

Frequently Asked Questions

This document is not intended to constitute comprehensive legal advice but contains practical information which will help you in conjunction with any legal advice you do seek.



Employment status

1. Am I eligible to make a redundancy claim?

Only people classed as employees are entitled to make redundancy claims, unlike people classed as workers or as self-employed who do not enjoy such rights. If you are classed as an employee you must also have been continuously employed for no less than two years from the date when your employment was effectively terminated, either by notice or contractually. To make a redundancy claim you must also have been dismissed, and the dismissal must have been by reason of redundancy.

2. Does working temporarily for an employer, an employer you have transferred to, or being on furlough contribute to the two-year employment period?

Yes, it does.

3. How do I know if I'm classed as an employee, worker or self-employed?

The following are indicators of employment status. None of the factors listed are definitive but they will be considered when determining your status.

You're classed as an **employee** if you:

- have an employment contract from your employer, formed when you accepted the job
- are employed to do work personally
- are given regular work by your employer and must do the work

If your employment is more casual, you could be classed as a **worker**. 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, but should do work you've agreed to- i.e. you're paid solely for the work you do, **not for your availability**
- 'wage work bargain'- you're not providing services as if doing the work on your own account

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 and can send others to do work for you
- invoice for your pay
- get contracts to provide services for clients, are able to work for different clients and able to charge different fees
- do not get paid holiday or sick leave

To help your lawyer or representative to assess your employment status, come up with a list of the following:

- 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

Whilst any description in your employment contract will not be definitive. Just because your contract says you are self-employed that may not necessarily be the case. However, you should bring your lawyer or representative a copy of your contract.

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.

4. What if I am on a zero hours contract?

If you are on zero hours contract you will be labelled as a 'worker' not an 'employee' in your contract. 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
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5. Are there any legal differences if 5 people are being redundant and 22 people are being redundant?

Yes. If **19 redundancies and fewer** made over a 90 day period, that's an **individual redundancy**. Whereas if **20 redundancies or more** made over a 90 day period, that's a **collective redundancy**- see more about collective redundancies under 'collective redundancies'.

Fair procedure

6. How does my employer decide to make me redundant?

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.

7. 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.

8. 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 need 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 Employment Rights Act (ERA 1996)*

An employer cannot select employees based on criteria that discriminate against them, and then make them redundant on that basis. Such discrimination includes race, sex, age, disability, pregnancy, marital status, sexual orientation, religion and gender reassignment (Protected Characteristics under *Equality Act 2010*)

This discrimination may be explicit (direct discrimination) or implicit (indirect discrimination). Such as, something which affects part-time workers could be indirectly discriminatory, if most of these part-time workers are women.

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 you've tried to enforce/apply statutory rights (e.g. the Protected Characteristics under the *Equality Act*) and the employer dismisses you for doing that, that can raise a claim for unfair dismissal

As said above, see *s98 ERA* for more information.

9. What's a transparent, fair, and proper selection procedure?

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.

10. What about individual consultation?

The employer has an obligation to consult with you individually and the consultation does not need to be face-to-face. It can be online. The consultation should last for a reasonable amount of time in the circumstances. What is a reasonable amount of time will depend on the employer's size and resources.

11. Is my employer required to offer me any suitable alternative employment if they want to make me redundant?

Yes, if such an alternative exists. If such an alternative exists and they don't offer that, then an employee may have a claim of unfair dismissal. *See more info under question 10.*

12. If my employer was going to make me redundant regardless, does it matter whether they follow a fair procedure?

Yes. A fair procedure is required in all dismissals, including redundancies- the employer can't claim the procedure is irrelevant.

Offer of new employment

13. I have been made redundant, but my employer has offered me an alternative job, will this affect my right to redundancy payment?

Being offered alternative employment can affect your right to redundancy payment. When offering you alternative employment if you have been made redundant, your employer must make the offer before the end of your previous employment, and the new employment must start four weeks or less after the

end of the previous employment. If your employer has not complied with these time frames your redundancy payment will not be affected.

If the time frames are complied with and you accept the new offer you will be considered not to have been dismissed for the purposes of entitlement to a redundancy payment.

If you wish to reject the offer, the burden is on your employer to prove that the alternative they have offered is **suitable** and that your refusal is **unreasonable** in order to deny you your redundancy payment entitlement.

When judging whether the alternative employment offered is suitable, an employment tribunal will consider how suitable the job for you based on factors such as:

- 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

Help your lawyer or representative by comparing any differences of these features in the terms of the new employment you have been offered to your previous employment and explain why you would find this unsuitable for you.

If the offer of alternative employment is either on the same terms as the old one, or it is judged to be 'an offer of suitable employment', then you will lose your entitlement to a redundancy payment if you: unreasonably refuse the offer of new employment, or accept it, but then unreasonably terminate it during the trial period. The burden is on your employer to prove that your refusal is unreasonable.

Even if the tribunal considers that the alternative employment offered is suitable, you can refuse the offer for personal reasons, based on reasons which relate to your perception of what the offer amounts to, and still be held to have acted reasonably.

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
- care commitments for children, carers or disabled relatives
- refusal of a spouse to move
- domestic commitments
- concern to maintain leisure time
- uncertainty about the security of the new job

Help your lawyer or representative by compiling the personal reasons which have led to you wanting to reject the offer of alternative employment.

Collective redundancies

14. What is collective redundancy?

If your employer has made 20 or more employees redundant at your workplace within the last 90 days, this is known as collective redundancy. Your workplace is not solely determined by your contract but may be determined by a number of factors.

15. What does your employer have to do?

Your employer must consult with either:

- 1) Representatives of your recognised trade union or:
- 2) Elected employee representatives.

13. What if there are no elected employee representatives?

In this case, your employer must carry out individual consultations with all individually affected employees.

Consultation

14. Does my employer have to consult me if I'm the only person being made redundant?

Yes, a consultation prior to redundancy is required for individual and collective redundancies. Although, if an individual redundancy is proposed there are no set rules as to how the consultation should be carried out. However, it's been accepted as good practice to use the same rules in individual redundancies, as those applicable for collective redundancies. Your employer must still consult you despite the Coronavirus pandemic although it's likely that this will need to be done remotely as there is no legal requirement to consult face to face.

15. When do collective consultations take place?

Consultations must be at least 30 or 45 days before the first dismissal takes place. The number of days is dependent on the number of proposed redundancies. However, the consultation period can go beyond the prescribed minimum periods between the start of consultation and the dismissals taking effect.

- Between 20 and 99 redundancies: 30 days
- 100 or more redundancies: 45 days

16. What are collective consultations all about?

The goal of consultations is to avoid dismissals or reduce the amount of people being made redundant. The consultations should include:

- The reasons for the dismissal proposals
- The numbers and descriptions of proposed redundant employees
- The total number of employees of 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

Some of these can be taken into account as guidance for individual consultations as well.

17. What happens after consultation?

There must be adequate time given for representatives or employees to respond as well as thorough consideration of a response given back by an authority.

*Important: redundancy notices cannot be issued until collective and individual consultation has taken effect.

18. What if my employer did not consult?

It is not the case that an employer can argue consultation was futile. This is not a defence. Have a look at the section titled, "Remedies" directly below (19 onwards).

Remedies

19. When might you have a claim for unfair dismissal without 2 years service?

If you were dismissed for an automatically unfair reason. For example, if you've tried to enforce/apply statutory rights (e.g. Protected Characteristics under **Equality Act 2010**) and your employer dismisses you for doing that, that can raise a claim for unfair dismissal.

20. What are the remedies when you are unfairly dismissed?

You can be either reinstated, re-engaged or compensated.

21. What is reinstatement?

This is the re-employment of the employee back into the role he was unfairly dismissed from

22. What is re-engagement?

This is the re-employment of the employee into a different role to the one he was unfairly dismissed

23. What compensation are you entitled to under unfair dismissal?

You can either receive a basic award and or a compensatory award.

24. What is a basic award under unfair dismissal?

It is 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.

It's the same as the statutory redundancy payment

25. What is a compensatory award under unfair dismissal?

The compensatory award is a sum payable to the employee in terms of sections 123 and 124 of the ERA. 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.

26. What is wrongful dismissal?

If an employee has been made redundant, an employer has to give an employee the minimum the statutory amount of time in advance. The employer may ask the employee to work this or they may pay the employee wages in lieu. The minimum notice is as follows:

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

Your contract may stipulate longer notice periods in which case they should be applied instead.

If your employer doesn't give you this minimum notice, you may have a claim for wrongful dismissal

27. What are the remedies when you are wrongfully dismissed?

You can either claim damages or non-monetary remedies

28. What are damages for the purposes of wrongful dismissal?

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.

29. Are there any non-monetary remedies for wrongful dismissal?

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.

30. What is redundancy compensation?

If an employee has not received the correct amount of redundancy pay 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. If you have lost your job, it is best to create a paper trail of all your job applications. The compensation you are given may be dependent on your efforts to seek alternative employment.

31. What is the protective award for collective redundancies?

It is a statutory punitive award you are entitled to if the employer did not fulfil their collective redundancies obligations (see 14-17).

32. When should I seek legal advice?

As soon as possible. Remember you have 3 months less one day to first go to ACAS to start early conciliation and then make a claim before the Employment Tribunal.

Further help and information:

To work out the amount of redundancy pay you may be entitled to, please refer to the GOV.uk redundancy pay calculator:

<https://www.gov.uk/calculate-employee-redundancy-pay>

For more information and help on dealing with redundancies, please refer to the ACAS website:

www.acas.org.uk

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