



LAW ANSWERED

SAMPLE CHAPTER FROM OUR EMPLOYMENT LAW ELECTIVE GUIDE

Law Answered is a comprehensive, distinction-level set of exam-focused study notes for the law students. This is a sample from our *Employment Law elective guide*.

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TERMINATION OF CONTRACT

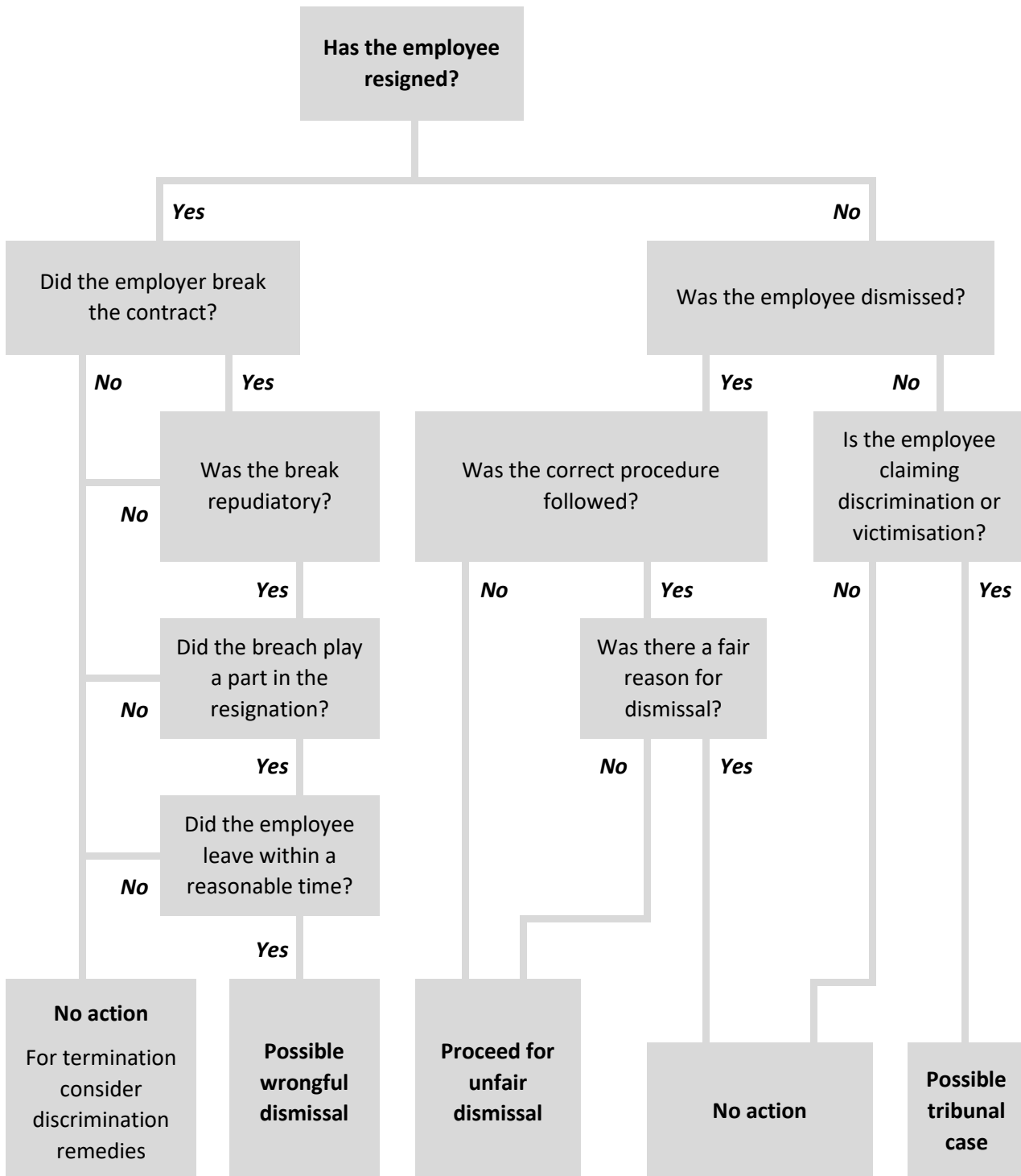


Problems arise when a contract of employment or contract for services is terminated in circumstances which give rise to a dispute between the parties. Claims arise where a dismissal is wrongful or unfair and it is important to understand the difference between the remedies available in each situation.

WRONGFUL DISMISSAL	UNFAIR DISMISSAL
Contractual remedy – allows recovery of sums due by way of remuneration and notice period under the contract.	Statutory remedy under s.94 ERA .
Available at any time from agreement of contract terms onwards.	Only available if the employee has been employed for a qualifying period unless the employee can show that the dismissal was automatically unfair .
Claim relates to a premature ending of a contract.	Claim relates to the procedure followed on the dismissal.
Available to those working as contractors under a contract for services as well as to employees under a contract of service.	Available only to employees with a contract of service.
No cap on amount of compensation which can be awarded.	Statutory limits on compensation.
Limitation Act 1980 ; time limits for action to be brought – 6 years from date of dismissal.	Statutory time limit of 3 months - strictly calculated. (May be extended by 1 months if employee engages in conciliation).
Action heard in County or High Court.	Matter heard in Industrial Tribunal.
Normally only available where contract is ended.	May arise where a short-term contract is not renewed.

TYPES OF DISMISSAL

ACTUAL DISMISSAL	Employer terminates contract.
CONSTRUCTIVE DISMISSAL	The employee resigns and demonstrates that the employer’s conduct was such that they were forced to resign.



WRONGFUL DISMISSAL

1: **Actual dismissal** where there is an ongoing/rolling employment contract

Was the employee was **given notice** in accordance with their contract?

Yes: Not wrongfully dismissed.

No: Wrongfully dismissed **unless:**

- the employee was in repudiatory breach of contract;
- the parties agreed to terminate on a shorter notice period; or
- there is a **PILON** clause in the contract, or the parties agree to a **PILON**. This allows the employer to make a **payment in lieu of notice**. This will be a payment equivalent to the net salary that the employee would have received had they worked their full notice period in return for the employee leaving sooner (or immediately).

NOTE: if the employer fails to actually pay out the **PILON** amount, the employee can bring a money claim to enforce the debt rather than a wrongful dismissal claim.

Was the contractual notice period at least as long as the statutory minimum notice period?

Length of employment	Minimum notice period
More than 1 month	1 week
More than 2 years	1 week for each complete year of employment, up to a maximum of 12 weeks
12 years or more	12 weeks

The employee will have been wrongfully dismissed if the contractual notice period was **less** than the statutory minimum.

If the contract does not contain any notice provision, then the employee must be given the statutory minimum notice period and "reasonable notice". Note that what is "reasonable" will depend on the context (such as the employee's seniority and role and the employer's financial circumstances) and that this could exceed the statutory minimum period.

2: **Actual dismissal** where there is a fixed term contract.

Did the contract contain a break clause permitting the employer to terminate before expiry of the fixed term?

No: Wrongfully dismissed **unless:**

- the employee was in repudiatory breach of contract; or
- the parties agreed to terminate on a shorter notice period.

Yes: The dismissal will not be wrongful **unless:**

- the notice periods in the contract were less than the statutory minimum (*see above*); or
- the contract did not contain any notice provision, and the period of notice given was not "reasonable notice".

3: **Constructive dismissal** – the employee is entitled or forced to resign by the employer's conduct.

The employee must demonstrate a **repudiatory breach of contract** by the employer. This requires:

- Breach of contract.
- The breach was sufficiently serious as to go to the **root** of the contract, leaving the employee not option but to resign.
- The breach was a cause of the employee leaving.
- The employee left within a reasonable period of time after the breach.

NOTE: if the employee wishes to claim constructive dismissal, then they must leave without notice. Working a period of notice may be regarded as an affirmation of the contract.

Remember that employment contracts will have **implied terms**, such as the duty of mutual trust and confidence, which both employer and employee owe to each other. Breaching this will be automatically repudiatory.

UNFAIR DISMISSAL

Unfair dismissal is a statutory claim for compensation. It introduces the concept of **reasonableness** to protect employees from dismissal at the whim of their employer. Application can be made to the Employment Tribunal to consider whether there was a potentially fair reason for the dismissal and whether the dismissal was fair in all the circumstances.

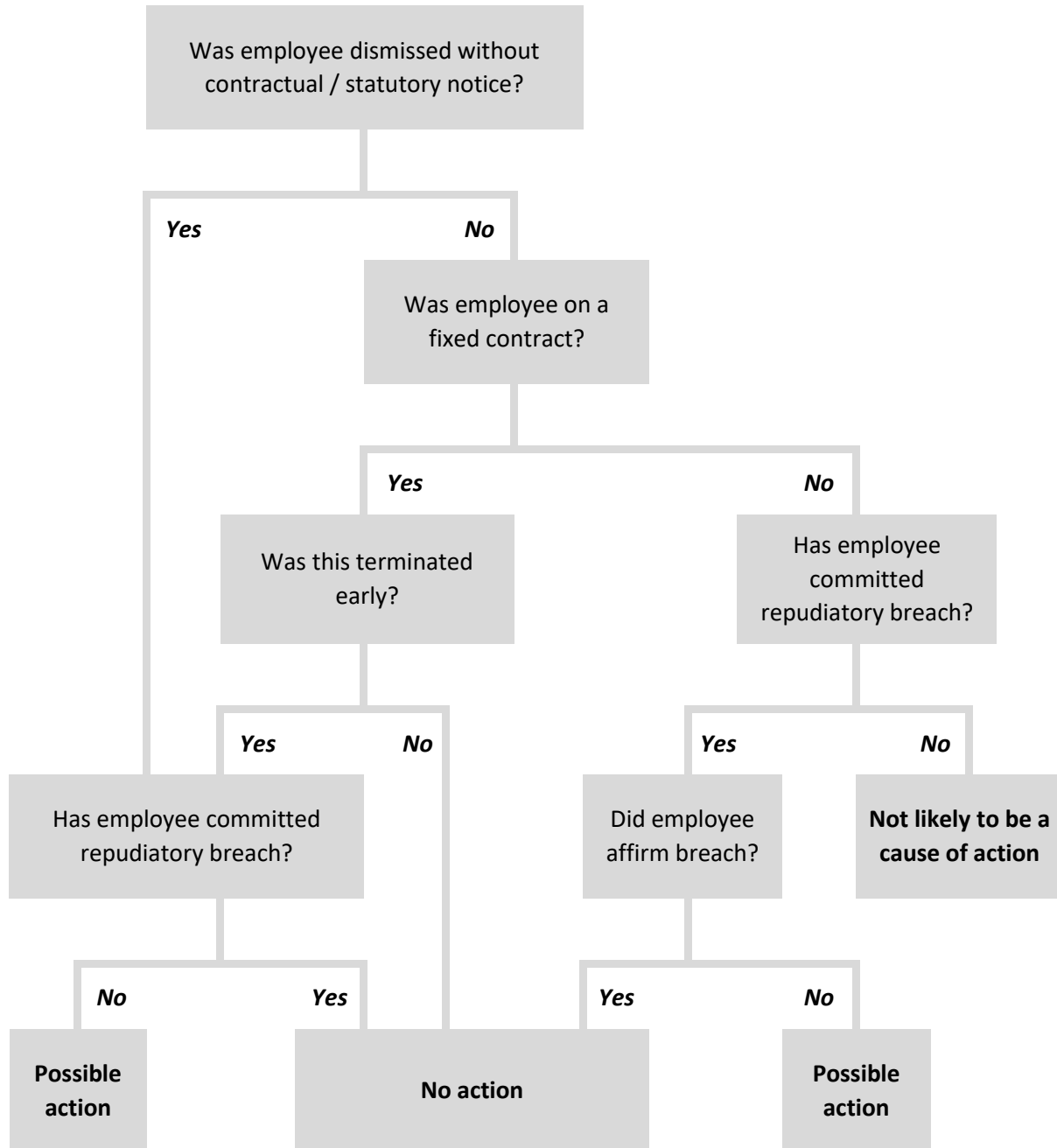
As with wrongful dismissal, unfair dismissal can involve **actual or constructive dismissal**. Successful claimants can recover a basic and potentially a compensatory award.

- It is governed by the **Employment Rights Act 1996**.
- It is important to abide by the **ACAS Code of Conduct**.

TIME LIMITS

Claims for unfair dismissal must be brought before the Employment Tribunal within **3 months** of the **date of dismissal**.

HAS A DISMISSAL OCCURRED – SUMMARY FLOWCHART



ELIGIBILITY TO CLAIM UNFAIR DISMISSAL

The remedy is only available to **employees** who have been dismissed.

For employees starting **on or after 6 April 2012**, the right not to be unfairly dismissed generally only arises when the employee has been continuously employed for a period of at least two years.

For employees employed before **6 April 2012**, the right not to be unfairly dismissed accrued after one year.

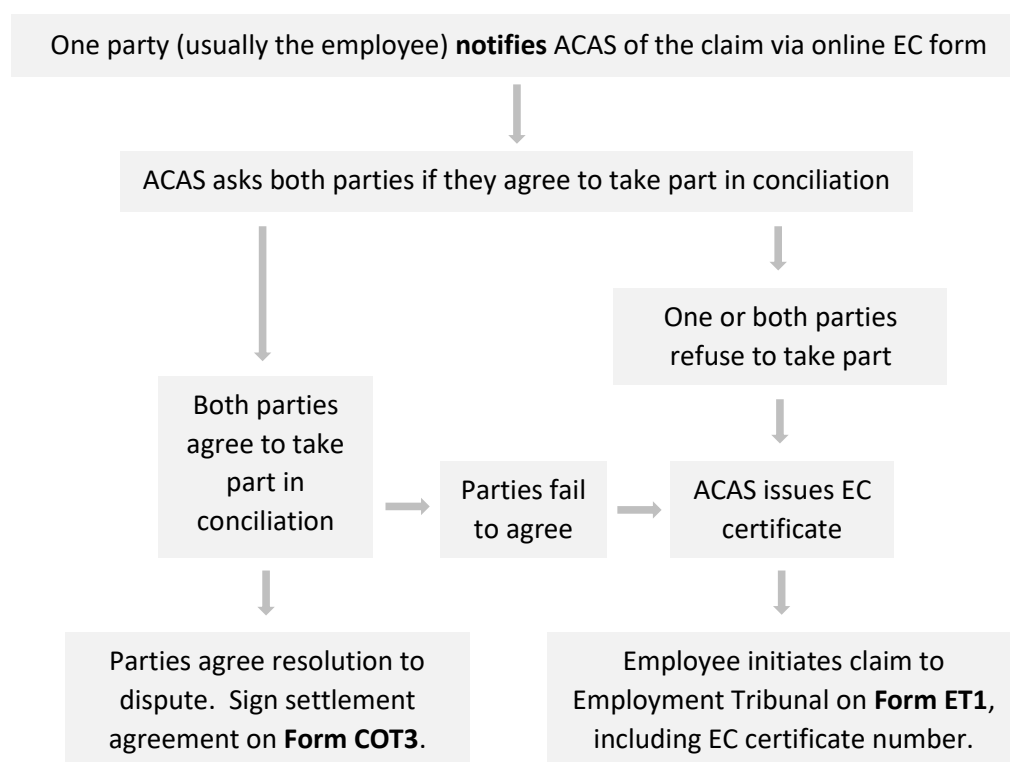
The burden of proof is on the employee to show the dismissal occurred and was unfair.

MANDATORY EARLY CONCILIATION PROCESS

An employee wishing to make an employment claim must engage in ACAS's early conciliation process before bringing a claim. The employee cannot bring a claim to the Employment Tribunal without an early conciliation (EC) certificate from ACAS.

The dispute will be referred to an ACAS conciliator, who will attempt to resolve the dispute without a claim having to progress to an employment tribunal. (*See the table below*).

THE CONCILIATION PROCESS



NOTE: There are a small number of exceptions where a claim need not be notified to ACAS (e.g. if a group of people are making a claim against the same employer in relation to the same dispute, if one person has already notified ACAS, the others may not have to).

LIMITATION DURING CONCILIATION

If the parties wish to engage in conciliation, the 3-month limitation period for bringing a claim to the Employment Tribunal is paused for one month.

- The pause commences on the day after ACAS is notified of the potential claim.
- This period can be further extended by up to 14-days if ACAS thinks there is a reasonable prospect of conciliation successfully resolving the dispute.

REMEMBER: You may be required to calculate the limitation period in the exam, so a good working knowledge of the periods and how they are affected by conciliation is important. *See the section “Is the claim in time?” above for more information on limitation periods.*

ADVANTAGES OF CONCILIATION

ISSUE	THE CONCILIATION PROCESS IS GENERALLY...
Cost	<u>Cheaper</u> than an employment tribunal
Stress	Likely to be <u>less stressful</u> than litigation
Speed	<u>Faster</u> than using the tribunal route, (if a dispute is successfully resolved by conciliation, the matter will come to an end)
Confidentiality	Private (unlike an employment tribunal), allowing the parties to keep the dispute <u>confidential</u>
Information	Parties can get more information about the potential strengths and weaknesses of the claim.

NOTE: it is possible for either party to choose a representative to engage in the conciliation process on their behalf. A representative can be a layperson or someone with legal qualifications. If a party elects to use a representative, then ACAS will not speak directly to the party who is represented. A representative can be added or removed at any time.

More information about the ACAS Early Conciliation Service can be found on the ACAS website: www.acas.org.uk.