Full redundancy claim

You have redundancy rights if:

- you're legally classed as an employee
- you've worked continuously for your employer for 2 years before they make you redundant

Employment status

What does it mean to be an **employee?**

Firstly, the **legal distinction** between types of employment (employee, worker and independent contractor) can be seen in 230(1) and (2) of the *Employment Rights Act (ERA) 1996.* This Act also defines who is an employee:

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing
(3) In this Act 'worker' means an individual who has entered into or works under (or, where the employment has ceased, worked under) -

- (a) a contract of employment, or
- (b) any other contract, whether express or implied, whereby the individual undertakes to do or perform personally any work or services for another party to the contract
- Have an employment contract from your employer, formed when you accept the job

Whether there's an employment contract can be determined using the following tests below. Remember, various "tests" are deployed by the courts in order to determine if there is an employment relationship, as no single test is satisfactory, due in large part to:

➔ Changes in employment relations (e.g. part-time working, franchising, agency, workers such as nurses/restaurant/teaching staff, zero-hours contracts, out-working

➔ Special contractual arrangements (e.g. worker using own vehicle and/or equipment, wearing company logo)

Tests to identify employment status:

a) **Control test**- Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C–517B

A contract of service (an employee) exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master, (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master, (iii) The other provisions of the contract are consistent with its being a contract of service

The normative basis of the Control test - Essentially, under this test, we ask: is the 'master' (employer) in a position to tell the 'servant' (employee) when and where the job is to be done, rather than how it is to be done? Is the 'servant' subordinated to the masters' managerial power? If so, this indicates that the servant is an employee under a contract of service.
However, the 'master' doesn't **have** to exert their power to control their 'servant'. They just need to have the **ability** to exert this power- the basis for this comes from *Walker v Crystal Palace Football Club Ltd [1910]*.

b) **Organisation/integration test**

Stevenson v MacDonald [1952]:

- 'Is the work done as an integral part of the business?' a person is considered an employee under a "contract of service" when the work is integrated in that of the business and considered an integral part of the business, whereas an independent contractor for services is merely an accessory to the business and, thus, not an employee. <u>This is substantive integration</u>
- Within integration, there's also <u>organisational integration</u>. A key question regarding this type of integration is, is the person 'part and parcel' of the organisation? Does the person have access to particular work schemes? If the answers are yes, this is indicative of the person being an employee. It may also be asked whether the individual subject to the enterprise's disciplinary or grievance procedures?

c) **Economic reality test**

Stringfellow Restaurants Ltd v Quashie [2013]; Uber BV v Aslam [2018]

- What degree of financial risk does the 'employee' take, and whether and how far does he have an opportunity of profiting from sound management in the performance of his task. The more economically dependent the person is the more likely they are to be an employee.

The following questions may be asked using this test:

- Has the individual made no investment of capital in his/her work and does the individual suffer no risk of loss in his/her work?
- Does the individual pay income tax and National Insurance contributions as an employee instead of VAT on the provision of his/her services?
- Does the enterprise supply tools, uniforms, stationery, equipment, or materials to the individual?
- Is the individual paid a wage or salary instead of a fee, commission, or royalties?

d) **Mutuality of obligation**

According to this test, in order for the court to find a contract of employment, it is necessary not just to show that there has been an exchange of work for wages, but that, in addition, there has been an exchange of mutual undertakings to be available for [a minimum or reasonable amount of] work over a period of time, on the employee's part, and to make [a minimum or reasonable amount of] work available [and pay for it], on the employer's (leading authority: Carmichael v National Power plc 1999)

<u>Analysis:</u>

- When establishing whether a contract of employment is present: control, mutuality of obligation and personal service are **indicative but not definitive.**
- In addition to the tests of mutuality of obligation, control, and personal service, the courts will apply a **multifactorial approach** involving consideration of a constellation of factors. The more affirmative the responses produced to the following questions, <u>the more likely it is that the individual will be classified as an employee.</u>

If the answers are evenly balanced the court may 'have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive' (Lord Justice Elias- *Stringfellow Restaurants Ltd v Quashie [2013]*)

Along with these tests, the following simple questions can be asked of an employee:

- Do they tend to be provided regular work by your employer?
- Are they employed to do the work personally?

Final key points on employment status:

- An employee is paid for being available to the employer
- The label of the contract is **relevant**, but it's not **definitive.** It's the true meaning of agreement between the parties that matters- per *Autoclenz Ltd v Belcher [2011]; Uber BV v Aslam*

There are other types of employment:
You could be **classed as a worker** if your employment is more casual. You usually would:

- have a 'contract for services' (to do work or provide a service for a payment or reward), which can be verbal or written
- be employed to do the work personally
- have very little obligation to receive or do work, you're not providing services as if doing the work on your own account- 'wage work bargain'
- But should do work you've agreed to- i.e. you're paid solely for the work you do, **not for your availability**

If you are on zero hours **contract** you will be labeled as a **'worker'**, not an employee. However, the contents of a contract are not definitive, and you may still be legally classed as an employee based on the facts of your case, meaning you may be entitled to redundancy pay. You should still contact your lawyer, representative or a legal advice centre for help with determining your employment status, provide them with a list of answers to the following questions:

- Who decides your hours and when do you work
- Where you work
- The level of control your employer has over how you do your work
- Whether you have made any investment of capital in your work and whether you bear any financial risk of loss in your work
- Whether you pay income tax and National Insurance contributions as an employee instead of VAT on the provision of your services
- Who supplies your tools, uniforms, stationery, equipment, or materials
- Whether you are paid a wage or salary instead of a fee, commission, or royalties
- Whether you are subject to the relevant enterprise's disciplinary or grievance procedures

If the company you worked for has been liquidated, the usual body to contact would be the Redundancy Payments Service at https://notice.redundancy-payments.service.gov.uk/claims/start however they are currently closed due to the Coronavirus pandemic.

In the meantime we recommend that you contact the insolvency service at redundancypaymentsonline@insolvency.gov.uk for help with your redundancy pay.

You're usually **classed as self-employed** if you:

- are responsible for how and when you work
- are the owner of a company or are a freelancer
- invoice for your pay
- get contracts to provide services for clients
- are able to send someone else to do the work for you, if appropriate
- are able to work for different clients and charge different fees
- do not get paid holiday or sick leave

Rights enjoyed by Employees and/or by workers

Right	Employee	Worker	Authority
Provision of statement of particulars of employment and statement of changes	Yes	Yes, since 6 Apr 2020 this has been extended to workers	ERA 1996, ss 1, 2, 4
Statutory sick pay	Yes	No	SSCBA 1992, s 151 SSCBA 1992, s 163
Statutory minimum periods of notice	Yes	No	ERA 1996, s 86

Written statement of reasons for dismissal	Yes	No	ERA 1996, s86
Unfair dismissal rights	Yes	No	ERA 1996, s 92
Statutory redundancy payment	Yes	No	ERA 1996. s 135

What is redundancy?

To determine whether someone has been made redundant, it first needs to be established if they've been dismissed.
s136 of the **Employment Rights Act (ERA) 1996** lists circumstances in which an employee has been dismissed:

(1) Subject to the provisions of this section … for the purposes of this Part an employee is dismissed by his employer if (and only if)—

A. the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),
B. he is employed under a limited-term (also known as fixed-term [FTC]) contract which terminates by virtue of the limiting event without being renewed under the same contract, or
C. the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

2) Subsection (1)(c) does not apply if the employee terminates the contract without notice in circumstances in which he is entitled to do so by reason of a lock-out by the employer …

5) Where in accordance with any enactment or rule of law—

A. an act on the part of an employer, or
B. an event affecting an employer (including, in the case of an individual, his death), operates to terminate a contract under which an employee is employed by him, the act or event shall be taken for the purposes of this Part to be a termination of the contract by the employer.

Extra explanation:

- s136(1)(a) applies where the employee is positively dismissed by the employer because of redundancy
- s136(1)(b) applies where a FTC ends without renewal because of redundancy
- s136(1)(c) applies where an employee has been made redundant due to the conduct of the employer- i.e. where there's been a constructive dismissal

If it's been established that the employee has been dismissed, it then has to be considered whether the employee has been made redundant. Potentially fair reason for dismissal. The legal definition of redundancy is provided by s139(1) ERA:

-> Statutory definition: <u>s139(1) Employment Rights Act (ERA) 1996</u>

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i)for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

-> What does it mean to be made redundant (in layman's terms)?

- Dismissal from your job due to either
    - Company as a whole shuts or;
    - Your branch (in which you work at) shuts down [again, this only relative- it's the true meaning of the contract that matters] or;
    - Reduced requirements for the work you used to perform e.g. automation, no longer required to carry out tasks in contract, function test. *Reduced requirements are defined in various ways.*

*__Extra point:__ Regarding the redundant employee's right to be paid a statutory redundancy payment, an employee's dismissal is presumed to be because of redundancy by virtue of s163(2) ERA- unless the contrary is proven.

If you are an **employee**, you are entitled to statutory redundancy payment if:

- you are an employee (see: is the worker an employee [via LexisNexis] and employment status heading above)
- you have been continuously employed for not less than two years (qualification period) at the 'relevant date' (the date when the employment is effectively terminated, either by notice or contractually)
- you have been dismissed and
- the dismissal was by reason of redundancy

The redundancy procedure

a) Fair procedure

The employer must follow procedural fairness in making an employee redundant- this has been highlighted in *Williams v Compair Maxam Ltd (individual redundancies); Polkey v A. E. Dayton Services Ltd (calls for fair procedure in all dismissals, including redundancies- the employer can't claim the procedure is irrelevant)*

Procedural fairness is required to ensure that the employer makes redundancy decisions with care, and also that the decision is:

- the most reasonable option available given the circumstances
- the least expensive option for the employer; and
- alternatives such as re-engagement (which is where the employer gives an employee a new job offer OR renewal of contract)

In selecting who is to be made redundant, the employer should use a fair and objective method. The employer must:

- choose an appropriate pool of employees for redundancy;
- apply transparent, fair, and proper selection criteria to that chosen pool; and
- apply transparent, fair, and proper selection procedures.

What constitutes an appropriate pool of employees for redundancy?

Generally, the rule is that the pool should include all employees carrying out the work that the employee no longer needs- i.e. the employer's need for the work has ceased

However, the pool may be extended to include other employees whose jobs are similar to, or interchangeable with, the jobs that are no longer required

- Similarity or interchangeability is to be assessed in light of the contractual terms and working patterns of the employees alleged to be performing such similar or interchangeable functions.

What constitutes a transparent, fair, and proper selection criteria to that chosen pool?

Once the employer has decided who is to be included within the pool for redundancy, **advance warning** of potential redundancies should be given to the employees within this pool- per *Williams v Compair Maxam Ltd (Browne-Wilkinson J)*

Firstly, if there's a pre-existing selection criteria contained within a redundancy agreement that should be consulted

However, if there isn't such, the selection criteria needs to be transparent, fair, and proper. Commonly used methods are:

- asking for volunteers (self-selection for redundancy)
- disciplinary records
- staff appraisal markings, skills, qualifications and experience

The employer may use as **part** of the selection criteria the method of 'last in, first out' [LIFO] in determining the selection criteria for the pool- which means that the employees with the shortest length of service are selected first. However, caution is needed, as LIFO may be discriminatory towards employees, as young people are most likely to be selected. If the selection criteria used by the employer is found to be discriminatory, the employee may be able to apply for unfair dismissal- see *s98 ERA 1996*

An employer cannot select employee or use criteria that discriminates against them and make them redundant on that basis, if that discrimination is based on:

- age
- disability
- gender reassignment
- marriage or civil partnership status
- pregnancy or maternity leave
- race
- religion or belief

- sex
- sexual orientation
- family related leave – for example parental, paternity or adoption leave
- role as an employee or trade union representative
- membership of a trade union
- a part-time or fixed-term contract
- working time regulations – for example if you've raised concerns about holiday entitlement or rest breaks
- concerns you've raised about not being paid the National Minimum Wage

Extra info:

- If an employer makes an employee redundant on any of these bases, that would most likely raise a claim under the Equality Act 2010.
- If an employee tries to enforce/apply statutory rights (e.g. Protected Characteristics under Equality Act) and employer dismisses them for doing that, that can raise a claim for unfair dismissal
- As said above, see s98 ERA for more information.

The employer may offer the employee a different role if one is available.

The employer may also ask the employee to reapply for their own job, which could help the employer decide who to select.

- If an employee doesn't apply or they're unsuccessful in their application, they'll still have a job until the employer makes them redundant

<u>What's a transparent, fair, and proper selection procedure?</u>

- The usual process followed by the employer is to apply the selection criteria to the employees within the pool, who are then assessed by giving them a numerical scoring. It is standard for the employees with the lowest scores to be selected for redundancy.
- Although an employer isn't required to disclose this numerical scoring, it's been held by the Inner House of the Court of Session in Scotland, that a tribunal or court has the power to inquire into the individual scores of the employees in the pool- which would mean disclosure of the scores of all of the employees.

It must also be added that if an employer is proposing to make the employee redundant, the employer must seek to find any suitable alternative employment for

employees they are proposing to make redundant. *See offer of new employment below.*
Also, procedural fairness may be inferred from the Trade Union and Labour Relations (Consolidation) Act 1992 [TULRCA]. As it's fairly reasonable that the procedural fairness rules that apply to collective redundancies, that should apply to individual redundancies too.

Offer of new employment

An employee who has been made redundant may be offered a renewed or new contract for employment on different terms and conditions, starting within four weeks of the employee's dismissal. If this occurs, the employee is not regarded as having been dismissed (s.138(1) ERA).

If an employee accepts the offer of employment on different terms and conditions, the question of its suitability never arises. The employee is simply considered not to have been dismissed for the purposes of entitlement to a redundancy payment.

Employees cannot maintain their rights to redundancy payments simply by refusing any alternative work that is offered to them. An employee cannot unreasonably turn down alternative work if it:

- is **suitable**
- was **offered before the end of the previous employment**, and
- starts **four weeks or less** after the **end of the previous employment**

If the employee does turn down such alternative work, the employee will lose their entitlement to the redundancy payment.

Therefore, if the time limits have been complied with, and the terms for the new job differ from your old contract, your employer must show that a) the job is suitable and b) refusal is unreasonable, in order to refuse your redundancy payment.

Job suitability

The nature of the employment offered must be considered and the tribunal must make an objective assessment of the job offered. However, it is not an entirely objective test: suitability means the suitability of the job for the particular employee, not just for that sort of employee. The whole of the job must be considered, including:

- tasks to be performed
- skills required

- salary or wages, and perks and fringe benefits
- hours
- responsibilities
- status, and
- location, including any relocation involved and the commute involved in getting to and from work

No single factor is decisive, and all must be considered as a package

Unreasonable refusal

According to s141(2) and (4) ERA 1996, if the new or renewed contract offered is either on the same terms as the old one, or it constitutes 'an offer of suitable employment', then an employee will lose his entitlement to a redundancy payment if he:

- unreasonably refuses the offer of new employment, or
- accepts it, but then unreasonably terminates it during the trial period

The question is whether the employee, given his particular circumstances, was reasonable in refusing the alternative employment. Even if the tribunal considers that the alternative employment offered is suitable, an employee can refuse the offer for reasons personal to him, based on reasons which relate to the employee's perception of what the offer amounts to, and still act reasonably. (Cambridge and District Co-operative Society v Ruse [1993] IRLR 156, Readman v Devon Primary Care Trust [2013] IRLR 878)

Situations which tribunals have found to justify reasonable refusals include:

- genuine but irrational fears about health, influenced by family history
- an employee's belief that the job could not be done in the time allotted
- a personal perception about the status of the job offered
- an employee finding another job before the offer of alternative employment
- the lateness of the offer
- an inability to buy a house in the new location
- concern about disrupting children's schooling
- refusal of a spouse to move
- domestic commitments
- concern to maintain leisure time
- uncertainty about the security of the new job

The degree of the suitability of any alternative employment offered is relevant to the reasonableness of an employee's refusal of it. In an appropriate case, where the new

job offer is overwhelmingly suitable, it may be easier for the employer to show that a refusal by the employee is unreasonable (*Commission for Healthcare Audit and Inspection v Ward*). The suitability of the alternative employment and the reasonableness of the refusal are, however, separate questions and must not be conflated (*Dunne v Colin & Avril Ltd t/a Card Outlet*).

Consultation

Another key aspect of procedural fairness regarding redundancy is a **consultation,** which is a legal obligation of the employer.

- Consultation applies to **individual redundancies** (19 redundancies and fewer made over a 90-day period) and **collective redundancies** (20 redundancies and more made over a 90-day period).

The purpose of a consultation is to avoid dismissal, i.e. redundancy. Or, mitigate the effects of being made redundant

- An employer is still required to consult employees during COVID-19. It's likely that this will need to be done remotely. **There is no legal requirement to consult face to face.**

An employee is entitled to a consultation with their employer if they could be made redundant. This involves speaking to the employer about:

- why they're being made redundant
- any alternatives to redundancy

If the employer is making up to 19 redundancies (AKA individual redundancies), there are **no rules** about how they should carry out the consultation. If they're making **20 or more redundancies at the same time**, the **collective redundancy** rules apply.

*However, it's been accepted as good practice to use the same rules as those applicable for collective redundancies (redundancies for 20 and more). So, for consultation as a whole, see the information below.

Consultation for collective redundancies

Employers must consult with:

- Representatives or any recognised independent trade union, or
- Other elected employees, if no trade union is recognised

As well as the employer consulting with the above, they must also conduct individual consultations with the employees.

What information should employers provide? Per *R v. British Coal Corporation, ex parte Price*

Employers should be as open as possible without jeopardising the business

Employers must disclose in writing to the appropriate reps the following info concerning proposals for redundancies, which includes:

- The reasons for the proposals
- The numbers and descriptions of employees it is proposed to dismiss as redundant
- The total number of employees of any such description employed at that establishment
- The way in which employees will be selected for redundancy
- How dismissals are to be carried out
- The method of calculating the amount of redundancy payments to be made to those who are dismissed
- Agency workers: the number of agency workers, where they work and the type of work they do

Withholding information from an employee may hinder the progress of effective consultation and could render the consultation invalid

- An employer must also give adequate time for the employee to respond, and for thorough consideration of a response to consultation by authority

How long should consultation last?

No time limit prescribed by the law, but the minimum is the following according to Trade Union and Labour Relations (Consolidation) Act 1992 [TULRCA]:

- **20 to 99 redundancies**- the consultation must start at least **30 days** before any dismissals take effect
- **100 or more redundancies**- the consultation must start at least **45 days** before any dismissals take effect

The consultation period can go beyond the prescribed minimum periods between the start of consultation and the dismissals taking effect. The key point is not how long the consultation lasts, but that it is meaningful while it lasts.

This period must also be for the **entire length of the pre-redundancy procedure**- which covers from the assessment of whether redundancies are required [formative stage], to the selection of the pool for redundancy, to the point when the selection criteria is chosen and the potential for suitable alternative employment within the employer's organization.

When does dismissal take effect?

Redundancy notices must not be issued until consultation has been completed. This notice may be given before the end of the minimum period, if the consultation is genuinely complete.

The dismissal itself cannot take effect until the minimum period has expired and individual notice periods have been observed. By minimum period here we are referring to the 30-day requirement of the consultation beginning and dismissal to take effect. The employer must also give notice according to statute:

- One week's notice if the employee has been employed by the employer continuously for one month or more, but for less than two years; or
- One week's notice for each year employed if the employee has been employed by the employer continuously for two years or more, up to a maximum of
- 12 weeks. For example, if an employee has worked for five years then they are entitled to five weeks' notice.

Adherence of these notice periods by the employer also constitutes following procedural fairness

Remedies

Where an employer fails to follow the appropriate procedures such as the need to consult about proposed redundancies, a complaint may be made to an employment tribunal. A complaint may be made by either:

a) an appropriate trade union, or, in cases where no trade union is recognised, an elected employee representative of affected employees, or
b) where there is no appropriate trade union or other elected employee representative, by any employee who has been or may be dismissed.

Time frame for complaint is tight – **3 months** after the last dismissal took place or either before the last one takes effect.

An employee may have remedies if they've suffered the following:

- Unfair dismissal
- Wrongful dismissal

Unfair Dismissal

This type of dismissal can arise for various reasons. For example:

- If an employee tries to enforce/apply statutory rights (e.g. Protected Characteristics under *Equality Act*) and employer dismisses them for doing that
- Selection for redundancy based on automatically unfair selection criteria

- If the reason for redundancy is not substantively reasonable, or procedural fairness wasn't followed

Chapter II of Part X of the *ERA* prescribes three remedies where an employee has established his/her claim for unfair dismissal.

1. **Reinstatement** is the primary remedy. Where a reinstatement order is made, the employee is entitled to return to his/her old job.
2. If the application of certain statutory criteria guides the tribunal away from making a reinstatement order, it has the power to order **re-engagement**. This is where an employee returns to work for their former employer, albeit in a different position.
3. If the tribunal fails to make a reinstatement or re-engagement order, it must award **compensation** to the employee which comprises a basic and compensatory award. Before making an award of compensation, the tribunal is duty-bound to consider whether an order of reinstatement or re-engagement would be preferable.

Besides the aforementioned three remedies, the tribunal also has the power to make interim relief orders under *TULRCA* and the *ERA* if it appears to the tribunal likely that it will find that the employee has been unfairly dismissed for one or more prescribed reasons. The tribunal has an additional power to order an employer to pay a financial penalty of between £10 and £5,000 where it loses a claim and there are aggravated features.

Reinstatement

This remedy is provided by s114 of the *Employment Rights Act 1996*

- This is the re-employment of the employee back into the role he was unfairly dismissed from (as though the dismissal had never occurred)
- Primary remedy for unfair dismissal → reinstatement of the employee permits him to continue to enjoy the economic benefits of the role in the future and also restores the mental satisfaction that he enjoyed from his role.
- Chagger v Abbey National plc & Hopkins (2009) - Mr Chagger had been unfairly dismissed on the grounds of his race. The tribunal ordered Santander to reinstate Mr Chagger in order to remedy its wrongdoing, however this was refused by Santander. Following this refusal, the tribunal ordered Santander to pay Mr Chagger compensation for his loss.
- The starting point for any discussion of the reinstatement remedy is sections 113, 114(1) and (2), and 116(1) and (2) of the ERA. Section 113 sets out the options of reinstatement or re-engagement and sections 114 and 116 provide additional details.

- Section 114(1) describes the basic nature of a reinstatement order. Essentially, it means that the employee gets his/her old job back with no adverse effect on his/her continuity of employment. As such, if an employment tribunal orders reinstatement of the employee to a post with the employer, but to a different role with slightly different responsibilities, that is an error of law.
- It will also be an error of law for a tribunal to order reinstatement on terms that modify the contractual provisions of the employee's employment. (Scottish Police Services Authority v McBride)
- The period beginning with the effective date of termination and ending with the date of reinstatement is counted towards the employee's continuity of employment. Section 114(2) is designed to supplement that right by providing an entitlement to back pay and compensates the employee for sums accrued, but unpaid, which are attributable to the period between the date of termination and reinstatement.
- The stumbling block to an order of reinstatement is the practicability of the employer being ordered to give the employee his/her job back. Practicability is not the same thing as 'expediency' and the onus is on the employer to show impracticability. The tribunals have been directed to take a 'broad common sense view' in their evaluation of the practicability of reinstatement and, in exercising their judgment, they are acting as an industrial jury, which makes it next to impossible to successfully challenge a tribunal's decision on the ground of perversity in an appeal (Wood Group Heavy Industrial Turbines Ltd v Crossan)
- The principal difficulty with a reinstatement order is that it is wholly unenforceable. Therefore, where an employer fails to comply with its terms in whole or in part, the employee's remedy is restricted to that set out in section 117 of the ERA, namely an award of compensation.

Re-engagement

This is the re-employment of the employee into a different role to the one he was unfairly dismissed. The legal basis for this is s115 of the *Employment Rights Act 1996*.

- In much the same vein as a reinstatement order, the re-engagement order must specify the terms on which re-engagement is to take place, including the date for compliance with the order. The terms are more extensive than in the case of a reinstatement order and must include confirmation of the identity of the employer, the nature of, and remuneration for, the employment, details of back pay and other sums accrued but unpaid in respect of the period between the dates of termination and re-engagement, and confirmation of any rights and privileges, including seniority and pension rights, which must be restored
- This remedy is available if reinstatement of the employee is not practicable

- The tribunal will consider whether it is practicable for the employee to return to work for the employer, and whether it would be just and equitable to issue this remedy knowing the employee was partly to blame for the dismissal.

Summary point about reinstatement and re-engagement:

- For either of these remedies to be prescribed, the courts will adhere to s116 of the *Employment Rights Act 1996*

Compensation

- The employee is compensated in full for all his loss of earnings from the date of the unfair dismissal to the date of the hearing.
- The amount may be reduced is the employee is found partly to blame or he did not mitigate his loss
- The tribunal will also consider matters such as loss of pension and any reasonable expenses incurred by the employee as a result of the dismissal.

→ Basic award - an award to reflect that the employee has been unfairly dismissed. It depends on the gross weekly pay of the employee, his length of continuous employment before dismissal and his age.

The purpose of the basic award is to compensate the employee in respect of the continuity of employment which he/she has lost as a result of being dismissed. Unlike the compensatory award, it is based on the *gross* weekly pay of the employee. It is calculated in the same way as the statutory redundancy payment under section 162 of the ERA, as follows:

- Half a week's pay for each full year of service where the employee's age during the year is under 22, with half a week's pay being capped at **£508**;
- One week's pay for each full year of service where the employee's age during the year is 22 or over, but under 41, with a week's pay being capped at **£508**; and
- One-and-a-half weeks' pay for each full year of service where the employee's age during the year is 41 or over, with one-and-a-half weeks' pay being capped at **£508**.

The **maximum amount** payable at the time of writing is currently **£15,240 in 2018–19**, i.e. £508 × 30 (which is the highest multiplier) = £15,240, but such maximum limit is increased annually in line with changes in the retail prices index.

The sum payable to the employee may be reduced under the provisions of sections 121 and 122 of the ERA. Section 121 provides that a redundant employee's basic award will be reduced to two weeks' pay where the employment of the employee was renewed or he/she was re-engaged or he/she unreasonably refused or left suitable alternative employment. Meanwhile, subject to certain exceptions, the tribunal may reduce the basic award where it is of the view that any conduct of the employee before the dismissal was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award to any extent

→ Compensatory award - to compensate the employee for financial losses suffered as a result of the unfair dismissal.

The compensatory award is a sum payable to the employee in terms of ss. 123 and 124 of the ERA 1996. Section 123(1) directs that the tribunal must fix the compensatory award in accordance with what it considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal insofar as that loss was attributable to action taken by the employer. The 'just and equitable' loss referred to in section 123(1) is taken to include any expenses reasonably incurred by the employee in consequence of his/her dismissal and any loss of benefit which the employee might reasonably be expected to have had but for the dismissal. It is not the objective of the compensatory award to punish the employer; rather, it is intended to indemnify the employee in respect of any financial losses which he/she has suffered as a result of the dismissal. There is a statutory cap on the compensatory award which currently stands at £83,682 or the employee's annual pay, whichever is the lower. Like the basic award, it is increased annually in line with the retail prices index.

For any of these remedies (reinstatement, re-engagement and compensation) to be available to the employee, the employee must have worked for their employer for a minimum period. If they're classed as an employee and started their job:

- on or after 6 April 2012 - the qualifying period is normally 2 years
- before 6 April 2012 - the qualifying period is normally 1 year

However, there's no qualifying period if an employee has been dismissed for any automatically unfair criteria. If an employee has been dismissed under any of this criteria, they have an automatic right to an employment tribunal.
See Redundancy page 32, for more information.

In unfair dismissal claims, the claim must be taken to a tribunal within **3 months** of being dismissed.

Wrongful Dismissal

If an employee has been made redundant, they may have a claim for wrongful dismissal (access to remedies) if they weren't given any/right amount of notice.

at a minimum the statutory amount of time in advance (give notice):

If an employee has worked for the employer for:

- 1 month to 2 years □–□ the minimum notice is 1 week
- 2 to 12 years □–□ the minimum notice is 1 week for each year you've worked
- 12 years or more □–□ the minimum notice is 12 weeks

If the employee has been wrongfully dismissed, the following remedies are available:

Damages:
A damages claim is the principal remedy available where an employee's wrongful dismissal action is successful. Unlike a claim in debt for unpaid wages, damages are subject to the ordinary rules of contract law on causation, remoteness of damage, mitigation of loss, and contributory fault. To that extent, damages are not a particularly attractive remedy. A damages claim for wrongful dismissal is a common law claim, and so it must be raised and pursued in the courts

Non-monetary Remedies
The common law approach has been to assume that damages will be an adequate remedy in a wrongful dismissal claim. The recognition that the contract of employment is personal in nature led to the courts rejecting claims for it to be enforced through equitable remedies such as specific performance and injunction.

Redundancy Pay / Compensation
If an employee has not received the correct amount of redundancy pay (or if the redundancy procedures are not followed properly) as stated by law, they can bring a claim in the Employment Tribunal for that amount.
The same applies if an employee has not received what they were entitled to under their contract if their contract states a redundancy payment figure.
Redundancy compensation is set by statute, meanwhile, a contract can provide a more generous redundancy pay.

According to s162 redundancy payments are calculated according to the following formula with a maximum of 20 years' service being taken into account. Starting at the end of the employee's period of service and calculating backwards:

- One and half weeks's pay is allowed for each of employment in which the individual was 41 or over

- A week’s pay for each year of employment in which the individual was between ages of 22 and 40
- Half a week’s pay for each year of employment between the ages of 18 and 21