

Executive dismissal

Wrongful dismissal, unfair dismissal, discrimination and redundancy



Overview

Dismissal from your job as a Director or Executive can be a distressing experience. What rights do you have if this happens? It is important to note that in general terms any rights you have will derive from your contract of employment (sometimes called a 'service agreement') not from being a director or shareholder per se.

Wrongful dismissal/ Breach of contract

Wrongful dismissal is a contractual claim. This arises where you have been dismissed and your employer has failed to fulfil their contractual obligations. For example, if you are not guilty of gross misconduct, but your employer has failed either to allow you to work out your notice or make a payment in lieu of notice (usually to include all benefits due like pension payments, company car benefits etc).

If you have no notice period set out in your contract, you should receive 'reasonable notice' which could be three to six months or even twelve months. At the very least, you will be entitled to statutory notice. This is one week's notice for each year of employment up to a maximum of twelve weeks.

You are under a duty to do your best to make sure that you find alternative employment (i.e. to 'mitigate' your loss).

Often your employer will state in your contract that they have the right to make a payment in lieu of notice on termination rather than putting you on leave or having you work your notice. Money received as a payment in lieu of notice where there is such a provision in your contract is taxable in the same way as wages. If you receive a payment in lieu of notice in accordance with your contract the Courts

will consider that the contract has been terminated lawfully, so that all post-termination restrictions contained within the contract remain in place, including any non-compete covenants or confidentiality restrictions.

Bonuses

An important area to resolve may be in respect of outstanding or pending bonuses. Your position will depend on what your contract says. Executives can sometimes even challenge 'discretionary' bonuses if the amount awarded is perverse or it is perverse to withhold the bonus.

Share options

Reimbursement in relation to share options is also often a key issue in executive dismissals. Your position will depend on your contract and the rules of the relevant option scheme.

For example, the rules may allow a discretion to be exercised permitting the options to be retained on dismissal.

Restrictive covenants

It is important that you are aware of any terms of your employment contract which could continue to impact on your future plans after termination. This can be especially

crucial if you are considering making a move with your team or if you would like to continue to deal with your current clients.

If your employer has breached your contract and the breach is serious enough, you may be able to renegotiate any restrictive covenants contained in your employment contract. If you have any queries in relation to this issue, you should seek further advice.

What is unfair dismissal

If you have been employed for two years or more you have the right not to be unfairly dismissed. In order to dismiss fairly, an employer must:

- Have a fair reason for dismissal; and
- In dismissing the employee, must follow proper procedures and the dismissal must be fair in all the circumstances.

Potentially fair reasons for dismissal include: capability; conduct, redundancy; and some other substantial reason (which includes loss of confidence).

Once it is established that the dismissal falls within one of those potentially fair reasons, the fairness of the process of dismissal must also be considered. This will involve an assessment of (amongst other things):

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- For misconduct dismissals, whether a reasonable investigation was conducted
- For poor performance dismissals, whether performance issues were raised and discussed and you were given an opportunity to improve
- For redundancies, whether you were warned and consulted, whether there was an objective and fair selection process and whether alternative employment was considered
- In most cases, whether the ACAS Code of Practice on Discipline and Grievance Procedures was followed.

There are also certain types of dismissal which are automatically unfair, like dismissal for maternity reasons or due to whistleblowing. In these cases there is no minimum service requirement and sometimes no cap on the compensatory award.

If you have been unfairly dismissed, then you will usually be entitled to a basic award of up to £538 per week (as of 6th April 2020) for each year of employment multiplied by 0.5, 1 or 1.5 depending on your age, and a compensatory award based on your losses. In ordinary cases this is subject to a current maximum of £88,519 (as of 6th April 2020).

Compensation is capped at the lower of the current statutory cap or a year's pay.

A Tribunal will award the compensatory award with a view to compensating you for the time during which you are unemployed as far as it is just and equitable for them to do so. This will take into account the efforts you have made to find a job and any money received from your new employment. You can also apply for re-instatement but such orders are rare.

Redundancy

Redundancy is a potentially fair reason for dismissal. In order to satisfy the definition for redundancy,

the dismissal must be related to the fact that;

- Your employer is ceasing to carry on its business completely or at your place of work; or
- The requirements of the business for employees to carry out the duties which you performed have reduced or have ceased.

Where you have been continuously employed for two or more years and you are made redundant, you will be entitled to a statutory redundancy payment calculated in the same way as the basic award for unfair dismissal. Some employers may have contractual policies which provide for redundancy payments over and above the statutory amount either in writing or by custom and practice.

Where you are made redundant but are offered suitable alternative employment, you may lose your right to a redundancy payment if you unreasonably refuse that offer.

Redundancy situations are not covered by the ACAS Code of Practice, unlike unfair dismissal situations above.

Discrimination

You may also be able to bring a further claim in the Employment Tribunal if your dismissal amounted to less favourable treatment on the grounds of your sex, race, religion, age, sexual orientation, pregnancy or maternity leave or if the dismissal was relating to a disability or where the employer had failed to make reasonable adjustments to accommodate your disability. Such claims are not subject to any cap on compensation.

Please see our '**discrimination**' factsheets for further information.

Bringing a claim

Claims for unfair dismissal must be brought in the Employment Tribunal. Time limits are very

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strictly applied and any claim must be brought within three months less one day of the date employment ended. This could be the date you are informed of it if an immediate payment in lieu of notice is made. Alternatively if you work out your notice period (or are on garden leave) the time may run from the end of the notice period. Where some form of appeal is allowed you should pursue an appeal but please note that this time limit will not be extended even where an internal appeal procedure is on-going.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

This process makes the calculation of time limits in Employment Tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk.

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You will also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the Employment Tribunal considers that you have unreasonably failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they unreasonably fail to comply with the Code). The time limit for bringing a claim is not affected by compliance with the ACAS Code. Please note that time limits can be complicated and that you should take prompt legal advice if you think you may have a claim. The sooner you seek advice the better.

Claims for breach of contract worth up to £25,000 can also be brought in the Employment Tribunal, within three months of the breach of contract. Please note that the Employment Tribunal only has jurisdiction to consider a breach of contract worth up to £25,000. High value claims for more than £25,000 in relation to contractual notice or relating to bonuses and other contractual claims for executives should be brought in the Civil Courts. The time limit is normally six years from the breach of contract.

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