

Breach of Contract

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An Insight into a Breach of Contract

On the face of it this is a fairly straightforward concept to grasp – if you have a written employment contract in place and your employee doesn't keep to a term, they are in breach of contract.

If an employee quits without giving notice then, assuming there is no argument that they have been constructively dismissed, that employee would be in breach of their employment contract.

What can an employer do about such a breach?

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In theory the employer could sue for breach of contract, but in practice it would very rarely be a matter worth pursuing. An employer cannot sue an employee in the Employment Tribunal. Claims there are exclusively available to the potential/existing/ex-employee or worker. However, if an individual first lodges a breach of contract claim in the Tribunal, it is possible for the employer to then lodge a counter claim for breach of contract. This is a rare occurrence.



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More likely in the case of failure to give notice, an employer would be looking at a civil court claim, but it's rarely worth the hassle, time and expense. If this happens to you as an employer it's worth considering whether the employee's actions have cost you anything. If it is more a logistical nuisance than anything else, there is unlikely to be much to gain by pursuing the matter – frustrating as that answer is.

In cases where there is more at stake than someone just leaving a few weeks earlier than you had hoped, further action may be necessary. Perhaps even in the High Court depending on the nature and value of the dispute. Matters aren't always as straightforward as failure to give notice and there can be factors like breach of restrictive covenants or breach of confidentiality provisions involved too.

Breach of contract obviously goes both ways and, as well as written terms, there are implied terms of the employment contract which either party can be at risk of breaching. Most commonly it's the duty of mutual trust and confidence which is the subject of implied breach of contract claims (see **Insight of Constructive Dismissal** for more on this).

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An important point to note is that there is no minimum length of service requirement for breach of contract claims. In situations where you dismiss an employee with less than two years' service you're therefore generally safe from a claim for unfair dismissal. However do bear in mind that if you don't give or pay them in lieu of notice they could still lodge a breach of contract claim for the failure to give notice (which is classed as wrongful dismissal). If you have contractual procedures in place which you fail to follow, this could also give rise to a wrongful dismissal claim for those with less than two years' service.

Some typical breach of contract claims found in the employment arena include:

- Failure to give notice
- Breach of restrictive covenants (e.g. joining a competitor within the restricted period of a non-compete clause)
- Breach of a confidentiality or intellectual property clause
- Breach of the implied term of mutual trust and confidence
- Failure to pay, or underpaying, a bonus

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The Consequences - Compensation

A bit of a lawyer's answer, but it will depend entirely on the nature of the breach. Typically with breach of contract claims damages are limited to actual loss. The starting point is that compensation should be no more than necessary to put the claimant in the position they would have been in had the contractual provision been honoured. This goes back to some wonderfully old case law you can impress your friends with (no? just me?): *Robinson v Harman* (1848) 1 Ex 850.

What this means for the employer in a wrongful dismissal claim (failure to give or pay notice), for example, is that the employee will be awarded their notice pay, although if they have found another job before their notice period expires compensation will be reduced to reflect earnings from the new job.

In a situation where the employer has failed to follow a contractual dismissal procedure it is likely the employee will receive a minimal amount, usually salary to cover the period they would have remained employed for had the procedure been followed (perhaps one or two weeks' pay).

Awards for breach of contract claims in the Employment Tribunal are capped at £25,000 so if an employee's claim is worth more than this they are likely to bring it in the civil courts. They could do this and separately pursue other claims in the Tribunal, potentially leaving you facing two battles.

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Other Remedies

The House of Lords has ruled that if an employee is stigmatised in the job market due to having previously worked for a corrupt employer, they can claim “stigma” damages from their former employer if they are unable to obtain another job. The employer’s corrupt conduct is a breach of the implied term of trust and confidence (*Malik v BCCI SA* [1997] IRLR 462). However, in practice it will be difficult for employees to obtain “stigma” damages as it will be hard for them to prove that their inability to obtain other work was actually caused by the stigma of their previous employment, rather than other factors.

Injunctions are often sought in claims concerning breach of post termination restrictions, whereby the company obtains an order from the Court to stop the employee from acting in breach of contract.

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Time Limits

Breach of contract claims in the Employment Tribunal can only be brought after the employment has ended, and the time limit is the same as unfair dismissal, i.e. three months less a day from the termination date. Claims brought in the employment tribunal have to be “connected with employment” and there are specific claims which are excluded, such as claims relating to breaches of restrictive covenants, confidentiality obligations and terms requiring the employer to provide living accommodation.

Breach of contract claims in the High or County Courts can be brought whilst the employee is still employed and a six year time limit from the date of the breach applies.



If you would like more advice regarding a breach of contract, get in touch for a friendly and informal chat today.

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