

Whitepaper – Dismissal & Resignation in Breach of Contract

Dismissal in Breach of Contract

A dismissal without notice, or with inadequate notice, or with inadequate payment in lieu, other than when an employer is acting in response to a serious breach by the employee where gross misconduct has been substantiated or where there is a statutory ban, will be classed as a wrongful dismissal.

In most cases a claim for wrongful dismissal will be one for damages for breach of contract. Accordingly, in such a case the employee is subject to a requirement to mitigate his or her loss by looking for suitable alternative employment. However, if the contract allows a payment in lieu to be made different considerations may apply. This depends on whether the contract:

- Gives a discretion to choose to pay in lieu; or
- is drafted so that the employer must either pay in lieu or allow the employee to work his or her notice.

In the former case the employee will have to claim for damages for breach of contract and must mitigate his or her loss. In the latter case, if the employer dismisses the employee without notice, the employee may claim as a debt the amount that should be paid in lieu of the notice period. The amount of money recovered by the employee is the amount fixed by the contract and is not subject to a duty to mitigate.

Some employers may think there is no claim if there is no contract however this is incorrect. There is always an implied contract in the absence of an express one. In this situation, the employee will tend to claim for whatever their statutory minimum notice period would be which is one year for each complete year worked up to a maximum of 12 weeks. However, tribunals have been known to award higher amounts if the employee can justify that their job in that industry would normally attract a higher notice period.

Assuming that the action brought is one for compensation; the measure of compensation will often be confined to the loss to the employee caused by not receiving the notice due under the contract, i.e. it will be limited to benefits due under the contract.

Some contracts of employment include a liquidated damages clause that sets out precisely what the employee will be paid in the event that the employer terminates the contract in breach of contract. A liquidated damages clause will usually entitle the employee to receive more than he or she would otherwise be entitled to receive by suing for damages. Such clauses are particularly useful for senior executives.

There are other contractual benefits that may need to be taken into account in calculating the measure of damages to which the employee is entitled, these being:

- Potential increases in pay. Bonuses and performance-related pay.
- Loss of rights under share option schemes.
- Benefits in kind.
- Rights under pension schemes.
- Loss flowing from the breach of the implied term of the employer's good faith.

Resignation in Breach of Contract

If an employee resigns without giving the correct period of notice he or she will be in breach of contract. The notice period required of an employee who has been employed for at least one month will be either one week or, if greater, the period specified in the contract of employment.

If the employer suffers financial loss through the employee's breach of contract the employee will be liable to pay damages if the employer brings a claim for breach of contract. This will generally be an amount equivalent to the costs over and above what the employee would have been paid, had they worked their notice period. For example, overtime rates over and above the employee's standard wage, enhancements for agency staff etc. or even costs of pre-booked training or accommodation that can't be cancelled that the employee was due to attend during this time.

**This information is provided for general reference purposes only.
If you have a specific enquiry relating to this topic please contact Wirehouse on:**

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Dismissal and Resignation in Breach of Contract updated 15/07/2019