

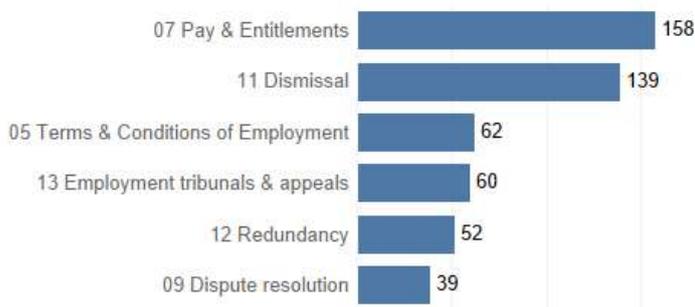
Unfair dismissals disguised as redundancy

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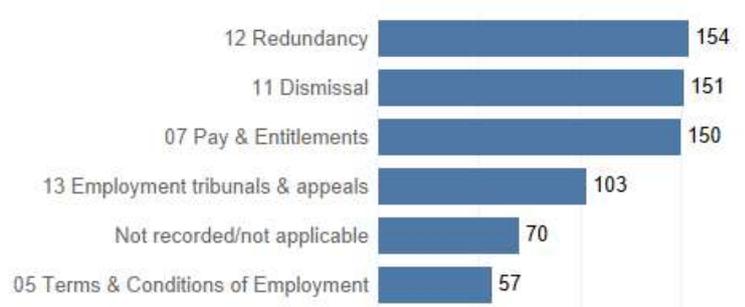
Since the beginning of the COVID pandemic, the demand for advice on redundancy issues has soared. Increased pressure on businesses means that they are having to make tough decisions to survive, particularly once the furlough scheme comes to an end. On a local level, redundancy has become the top employment issue that our clients seek advice on, compared to 5th place before lockdown. Compared to the 1Q20 there was a 3 fold increase in the number of redundancy related issues in the 3Q20 and redundancy remained the top issue in the 4Q20. Not surprisingly queries related to the Furlough Scheme also featured in the top 6 issues for the first time in the 4Q20

6 most common employment issues our advisors assist with in Barnet

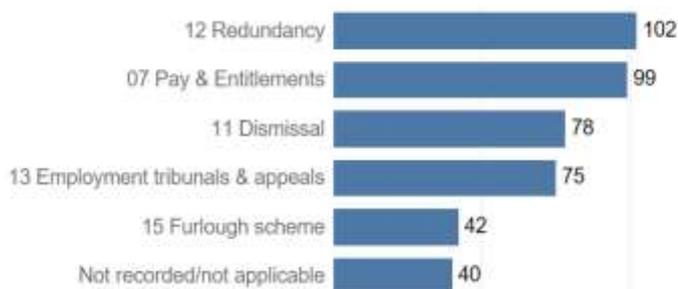
Dates: 01.01.2020- 25.03.2020



01.07.2020-25.09.2020



Dates: 01.10.2020 – 25.12.20



However, there is concern that the current climate may allow certain employers to mask unfair dismissals as redundancies. The difference is important, because unfair dismissals could potentially allow certain employees to claim an award in an Employment Tribunal.

A redundancy may in fact be an unfair dismissal if an employee was dismissed for the wrong reason, or if the right procedure was not followed. However, this will depend on their [employment status](#) and how long they were employed with that particular employer. Sometimes, being dismissed and then re-employed under a new or [amended contract](#) may be seen as unfair dismissal if the process is not carried out properly.

Employed for two years or more

Employees who have worked with their employers for two or more years will have the right to claim unfair dismissal if they have been dismissed without a fair reason, such as [genuine redundancy](#). This usually means that the role itself is no longer needed or available.

Employees in this category are also entitled to a fair and reasonable redundancy procedure. This includes notice and individual consultation during which the employer has to explain the alternatives (if any) that are available to the employee (e.g. retirement, redeployment, part time working), and the reasons behind the need to make redundancies. These reasons should be given to the employee in writing, for instance via email or a letter. The employee also has the right to be accompanied to the consultation, even if it is via video call.

The employer must also have made reasonable attempts to look for alternatives for the employee before deciding to make them redundant, such as other [suitable vacancies](#). They must make the employee fully aware of any such vacancies and how to apply. Whilst the increased financial pressure brought about by COVID-19 has meant that some of our clients have not been offered ideal alternatives, our advisers often make them aware of their right to a trial period.

Another key aspect is that the employer must operate a [reasonable selection process](#). This involves deciding on a pool of employees from whom the employer will then choose people to make redundant. The choice of the pool and the individual employees must be based largely on fair and objective selection criteria that can be measured, (such as performance, timekeeping or their disciplinary record), rather than on a subjective dislike of a particular employee. These criteria must also be applied fairly in practice.

Client testimony 1

Ms C felt that she had been unfairly selected for redundancy as a result of a dispute with her manager, rather than on the basis of any fair criteria. She has now shared her feedback on the advice she received:

'I knew that I was treated badly and I called Citizens Advice to see if my judgement was correct. The fact that the adviser said that I was absolutely correct gave me the confidence to seek the opinion of an employment law solicitor and there he said I have a very strong case.'

'I myself rang for advice because I was quite confident that I was not treated correctly and I have a keen interest for law, I then encouraged my fellow colleagues to call their citizens advice and speak to one of the advisers as I think they are a tremendous help.'

Employed for under two years

Although employees in this category generally do not have the right to the redundancy procedures described above, there are several exceptions.

One of these is [collective redundancy](#), affecting at least 20 people. These employees have the right to be represented at a group consultation with their employer at least 30 days before the redundancy (or 45 days if 100 or more people are being made redundant), and will be entitled to compensation ('protective award') if their employer fails to do so.

Another important exception is that employees cannot be discriminated against when selected for redundancy.¹

There are also some reasons for dismissal that the law classifies as [automatically unfair](#), regardless of how long the employee has been working for. These include part time/flexible working, trade union membership, being pregnant, asserting pregnancy/maternity/paternity/adoption/ family leave rights, asking for a legal right (such as the National Minimum wage) or for action to be taken on

¹ Hyperlink to next article

health and safety issue. In practice, employees in these categories can still be legally dismissed, as long as it was not for one of these reasons.

In addition, pregnant women and women on maternity leave have the right to the same fair redundancy procedure as employees who have been working for over two years.

Client testimony 2

When Ms L became pregnant, her employer told her that she could not afford to pay Statutory Maternity Pay (SMP) and that Ms L should instead claim “Maternity Allowance” so that the government would have to pay. Following Ms L’s refusal, the employer said that she would find a way to dismiss Ms L when she returned from Maternity Leave. In February 2018, Ms L started her Maternity Leave. The employer reluctantly paid her SMP, but commented to Ms L that she would never again hire someone who could become pregnant.

Around two months before Ms L was due to return from Maternity Leave, the employer informed her that her post no longer existed. She gave Ms L the options of either returning to work as a junior intern or handing in her resignation. Ms L declined to do either. In February 2019, on the day that Ms L was due to return, she was made redundant.

Citizens Advice Barnet assisted Ms L to pursue a Claim against her former employer in the Employment Tribunal for Pregnancy/Maternity Discrimination and Automatic Unfair Dismissal. Part of Ms L’s case was that her redundancy was a “sham” and that the real reasons for her dismissal was that her employer was angry that she had been obliged to pay SMP while Ms L was on Maternity Leave and was worried that Ms L might become pregnant again in future. Following negotiations via ACAS, Ms L’s Claim was settled for £6805 and a favourable reference.

If you think you have been unfairly dismissed

Employees who have been working for their employer for 2 years or more can take their case of unfair dismissal to the employment tribunals. Whilst employees who have worked for less than 2 years cannot do this, they can still make a claim for discrimination² if they have a strong case.

Before issuing a claim:

- If your workplace has a **trade union** representative, talk to them. If not, consider getting in touch with a trade union, particularly if there is one that oversees your industry specialism.
- If you have been selected for redundancy or made redundant and wish to challenge the fairness of the dismissal, you should appeal against the dismissal in writing.
- If you wish to pursue legal action, you first have to apply to the **Advisory, Conciliation and Arbitration Service (ACAS)**, who will try to resolve the issue through early conciliation, for example by facilitating dialogue through meetings etc. The Early Conciliation Notification form should generally be submitted within 3 months 1 day of the dismissal (or 6 months if it is a claim about redundancy pay).

² [Hyperlink to next article on discrimination](#)

- If early conciliation does not work, ACAS will issue you a certificate and you can make a claim to the employment tribunal within a set time. Please see our [website](#) for more information about employment tribunal procedure, including time limits, fees and costs, as well as the different awards available.

General recommendations

Whether a case is taken to the tribunal or not, there are several things that employees are entitled to if they are made redundant. Regardless of how long you have been employed for, it is worth checking the following:

1. **Check how much redundancy pay you get.** You're entitled to statutory redundancy pay, which is the minimum the law says you're entitled to, if you've been employed continuously for at least two years. The amount you will get depends on your age and how long you have worked for the company. You won't get statutory redundancy pay if you've worked for the company for less than two years, are self-employed or are in certain professions such as the armed forces or police.
You may also lose out on statutory redundancy pay if you turn down a suitable alternative job from your employer without a good reason. Your employer may also pay extra money on top of the statutory amount you're entitled to - this is called contractual redundancy pay. Some employees may be entitled to contractual redundancy pay even though they are not entitled to statutory redundancy pay.
2. **Furloughed? Make sure you get 100% redundancy pay.** If you were furloughed and then made redundant, your redundancy pay should be based on your normal wage.
If you were paid 80% of your wages while on furlough, your redundancy pay should be based on your full wage.
3. **Check your notice period.** If you've worked for your employer for at least a month you're entitled to a paid statutory notice period. If you've worked there for more than a month but less than two years, you have to be given a week's notice. For two years or more, it's a week for each full year you have worked, up to a maximum of 12 weeks. You may be entitled to a longer notice period as part of your employment contract.

Your notice period only starts when your employer says you'll be made redundant and gives you a finishing date - not when your employer says you're at risk of redundancy.

Your employer might decide to give you notice pay instead of your notice period - this is called 'pay in lieu of notice' and will be legal if the employer's right to do so is set out in your employment contract.

4. **Check other forms of pay you may be owed:**

Holiday pay: You'll be paid for any holiday you have left over when you leave. This should be at your normal rate's pay, even if you're currently furloughed on 80% of your pay. You can ask to take holiday during your notice period, but it's up to your employer to decide if you can take it then. Your employer can also tell you to use up any holiday you have left over,

but they must give you your notice. The notice must be at least twice as long as the holiday they want you to take.

You might also be entitled to accrued **sick pay, arrears of wages or lost pension** contributions.

5. **If your employer is insolvent**, you might be able to apply to the government [Insolvency Service](#) for certain kinds of pay owed by your employer.
6. **You might be entitled to paid time off to look for work.** If you've worked for your employer for two years at the end of your notice period, you're likely to be entitled to 'reasonable' time off to apply for jobs or go on training. You can take the time off at any time in normal working hours and your employer can't ask you to rearrange your work hours to make up the time off. When taking time off to look for work, you'll be paid at your normal hourly rate, but only for up to 40% of a week's work - for instance for up to two days if you work a five day week. See preparing for after redundancy for more information.
7. **Check if you've got legal help via your home insurance.** Often people get 'legal expenses cover' as part of their home insurance package, but many don't realise they can get free legal help to challenge their redundancy if they think it's discriminatory or unfair.

Other forms of insurance (such as "unemployment insurance" or "mortgage protection insurance") might be able to cover certain repayments for a limited period of time if the policyholder becomes unemployed unintentionally. It's worth checking the terms and conditions and speaking to your insurer if unsure.

If you have a **trade union** at work, you could also contact them. Your union can help you work out if you've got a claim, and support you through the process, for example by going to meetings with you or negotiating on your behalf.

8. **Check if you are eligible for [benefits](#).** If you have paid tax and national insurance contributions for two completed tax years, you may be eligible for New Style Job Seeker's allowance (JSA). This also requires registering with a job centre that will be responsible for monitoring your search for a new job.

If you do not meet the requirements for JSA, you may still be eligible for Universal Credit. There are also other benefits available for a range of specific circumstances (e.g. Personal Independent Payment (PIP) for disabilities, Carer's allowance....)

More information

If you need specific advice please contact one of our advisers:

<https://barnetcab.org.uk/contact-us/> 0300 456 8365

The Equality Advisory and Support Service also offers free information and advice on issues relating to equality and discrimination:

<https://www.equalityadvisoryservice.com/app/help> 0808 800 0082

ACAS offers free information and advice on problems relating to the workplace and employment more generally:

<https://www.acas.org.uk/contact> 0300 123 1100

Support us

Since the closure of the Barnet Law Service in 2014, Citizens Advice Barnet is one of the only sources of free legal advice in Barnet and relies on donations from local residents. If you'd like to support us, visit <https://barnetcab.org.uk/support-us-2/>