii. Where an employee is taking part in part in an unofficial strike or other unofficial industrial action at the date of dismissal[99].
iii. Where an employee is taking part in lawful industrial action at the date of dismissal and the employer has dismissed all other employee's taking part[100].
iv. Where the employer is conducting a lock-out at the date of dismissal and has dismissed all employees with a direct interest in the dispute[101].

Automatically unfair reasons for dismissal

There are other reasons for dismissal that are 'automatically unfair'. Every employee has statutory employment rights which are listed under section 104 ERA 1996 and other pieces of legislation. It is an automatically unfair dismissal if an employee is dismissed for asserting any of the listed statutory rights. These rights include any right given by ERA 1996 for which an individual can seek redress in the ET. Thus, any new employment right which is inserted into ERA 1996 automatically becomes a relevant statutory right in the same way as the other listed rights. Here the onus of proof is on the employee to show that their dismissal was for an automatically unfair reason, despite the employer's insistence that dismissal was for a potentially fair one.

[99] Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s 237.
[100] TULRCA 1992, s. 238.
[101] ibid.

b. How is the reason defined and what criteria apply?

In defining the reason and the applicable criteria, the ET applies a dual test.

i. The employer must establish that the reason or principal reason for dismissal falls within the permitted reasons in section 98 ERA 1996.
ii. If the dismissal falls within the permitted reasons, it must be fair pursuant to section 98(4) ERA 1996.

The courts have said that the starting point is 'a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee[102]'. The court must first make factual findings as to the employer's reason for dismissal then decide how the employer's reasons are reflected by the statutory provisions of section 98 ERA 1996[103]. If the employer's reasons do not fall in the permitted category, then the dismissal will be unfair, and the court will not make further enquiries. The dismissal will be unfair if the reason shown is insignificant, trivial or unworthy[104].

ERA section 98(1) (a) requires the employer to show that, 'the reason (or, if more than one, the principal reason) for the dismissal' falls within the permissible categories. This means that the employer must show one main reason for dismissal and not aggregate several reasons to justify its actions. In *Smith v Glasgow DC*[105] the House of Lords (precursor of the UK Supreme Court) overturned the decision of the Court of Appeal when the employer presented four reasons for dismissal but was unable to establish the principal reason.

Once the employer has established a potentially fair reason[106] for the dismissal, it must then show that it was fair to dismiss for that reason. The statutory test for fairness is set out in section 98(4) ERA 1996 as follows,

> '…... 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

[102] *Abernethy v Mott, Hay & Anderson* [1974] IRLR 213 (CA).
[103] *UPS Ltd. v Harrison* [2012] WL 14622, [2012] UKEAT/0038/11/RN.
[104] *Gilham and others v Kent CC (No 2)* [1985] IRLR 18 (CA).
[105] [1987] IRLR 326 (HL).
[106] ERA 1996, s 98 (1).

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.'

The courts have said that section 98(4) ERA 1996 poses one unitary question, which is whether the dismissal was fair or unfair, having regard to the reason evidenced by the employer[107]. Additionally, the determination of whether the employer acted fairly or unfairly is a question of fact, not of law. Section 98(4) ERA 1996 operates in three stages. First, the employer must show why in fact he dismissed the employee. Next the employer must show that this reason falls into one of permitted categories of reasons. The court must consider whether, looking at the matter broadly and giving the words their ordinary meaning, the reason for the dismissal falls within one or other of the permitted reasons. In the third and final stage, the court must ask itself, 'Has the employer satisfied us that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating this conduct as a sufficient reason for dismissing the employee'[108].

Effectively, section 98(4) ERA 1996 gives the court the discretion to base their decisions on the facts of the case before them and in the light of good industrial relations practice.

The employer must act reasonably in treating the selected reason as sufficient to dismiss[109]. Here, ET's must use their own collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved'[110].

The Court of Appeal formulated 'the band of reasonable responses' test in *British Leyland (UK) Ltd. v Swift*[111], to assist them in making this determination.

The authorities were summarised in *Iceland Frozen Foods Ltd. v Jones*[112] as follows;

[107] *USDAW v Burns [2014]* WL 2652599, UKEAT/0557/12/DA.
[108] *Union of Construction, Allied Trades and Technicians v Brain* [1981] IRLR 224 (CA).
[109] ERA 1996, s 98(4) (a).
[110] *NC Watling & Co Ltd. v Richardson* [1978] IRLR 255 (EAT).
[111] [1981] IRLR 91 (CA).

i. The starting point should always be the words of section 98(4) ERA 1996.
ii. In applying the section, the ET must consider the reasonableness of the employer's conduct, not simply whether the ET considers the dismissal to be fair.
iii. In judging the reasonableness of the employer's conduct, the ET must not substitute its own decision as to what was the right course to adopt for that of the employer;
iv. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
v. The function of the ET, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair.

The employer's size and administrative resources

In assessing whether the employer acted reasonably in the circumstances, the ET must take account of the 'size and administrative resources of the employer's undertaking[113]'.

Case law shows that the larger the employer, the more is expected by the courts in terms of appropriate disciplinary, grievance and consultative measures, whereas smaller employers are permitted a more scaled back approach. In a case where the ET criticised a girls' boarding-school for not providing a mechanism to appeal beyond the board of governors who made the decision to dismiss, the EAT in disagreeing with the ET, pointed out that it could be very difficult to provide for further appeals in a small organisation[114].

A smaller size and less administrative resources will not excuse a complete absence of correct procedural steps, and the courts have held that a smaller employer may affect the nature or formality of the consultation process, but it cannot excuse a total lack of consultation[115].

Substantive and Procedural Fairness

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[112] [1982] IRLR 439 (EAT).
[113] ERA 1996, s. 98(4) (a).
[114] *Royal Naval School v Hughes* [1979] IRLR 383 (EAT).
[115] *De Grasse v Stockwell Tools Ltd*. [1992] IRLR 269 (EAT).

In considering the reasonableness of the employer's conduct, the courts will assess whether the substance of the employer's decision falls within the 'band of reasonable responses'. The test for substantive fairness for conduct dismissal was devised in *British Home Stores Ltd. v Burchell*[116] and requires the employer to show that it, 'entertained a reasonable suspicion amounting to a belief in the guilt of the employee….at that time.' To do this, the employer must establish the fact of that belief, that it had reasonable grounds on which to sustain that belief, and that it had carried out a reasonable investigation of the matter.

Therefore, although the band of reasonable responses has a neutral burden of proof[117], there is embedded within it a test of substantive and procedural fairness, proof of which rests on the employer. Establishing the facts and reasonable grounds form the substantive, whilst the reasonable investigation forms part of the procedural aspects of the task before the employer. These requirements must both be satisfied for a dismissal to be fair (valid). Overlying substantive and procedural fairness is the requirement of equity and a consideration of the substantial merits of the case[118].

Procedural fairness

Procedural rules are different depending on the grounds of potential dismissal. The requirements of a fair procedure for dismissal are laid out in the ACAS Code [119] and case law. They may also be laid out in the employer's internal disciplinary policy and procedure, or the employment contract (via a collective agreement) in which case they can become a contractual requirement.

i. **Conduct**

Paragraphs 5 to 29 of the ACAS Code deal with disciplinary proceedings and establish the standards expected of the employer. It sets out 6 procedural steps that an employer must follow;

a) Establish the facts of each case[120].
b) Inform the employee of the problem[121].
c) Hold a meeting with the employee to discuss the problem[122].

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[116] [1979] IRLR 379 (EAT).
[117] *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129 (EAT).
[118] ERA 1996, s 98(4)(b)
[119] ibid (n 76).
[120] The ACAS Code, para 5-8.
[121] ibid, para 9-10.

d) Allow the employee to be accompanied at the meeting[123]. This is a statutory right contained in section 10 of the Employment Relations Act 1999. It is a right to be accompanied, and not a right to be represented.
e) Decide on appropriate action[124].
f) Provide the employee with an opportunity to appeal the decision to dismiss[125].

The outcome of disciplinary action can be no action, a verbal warning, a formal written warning, a final written warning, demotion, performance management or ultimately dismissal.

The Guide[126] to the ACAS Code, advises employers that, when deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to, among other things, the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service; any special circumstances that might make it appropriate to adjust the severity of the penalty; and whether the proposed penalty is reasonable in view of all the circumstances.

ii. Capability

In terms of capability, the ACAS Code [127] provides that, 'if employers have a separate capability procedure they may prefer to address performance issues under this procedure……. the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted'.

The employer must manage the performance of the employee by giving an opportunity for improvement[128], appraising work, training and disciplinary warnings. In statutory restriction and capability, it may even be appropriate for the employer to consider alternative employment.

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[122] ibid, para 11-12.
[123] ibid, para 13-16.
[124] ibid para 17-24.
[125] ibid para 25-28.
[126] The ACAS Guide, 'Discipline and Grievance at Work' http://m.acas.org.uk/media/pdf/9/g/Discipline-and-grievances-Acas-guide.pdf accessed 1st March 2018.
[127] The ACAS Code, Introduction.
[128] *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 (HL).

iii. Ill Health

In addition to the principles set out by case law, the Guide to the ACAS Code[129] makes recommendations on the actions that the employer must take in cases of ill-health.

In *Bolton St Catherine's Academy v O'Brien*[130] the court said that 'The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances'.

Where an employee is incapable of work due to bouts of short term illness or a single protracted illness the employer must decide on dismissal based on reasonable grounds and use a fair procedure when doing so. A fair procedure requires consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and consideration of other options[131].

The courts have said that the relevant factors that the employer must consider include, 'whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the 'unsatisfactory situation of having an employee on very lengthy sick leave[132]'.

There are additional obligations for employers under the Equality Act 2010 regarding long term ill-health because a dismissal may amount to discrimination 'arising from disability[133]' unless it can be justified. There is also a duty to make reasonable adjustments for disabled workers[134]. Where ill-health is caused by work, the employer must take reasonable steps to remove those risks following a risk assessment[135] or render the dismissal unfair[136].

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[129] The ACAS Guide, pages 71-72.
[130] [2017] EWCA Civ 145, [2017] IRLR 547.
[131] *East Lindsey District Council v Daubney* [1977] IRLR 181 (EAT)
[132] *S v Dundee City Council* [2013] CSIH 91, [2014] IRLR 131.
[133] Equality Act 2010, s 15.
[134] ibid, s 39(5).
[135] Health and Safety at Work (etc.) Act 1974
[136] *Jagdeo v Smiths Industries Ltd.* [1982] ICR 47 (EAT).

Case Law

The House of Lords established procedural fairness as an integral part of the 'band of reasonable responses' test in the case of *Polkey v AE Dayton Services Ltd*[137]. The court laid out the steps that an employer would need to take to have acted reasonably. In cases of incapacity, the employee must be given a fair warning, and a chance to improve and in misconduct, there must be a full and fair investigation together with a disciplinary hearing.

Where the non-use of a fair procedure, (whether from the ACAS Code or the employer's own internal procedures) would still have led to dismissal, the dismissal would still not be fair (valid), but the employee's compensation would be substantially reduced. This is called 'The Polkey Reduction'.

Internal Policies and Procedures

The disciplinary policy and procedure is the employer's own assurance of how it will be procedurally fair. The employer must adhere to its internal policies and procedures for a dismissal to be fair[138]. It cannot contain less than the procedural requirements of the ACAS Code but can contain more. The employer's policy and procedure forms part of the evidence that an employer can show the court to prove that it has acted reasonably within the requirements of s. 98(4) ERA 1996.

Where the policies and procedures are contained in the employment contract, non-adherence by the employer could additionally be in breach of contract.

Equity and the substantial merits of the case

The ET must establish the employer's reasonableness 'in accordance with equity and the substantial merits of the case[139]'. 'Equity' means that the rules of natural justice must be applied, the employer must be procedural fair, together with common sense and general notions of fairness. Substantial merits require a consideration of any mitigating

[137] [1987] IRLR 503 (HL).
[138] *Welsh National Opera Ltd. v Johnston* [2012] EWCA Civ 1046, [2012] UKEAT/0015/11/LA.
[139] ERA 1996, s 98(4) (b).

circumstances, and whether the employee's behaviour or performance warranted dismissal[140].

c. Can dismissal be considered as an ordinary tool of company management or is it an instrument that can be used only if there is no other real alternative?

The common law provides management with the power to demand implied and express duties of obedience, loyalty, and co-operation from employees by virtue of the employment contract. Additionally, the common law managerial prerogative gives the employer the right to choose the manner and method of working within the boundaries of the work which the employee is required to do and make rules such as those relating to acceptable behaviour in the workplace. Statutory provisions provide safeguards for employees under the unfair dismissal regime but hiring and firing remain a managerial prerogative.

This is illustrated by the band of reasonable responses test[141] where the judiciary, in exercising their discretion, are enjoined not to put themselves in the position of the employer and consider what they themselves would have done in those circumstances. They must not put themselves in the place of management[142]. They should also not substitute their own judgment, by trying to determine whether the employee was at fault. Rather they should make an assessment to determine whether the employer acted reasonably in all the circumstances.

The managerial prerogative is not unfettered, and in *Quadrant Catering Ltd. v Smith*[143], the court stated that an employer should use dismissal as a last rather than a first resort and that it will only be in serious cases of misconduct supported by irrefutable facts that a dismissal will be justified. In other circumstances, a warning would be the appropriate sanction.

It is only when the employer's efforts are unsuccessful that a dismissal would be reasonable. In certain professions such as pilot, nuclear scientist and train driver, where a single mistake could lead to major consequences, dismissal for capability could be justified without going through a performance management process[144].

The 'band of reasonable responses' test applies equally to the procedure by which the employer makes the decision to dismiss, as well as the decision itself[145].

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[140] *SPS Technologies Ltd. v Chughtai* [2012] WL 5995897, [2012] UKEAT/0204/12/SM
[141] ACAS Code, para 13-16.
[142] *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden* [2000] ICR 1283 (CA).
[143] [2010] WL 5556646, [2010] UKEAT 0362/10/RN.
[144] *Alidair v Taylor* [1978] IRLR 82 (CA).
[145] *Sainsburys Supermarkets v Hitt* [2002] EWCA Civ 1588, [2003] IRLR 23.

Thus, the procedure employed in deciding to dismiss, becomes a management tool of control and discipline in which dismissal is a last resort.

The analysis above shows that different standards have evolved through the courts which are applied, depending on the section 98 ERA 1996 reason which the employer seeks to establish.

5. Formal and Procedural Requirements

Is there a specific form of communication/notification and period of notice required? What are the consequences of infringement of these rules?

5.1 Notice

All employees have the right to statutory minimum notice which is set out in section 86 ERA 1996 and contractual notice which is set out in the individual employment contract or collective agreement. The right to notice applies in all instances of termination except where a party terminates without notice due to the conduct of the other (for example where the employer summarily dismisses the employee for gross misconduct).

Employees are entitled to;

i. No minimum notice in the first month of employment.
ii. One week notice after continuous service between one month and two years.
iii. One week notice for each complete year of service between two years and twelve years.
iv. 12 weeks' notice after twelve years or more.

The employment contract or collective agreement can provide for a longer period of notice but not less, and section 86 ERA 1996 will always prevail where the notice given by the employer is shorter by implying the entitlement to statutory notice into the employment contract.

Employees can waive their right to notice and accept payment for the notice period. This is called payment in lieu of notice (PILON). An employee can make a breach of contract claim against the employer for failure to pay statutory minimum or contractual notice.

5.2 The Section 1 Statement

Every employee must be issued with a written statement of employment within two months of starting employment. This is commonly referred to as the 'Section 1 Statement'[146].

[146] ERA 1996, s 1.

There is a long list of information that the employer must include in the Section 1 statement and employees must be notified of any changes within one month of those changes[147].

For our purposes, the Section 1 statement must provide the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment[148]. Either in the Section 1 statement itself or in a supplemental statement the employer must provide a note specifying or directing the employee to a document containing;

i. The disciplinary rules.
ii. The procedure the employer will apply when taking disciplinary action or deciding to dismiss the employee.
iii. An explanation of any further steps relating to disciplinary action or dismissal[149].

The statement must contain details of the person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him or any decision to dismiss him, the person to whom the employee can apply for seeking redress of any grievance relating to his employment, and the way any such application should be made[150].

If the employer does not provide a Section 1 statement, fails to provide one with all the necessary particulars, or a question arises as to the particulars which should have been included, the employee can make a complaint to the ET, which will decide what particulars should have been included[151].

If the ET finds in favour of the employee, it must make an award of two weeks' capped pay or four weeks' capped pay if the circumstances justify the higher award.

[147] ERA 1996, s 4.
[148] ERA 1996, s1 (4) (e).
[149] ERA 1996, s 3(1).
[150] ERA 1996, s 3(5).
[151] ERA 1996, s 11(1).

6. ROLE OF THE LABOUR AUTHORITY, WORKER'S REPRESENTATIVES AND/OR COLLECTIVE AGREEMENTS

There is no overall labour inspectorate in the UK. Her Majesty's Revenue and Customs (HMRC) regulates issues involving pay and therefore ensure compliance with the National Minimum Wage. There is also the Health and Safety Executive which governs all health and safety matters including working time. However, in relation to termination of employment, there is no statutory body.

Collective Agreements

Employers who recognise Trade Unions may negotiate procedures about individual dismissal which become part of a collective agreement incorporated (either express or implied terms) into contracts of employment. These rights are only enforceable if incorporated into a contract of employment.

An employer must ensure that it follows its own internal procedures and give an employee written notice of these rules within two months of the commencement of employment[152]. Case law has also established that an employer is required to follow its own procedures, notably *Polkey*[153].

Workers' Representatives

Individuals have a statutory right to be accompanied during any internal proceedings which may lead to termination of employment as defined within the Employment Relations Act 1999. This includes a person;

a) employed by a trade union of which he is an official within the meaning of section 1 and section 119 TULRCA 1992;
b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or
c) another of the employer's workers. [154]

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[152] ERA 1996, s. 3.
[153] *Polkey v AE Dayton Services Ltd* [1988] AC 344 (HL).
[154] ERA 1999, s. 10.

Worker's representatives who accompany employees to disciplinary hearings may present cases on behalf of the individual but may not answer questions on their behalf. Under ERA 1996, an employee who is a representative under the TULRCA 1992 is entitled to paid time off work to perform such duties.

7. JUDICIAL CONTROL OF DISMISSAL

What is the scope of control of courts? Do they check existence of valid reasons, proportionality, adequacy and necessity of the employer's decision in the termination of the contract, dismissal as extrema ratio, causal link, etc.? What is the qualification of the unfair dismissal – justified, unjustified, etc.? Are there limits and prescription periods of legal action, burden of proof, extrajudicial resolution of conflicts, enforcement of the judgement, interim measures, etc.?

The Scope of Control of the Courts

The majority of employment relations disputes are dealt with by Employment Tribunals (ET). ET's have wide powers to decide cases in a common-sense way and have common law jurisdiction over breach of contract claims including termination of employment[155]. An employee may appeal to an Employment Appeal Tribunal (EAT) if dissatisfied with the ruling by an ET, however this appeal can only be made on a point of law[156]. Employment Appeal Tribunal rulings can be appealed to the Court of Appeal in England with a further appeal to the Supreme Court where a point of law that has general public importance is disputed. The number of employment related cases that are heard by the Supreme Court is low at around 6 or 7 per year[157].

There is a surprisingly low success rate (50% in 2015/16) for claimants in most ET cases proceeding to full hearing. In unfair dismissal claims, the success rate was only 39% in 2015/16 according to Ministry of Justice figures [158].

Wrongful Dismissal

There is no specific legislation relating to wrongful dismissal. It is derived from common law and therefore wrongful dismissal claims are heard within the civil court system where an individual can bring a claim for damages arising out of termination of employment. Employment Tribunals have jurisdiction to deal with all wrongful dismissal cases up to awards of £25,000. The time limit for a wrongful dismissal claim in the civil courts is six years from the dismissal therefore an employee who is late bringing a wrongful claim to ET can choose the civil courts for that reason. The difference between claims for unfair dismissal

[155] Smith & Woods, 28-29

[157] CIPD *Employment law: the court system* Factsheet [2017]

[158] Smith & Woods, 29.

and wrongful dismissal is that the ET will look into the substance and procedure involved in the dismissal for unfair dismissal claims whereas civil courts will look into action under breach of contract for wrongful dismissal. This, in essence, means that although a dismissal could be both wrongful and unfair, it could also be one and not the other[159].

Limits/Prescription periods of legal action

Employment Tribunals will consider complaints under section 11 of the ERA if it is presented within 3 months of the effective date of termination or; 'within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of three months'[160]. Where a dismissal is with notice, an individual can bring a claim to ET before the effective date of termination but after the notice is given. An additional one month is allowed for ACAS conciliation – see below - (plus a further 14 days in some circumstances). The conciliation period temporarily stops the normal three- or six-month clock for lodging a tribunal claim until conciliation has been completed.

Proportionality

As discussed in question 5, the court must be satisfied that the employer has followed a fair procedure.

In a recent case, the European Court of Human Rights (ECtHR) ruled that a claim for unfair dismissal on the grounds of a violation of the claimant's Convention rights was inadmissible[161]. These proceedings concerned the interpretation of Article 8 of the European Convention of Human Rights (ECHR), the right to respect for private life, in the context of an employment dispute. The complainant was dismissed by his employer, the Probation Service, for sexual activities recorded in a nightclub which were regarded as damaging to his work with sex offenders. The ECtHR applied a test of proportionality in order to establish whether dismissal was a justified measure. 'In doing so, it stated that national authorities have a 'margin of appreciation', which is a well-established doctrine that the Court uses when it

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[159] Smith & Woods, 479
[160] ERA 1996, s111 (2)(b)
[161] *Pay v United Kingdom* (Admissibility) 32792/05 [2009] IRLR 139 ECHR

wishes to allow national authorities a degree of discretion in the regulation of sensitive social and political matters'[162].

In applying the test of proportionality, the ECtHR did not ask whether the employer acted 'reasonably' or 'within a range of reasonable responses'. The decision demonstrates that the test of justification under Article 8(2) differs from the normal test of reasonableness for unfair dismissal. The consequence of this is that the UK courts need to include a test of proportionality into the law of unfair dismissal when termination of employment interferes with a Convention right[163]

Adequacy/necessity of employer's decision – band of reasonable responses

The case law established that the ET must consider whether the employer acted within the band of reasonableness as explained in Q4. As a result, the judge does not substitute its views but just check whether the decision fitted in that band, which is broad. The control of the judge is therefore relatively limited.

Burden of proof

The employee must prove that he or she was dismissed in order to make a claim to ET. Thereafter, the burden of proof is on the employer under section 98 of the ERA 1996. 'The significance of the burden of proof being on the employer is that if it fails to satisfy the tribunal at either of the first 2 stages (1) reason and (2) prima facie fair, the dismissal will be held to be unfair'[164]. If the employer is satisfied of the first 2 stages, it will then be for the ET to determine whether the employer acted reasonably, as discussed previously in question 4.

Extra-Judicial Resolution of Conflicts

In the UK, there is no overall statutory framework for compulsory conciliation and arbitration as found in other countries[165]. However, the closest framework for this is that of Early Conciliation through ACAS which was introduced in 2014. The basis of this is that an individual must go through this process before they can lodge an ET claim[166]. Previously, ACAS was able to conciliate cases once ET proceedings had commenced. There is a one-

[162] Virginia Mantouvalou & Hugh Collins, *Private Life and Dismissal* (2009) ILJ 38 (1) 133-138
[163] Smith & Woods 543
[164] Smith & Woods, 516
[165] ibid 15
[166] ibid 18-21

month period during which ACAS has a duty to attempt parties to agree to a settlement outside of ET. After this period, ACAS must issue an early conciliation certificate if:

- the ACAS conciliation officer concludes that it is not possible to achieve a settlement, or
- the conciliation period ends without agreement.

The early conciliation certificate confirms to the tribunal that a claimant has complied with the early claim requirements and therefore an ET claim can be submitted.

There exist voluntary arbitration services, largely provided by ACAS. The functions of ACAS (some of which are discussed in question 4) are set out in Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992[167]. Wherever possible, tribunals are required to encourage and facilitate the use by the parties of the services of ACAS, judicial or other mediation, or other means to resolve their disputes by agreement.

The main forms of Alternative Dispute Resolution available for employment disputes include:

- internal workplace mediation
- private mediation or conciliation services
- free ACAS pre-claim conciliation
- arbitration.[168]

Internal workplace mediation is more commonly used by larger employers for less serious matters where the employment is continuing. Conciliation is similar to mediation although in mediation, if no agreement can be reached the process fails.

Arbitration also involves an independent third party but is different because the arbitrator's resolution is a legally binding decision. There are very limited grounds for challenging the decision. Usually, appeals can be made only if the arbitrator erred or behaved unreasonably.

Enforcement of the Judgement

Failure to pay tribunal awards

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[167] 1992, c.52 TULRCA

[168] CIPD [2017] *Tribunal claims, settlements and compromise Q&As* *https://www.cipd.co.uk/knowledge/fundamentals/emp-law/tribunals/questions*

Employers who fail to pay employment tribunal awards or agreed sums due under certain settlement agreements can be subject to penalties. A claimant who has not been paid a settlement sum or tribunal award can ask the Department for Business Innovation and Skills (BIS) to issue a penalty of 50% of the outstanding amount up to a maximum of £5,000[169].

Recovery of legal costs by a successful party in a wrongful dismissal claim remains difficult in the ET but is far more likely in the civil courts, so an employee with a strong wrongful case may prefer the civil courts as they can possibly recover their costs[170].

Dismissing for trade union membership or activities

Dismissing for Trade Union membership or activities is unlawful and constitutes automatic unfair dismissal if established (Employees do not have to fulfil the two-year qualifying period to make such a claim). There are specific remedies available in this case: First, the employee can apply for interim relief (TULRCA 1992 s 166). If the tribunal finds that the employee is likely to succeed at the full hearing, re-instatement, re-engagement or continuation of the contract can be ordered (TULRCA 1992, s 163) providing the employee with a better protection. Secondly, if the claim is successful, a minimum basic award is paid to the employee (TULRCA 1992, s 153, the amount is reviewed annually and is currently at just under £6000).

However, even if a trade union officer succeeds in his claim for unfair dismissal and obtains an order for re-instatement, such remedy can be left unenforced. In *R (Bakhsh) v Northumberland Tyne & Wear NHS Foundation Trust*[171] an ET found that Mr Bakhsh had been dismissed for trade union activities and ordered re-instatement. The employer refused entry to the hospital, forcing Mr Bakhsh to return to the employment tribunal which expressed its frustration at the decision of the Trust to 'pay off' the relevant remedy (for not abiding with the order of the tribunal) and refused to allow the complainant to return to his work: 'a decision taken by public officials to use public money allocated for the Health Service to flout an order of this Tribunal and to do so quite deliberately and without any justification so far as this Tribunal is concerned.' It expressed the view that the penalty for

[169] Section 150 of the Small Business, Enterprise and Employment Act 2015 and sections 37A to 37Q of the Employment Tribunals Act 1996 provide for these further financial penalties on employers.)
[170] N 167
[171] [2012] EWHC 1445

failing to comply with an order for reengagement, which was restricted to £17,160 in this case, was an inadequate remedy.[172]

[172] ibid [10]

8. CONSEQUENCES AND EFFECTS OF A (LAWFUL AND UNLAWFUL) DISMISSAL

Amount of compensation, legal guarantees of the enforcement of the sentence, procedural problems on legal qualification and enforcement of the judicial decision, etc.

Sections 111-132 ERA 1996 provide the statutory arrangements for three remedies available to an employee who has established a successful claim for unfair dismissal. These are reinstatement, re-engagement and compensation.[173] Before making an award of compensation, the ET is duty-bound to consider the alternative two options[174] yet it is rare for the former awards to be ordered. For example, in 2008, out of 8,312 unfair dismissal cases that went to an ET hearing, 46% were upheld and 54% were dismissed in which only eight orders for reinstatement or reengagement were ordered; this is 0.1% of cases heard whereas compensation was awarded in 2,552 cases. As such, the primary award is compensatory in nature and receives a greater focus by the ET.

8.1 Orders for reinstatement or re-engagement

Under section 112 ERA 1996, the ET can explain to the complainant the possible orders for reinstatement and re-engagement and ask whether an order should be made, although the requirement is not mandatory. This means that if the ET fails to comply with this requirement then its decision remains valid.

Section 114 ERA 1996 provides that an order of reinstatement entitles an employee to back payment (between the date of termination of the employment and the date of reinstatement); including any accrued interest from improvement of terms and conditions during this period. In calculating the back pay, the ET will take account of any wages in lieu of notice, ex gratia payments paid by the employer, or remuneration paid by another employer. In effect, the employer must take the employee back into his or her job and treat them as not dismissed.

Section 115 ERA 1996 provides that an order of re-engagement also entitles an employee to back payment including preservation of accrued interests whilst calculating any deductions as

[173] ERA 1996 s 111.
[174] ERA 1996 s 112.

expressed. However, the employee must be taken back on by the employer in employment which is 'comparable' or 'suitable' to that from which the employee was dismissed, and on terms specified by the ET.[175] For instance, the identity and nature of employment, and the date by which the order must be complied with.

Under the Employment Protection (Continuity of Employment) Regulations 1996, either kind of order acknowledges the time between dismissal and re-employment as a period of employment.[176] However, this legal guarantee of the employee's continuation of employment is only preserved through the ET, ACAS or other formal agreement, otherwise there may be a break in continuity. For example, in *Morris v Walsh Western UK Ltd*[177], the employer voluntarily re-employed Morris after he was dismissed yet that period of absence was not recognised as a continuation of employment. Section 116 ERA 1996 lays down the procedure for the ET to follow in reinstatement or re-engagement as follows;

1. The ET first decides on reinstatement and then considers re-engagement on specific terms.
2. For both orders, the ET must consider:

    i. The expressed wishes of the complainant;
    ii. Whether the order is practical for the employer to comply
    iii. Whether the complainant contributed to the dismissal

A stumbling block to this order is the defence available to employers in section 116(1b) ERA 1996, namely, the practicability of the employer ordered to give the employee his or her job back. The onus of proof is on the employer to use this defence at stage (2) above, to show impracticability to comply with the order. Each case turns on its own facts and ET's have been directed to take a 'broad common-sense view' in exercising their judgement of practicability.[178]

Significantly, in the case of a small employer with few staff, it is not appropriate to make these orders if the employer is reluctant to take on the employee and has insufficient grounds to show an order will be unsuccessful.[179]

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[175] see ERA 1996 s 115 (2).
[176] SI 1996/3147.
[177] [1997] IRLR 562 EAT.
[178] *Cold Drawn Tubes Ltd. v. Middleton* [1992] ICR 318 [601] to [602] Kilner Brown J.
[179] *Enessy Co SA v Minoprio* [1978] IRLR 489.

If an order is made for the employee to be taken back but the employer does not comply fully with its terms, the employee can complain to the ET under section 117 ERA 1996 and ask for extra compensation as the ET thinks fit. Where the employer has not complied with the order at all, and refuses to take back the employee, the ET can make an award of compensation in the normal way including an award of 'additional compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay'.[180]

This payment is subject to the same maximum cap in place for the ordinary basic award.[181] In *A J George v Beecham Group*,[182] it was acknowledged by the ET that the calculation of the additional compensation is also not expressly limited to have 'regard to the loss sustained by the complainant' therefore it was seen as a 'deliberate omission' in the statute; this can result in a punitive award if the employer refuses to comply to the order.[183] Employers also have the option to raise a defence to granting additional compensation on the basis of impracticability to comply with the order. This gives the employer a second opportunity to show this defence if in practice, the order did not work out. For example, in *Port of London Authority v Payne*[184] the Court of Appeal accepted the approach of showing in practice that the order was impractical thus an additional award of compensation should not be made.

8.2 Compensation

Where an order of reinstatement or re-engagement is not made, the ET must award compensation;[185] this comprises a basic and compensatory award.[186]

<u>Basic award</u>

This is a fixed sum and calculated to a statutory formula as follows;[187]

1. Work out the effective date of termination,
2. From the date dismissed, calculate the years worked for the employer,

[180] ERA 1996, s. 117(3)(b).
[181] As from 6 April 2017 the figure is £80, 541 or 5 weeks' pay, whichever is lower equivalent in euros: approximately 90,000.
[182] [1977] IRLR 43.
[183] ibid [232.2].
[184] [1994] IRLR 9 CA.
[185] ERA 1996 s. 112(4).
[186] ibid s. 118(1)(a) and (b).
[187] ibid s 119.

3. Calculate the appropriate amount for each of those complete years worked.

If the employee has two years service with the employer, the basic award will be either:

i. Half a week's pay for each complete year of employment when below the age of 22, with half a week's pay being capped at £489 (approximately 550 euros);
ii. One week's pay for each complete year of employment where the employee's age during the year is 22 or over, but under 41, with a week's pay being capped at £489; and
iii. One and a half week's pay for each complete year of employment where the employee's age during the year is 41 or over, with one and a half week's pay being capped

As the maximum years' of service to claim is 20 years, the maximum amount payable is £14,670 (calculated at working from 41 and the max years of service – approximately 16, 000 euros), but such maximum limit is increased annually in line with the Retail Prices Index.[188]The basic award is also subject to reduction if there was contributory fault on the part of the employee,[189] if the employee received an ex gratia payment,[190] or if an employee refused an offer of reinstatement.[191]

Compensatory award

Section 123 ERA 1996 states that compensation for losses suffered shall be the amount that the ET considers just and equitable in all the circumstances in so far as that loss is attributable to action taken by the employer. This award has been limited to one year's pay since 2013 and is capped to the amount payable of £80,541(approximately 90793.06 euros).
The award increases annually in line with the Retail Price Index.[192] When assessing the relevant heads of compensation, the ET sets out their decisions under the following five headings:[193]

1. <u>Loss up to the date of hearing</u>

[188] The Unfair Dismissal (Variation of the Limit of the Compensatory Award) Order 2013 Art 2.
[189] ERA 1996, s. 122(2).
[190] ibid s. 122(4).
[191] ibid s. 122(1).
[192] ERA 1996 s 124.
[193] *Norton Tool Co Ltd v Tewson* [1973] 1 ALL ER 183, [1997] IRLR 314, HL.

This calculates the actual loss of income during the period between dismissal and the hearing including fringe benefits, such as, a company car, private healthcare or loss of stock options and more.

2. Future loss of earnings

   A period of between six to 12 months is determined by the ET considering all evidence, subject to the maximum statutory amount as expressed above,

3. Expenses incurred while looking for new employment.

4. Loss of pension rights

   Without new employment, an employee cannot transfer their existing pension rights.

5. Loss of statutory rights

   Since the case of *S H Muffett Ltd v Head*,[194] the EAT has deemed it appropriate to award a nominal sum of £100 under this head.

Significantly, the compensable 'loss' suffered in section 123 ERA 1996 is restricted to financial loses, thus non-economic loss such as injury to feelings will not be awarded. These stigma damages can only be recovered to the extent there is a connection with the pecuniary loss such as loss to future employment[195] but not non-pecuniary injuries such as damage to reputation.[196] Conversely, the ET and courts can also reduce the level of compensatory awards, in the order for compensation as follows;

i. If the ex gratia payment is a considerable amount.[197]
ii. The decision of the House of Lords in *Polkey v AE Dayton Services Ltd*,[198] established as a general principle that any compensatory award can be reduced at the employment ET 's discretion and can range from nil to 100%, if it is deemed likely that the employee would have been dismissed fairly in the foreseeable future.[199]
iii. Section 123(4) ERA 1996 states the reduction whereby the employee must take reasonable steps to obtain alternative employment.
iv. Contributing to the fault of dismissal will also affect the compensatory award.[200]
v. Any non-statutory redundancy payment.
vi. The statutory limit, if applicable.

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194 [1987] ICR 1; [1986] IRLR 488.
195 *Johnson v Unisys Ltd* [2001] ICR 480.
196 *Chaggar v Abbey National* [2009] EWCA Civ 1202.
197 *Chelsea Football Club and Athletic Co Ltd v* Heath *[*1981*]* ICR.323; *[*1981*]* IRLR 73*,* EA.
198 [1998] ICR 142, [1987] IRLR 503 HL.
199 Smith (n) 558.
200 as seen in *W Devis & Sons LTD v Atkins* [1977] ICR 662.

vii. If the employer failed to follow the ACAS Code.

8.3 Legal guarantees and enforcement

There is a 42-day wait in cases of appeal before acting against an employer if the employer has not paid the compensation awarded by the ET.[201] The ET has no authority to enforce payment therefore a claimant has the following options of enforcement;

1. Fining the respondent by completing a penalty enforcement form; this entails a warning notice of 28 days to pay which results in a fine of equal to half the award that is outstanding at the time the notice is issued, subject to a minimum of £100 (approximately 112.73 euros) and a maximum of £5,000(approximately 5636.45 euros). It is important to note that this penalty will be payable to the government not the claimant.[202]

2. Another method is using the Fast Track scheme by which a High Court Enforcement Officer (part of the civil court system) will act for the employee to collect the money. This costs £66 (approximately 74.4 euros), which can be reclaimed from the respondent if they pay.[203] Of those using Fast Track, 50% had a successful outcome (30% were paid in full and 20% in part).[204]

3. A third procedure is asking the local county court to send an enforcement officer to get the money from the respondent which costs £44.[205] 59% of claimants received a successful outcome from this option (38% were paid in full and 21% in part).[206]

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[201] 'Make a claim to an employment tribunal' (Gov.UK) <https://www.gov.uk/employment-tribunals/if-you-win-your-case> assessed 29 January 2018.

[202] 'Guide to completing the Penalty Enforcement Form' (GOV.UK 13 April 2016) <https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement> Assessed 29 January 2018.

[203] ibid (n203).

[204] Department for Business innovation & Skills 'Payment of Tribunal Awards' 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf> assessed 29 January 2018 p 42.

[205] ibid (n 203).

[206] ibid (n206) pg. 42.

It is important to note that from 2008 to 2013, studies show that the use of enforcement increased the overall payment rate from 53% to 65% of successful claimants receiving full or part payment of their compensatory award; this increase was by 12%.[207] However, there is a lack of awareness or expense issue to use the options available for enforcement. For example, 24% of claimants were not aware of options available and 41% of claimants expressed the enforcement costs was a reason for not pursuing enforcement.[208] Most commonly a failure to receive any compensation is due to the company no longer existing (38%), or the employer refusing to pay (32%).[209]

[207] ibid.
[208] ibid pg. 46.
[209] ibid pg. 45.

9. SPECIAL CATEGORIES OF WORKERS

Is there special protection against dismissal in case of maternity, paternity, women who are victims of gender violence, trade union representatives, discrimination, persons who participated in a strike, etc. In other words: are fundamental rights protected during a dismissal procedure and its consequences?

Workers have 'protected characteristics' under section 4 Equality Act 2010. These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Dismissal for any of the protected characteristics will be unfair, and employees will not have to fulfil the two-year qualifying period to make such a claim.[210] For example, dismissals, specifically relating to reasons such a;

i. Pregnancy: including all reasons relating to maternity such as maternity leave or childbirth;[211]
ii. Family reasons: including parental leave, paternity leave (birth and adoption), adoption leave, time off for dependants or invoking the right to request flexible working;[212]
iii. Reporting health & safety risks, or refusing to work in dangerous situations;[213]
iv. Trade union membership grounds and union recognition including taking part in an official and lawful strike;[214]
v. Whistleblowing (making a protected disclosure);[215]
vi. Asserting rights under legislation protecting part-time, fixed-term or agency employees;[216]
vii. Asserting statutory rights such as pay and working hours: including the Working Time Regulations, annual leave and claiming National Minimum Wage.[217]

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[210] ERA 1996 s. 108(3).
[211] ibid s. 99.
[212] ibid s. 99 & s.104C.
[213] ibid s. 100.
[214] TULRCA 1992, s.152 & s.238A.
[215] ibid s.103A.
[216] Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551, Reg. 7(1); Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034, Reg. 6(1); Agency Workers Regulations 2010, SI 2010/93, Reg. 17(1).
[217] ERA 1996 s.101A & s.104A.

Notably, whilst dismissal on grounds of pregnancy is automatically unfair, dismissal on other discriminatory grounds is not automatically unfair however, are protected under the Equality Act 2010.[218] Under the Equality Act 2010, workers benefit from the absence of a statutory limit on compensatory awards; this absence applies also if the reason for dismissal is, connected to certain Health and Safety functions or because the employee was a whistle-blower.[219] In addition, the statutory limit does not apply where an employer refuses to comply with reinstatement or re-engagement order.[220]

9.1 Trade Unions

In relation to dismissals concerning ***trade unions***, if the dismissal is attributable to the employee's membership or activities in any circumstances in which an employee is held to have been automatically unfairly dismissed (as explained earlier) then there are specific remedies available. For example;

- The employee can apply for interim relief.[221]
- If the ET finds that the employee is likely to succeed at the full hearing, re-instatement, re-engagement or continuation of the contract can be ordered[222] providing the employee with a better protection.
- Second, if the claim is successful, a minimum basic award is paid to the employee the amount is reviewed annually and is currently at just under £6000 (approximately 6763.74 euros).[223]
- The ET can also order an employer to pay financial penalties between £10 (approximately 11.27 euros) to £5000 (approximately 5636.45 euros) where it loses a claim and there are aggravated features.[224]

It is important to note however, that there are some enforcement concerns under this protected characteristic.

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[218] s. 39(2)(c).
[219] ibid s. 124(1A).
[220] Robert Upex and Stephen Hardy, The Law of Termination of Employment (8th edn 2012) 308.
[221] TULRCA 1992, s. 166.
[222] ibid s.163.
[223] ibid s. 153.
[224] Employment Tribunals Act 1996 s. 12A.

For example, in *R (Bakhsh) v Northumberland Tyne &Wear NHS Foundation Trust*[225] although the claimant won and successfully was awarded a reinstatement order, the employer refused the order without justification leaving compensation as the only subsequent remedy. As such, Foskett J argued that additional remedy should be available outside the ACAS Code as the penalty, restricted to £17,160 in this case was an inadequate remedy.[226] In effect, the current effectiveness of protection is questionable.

9.2 Discrimination

In relation to dismissals concerning ***discrimination***, by section 124 (2) Equality Act 2010, the remedies available are: a declaration of rights, a recommendation to the employer; to have the effect of removing the discrimination for the individual concerned, or compensation; this is unlimited for discrimination cases including award for economic loss and injury to feelings unlike the remedy for an unfair dismissal claim.

Guidance on how the ET and courts should award compensation is outlined in *Vento v Chief Constable of west Yorkshire*,[227] whereby awards should not be too low but reflect the range of awards in personal injury cases.[228] Awards for injury to feelings fall under 3 bands of compensation: the lowest band is between £500 and £6,000 for less serious cases; for example, where the conduct is an isolated incident such as a racist remark,[229] the middle ground of between £6,000 and £18,000 should be reserved for serious cases, and the highest band of between £18,000 and £30,000, for a campaign of discriminatory. Significantly, only exceptional circumstances will an award above £30,000 be competent and awards below £500 are not to be made at all.[230] Statistically, in 2013 and 2014 the average awards for injury to feelings were £5,564 and £8,162, respectively.[231]

The UK ensures compensation payments are in line with EU directives, in particular Article 15 of the Race Directive 2000/43, Article 25 of the Recast Directive 2006/54 /EC and Article 17 of the Framework Directive 2002/21 /EC in respect of discrimination claims to be

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[225] [2012] EWHC 1445 (Admin).
[226] ibid (n 221).
[227] [2003] IRLR 101 which was updated by the EAT in *Da'Bell v NSPCC* [2010] IRLR 19.
[228] Stephen Taylor & Astra Emir, 'Employment Law an Introduction (4th edn 2015) 597.
[229] *Ministry of Defence v Kemeh* [2014] ICR 625.
[230] David Cabrelli, Employment law in context: text and materials (2nd edn, OUP 2016) 470.
[231] ibid pg. 471.

‘effective, proportionate and dissuasive’.[232] Therefore, a recommended cap on the level of compensation will be rejected to ensure compliance.[233] This is further supported as recently, the Court of Appeal in *Pereira de Souza v Vinci Construction* has applied the 10% uplift on damages for injury to feelings for discrimination cases in order to correspond to an equivalent case in the County Court (equivalent civil court).[234] In effect, discrimination cases are protected continually in alignment with EU law.

[232] ibid.
[233] ibid.
[234] [2017] EWCA Civ 879.

10. DEVELOPMENTS IN DISMISSAL LAW IN THE PAST 10 YEARS

Has the test by courts increased, is there an impact by the economic crisis, have employers been imposed more obligations to keep workers employable to avoid dismissals?

Red Tape Challenge

During the Coalition government (Conservatives and Liberal Democrats), The Red Tape Challenge aimed to introduce regulatory reform and reduce administrative burden in a number of areas. The Enterprise and Regulatory Reform Act 2013 was the principal legislation arising from this with major changes including an increase in the qualifying period for unfair dismissal from one to two years continuous employment, a 12 month pay cap on unfair dismissal compensatory awards, fees for employment tribunals, early conciliation, and streamlining some ET rules.

Employment Tribunals

The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012 set the rules and procedures which govern ETs, following the Resolving Workplace Disputes Consultation. The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) regulations 2012 allowed unfair dismissal claims to be heard by a judge sitting alone rather than a panel.

Acas Early Conciliation

As discussed in question 7, the introduction of ACAS early conciliation in 2014 through has led to an increase in the number of settlements, however only 35% of all employees who begin Early Conciliation achieve a settlement or go on to submit an ET claim[235].

Employment Tribunal Fees

In July 2013, following an independent review, a system of fees for bringing tribunal proceedings was introduced. This included a fee for issuing proceedings and a further fee for

[235] ACAS Research Paper *Early Conciliation decision-making* [2017] http://www.acas.org.uk/media/pdf/5/9/Acas-Early-Conciliation-decision-making.pdf

proceeding to a hearing. There were two types of claims; Type A claims (of a technical nature such as notice periods) the issue fee was £160 (€180) and the hearing fee £230 (€260); and Type B claims (such as unfair dismissal) the issue fee was £250 (€285) and the hearing fee £950 (€1080). This had an immense impact on the number of ET claims submitted leading to a 70% drop in claims[236]. A survey conducted as part of the 2015 evaluation of Early Conciliation showed that 26% of those employees did not go on to bring an ET claim due to tribunal fees[237]. Concerns were raised in relation to access to justice and the regime was challenged through the courts by the Trade Union Unison through a judicial review.

In July 2017, the Supreme Court unanimously allowed Unison's appeal that the UK's fee system for individuals enforcing their employment rights via employment tribunals was unlawful. The Supreme Court found that charging fees was indirectly discriminatory because a higher proportion of women would bring discrimination cases. It also ruled that the fees prevented access to justice, acting as a deterrent for potential claimants. With no guarantee of success, individuals might have had to pay more in fees than their claim was worth. This could not be seen as proportionate and was therefore contrary to both domestic and EU law[238]. As a result, the government has effectively repealed the legislation and offered to reimburse the fees to those who had paid the fees[239]

Government statistics show that from July to September 2017 – the period after the fee regime was abolished - the number of single employment tribunal claims has risen by 64%.

Increase in Qualifying Period for Unfair Dismissal claims

In 2012, the qualifying period for claims for unfair dismissal increased from one year to two years continuous employment through The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, art 3.

Settlement Agreements

Section 11 of the ERA 1996 was amended in 2013 to include a mutually beneficial way of ending the employment relationship via Settlement Agreements. Prior to this, similar agreements existed in the form of Compromise Agreements which enabled an employer and

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[236] ibid

[237] M Downer [2015] *Evaluation of Acas Early Conciliation 2015.* London: Acas.

[238] *R.(on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [2017] IRLR 911, 104, 117

[239] https://www.personneltoday.com/hr/employment-tribunal-fee-refunds-total-1-8m-two-months/

employee to come to a legally binding agreement to bring employment to an end. The common law "without prejudice rule" prevented any statements made during a ‘without prejudice meeting’ to be used within a tribunal or court as evidence, however this only applied if there was an existing dispute. The amendments to the ERA 1996 in 2013 introduced a more flexible system whereby an employer can engage in pre-termination negotiations before any formal dispute arises, ‘without prejudice’, with an employee with a view to reaching an agreement for the termination of employment[240]. Acas also issued a Code of Practice on Settlement Agreements. This code outlines what may constitute ‘improper behaviour’ which would lead to the pre-termination negotiations becoming admissible as evidence in a Tribunal[241].

Brexit

The legislation and case law on tribunals and settlements is mostly not derived from the EU. Therefore, these procedures are unlikely to be directly affected by Brexit.

[240] Smith & Woods 21

[241] ACAS Code of Practice 4 [2013] Settlement Agreements

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TABLE OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
CJEU	Court of Justice of the European Union
EAT	Employment Appeal Tribunal
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ERA	Employment Rights Act 1996
ERRA	Enterprise and Regulatory Reform Act 2013
ET	Employment Tribunal
EU	European Union
EU-CFR	Charter of Fundamental Rights of the European Union
EU-CFR Protocol	Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom
UK	United Kingdom