

Labour · July 2026

Dismissed in a restructuring: with severance already paid, is there still a claim

Severance, pay in lieu of notice, and damages for unfair dismissal are three separate sums resting on different statutes. Receiving the first two therefore does not answer the question about the third. The Supreme Court accepts restructuring as an adequate reason, but the restructuring has to be real and the selection of who goes has to follow some criteria.



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An employee dismissed because the company says it is restructuring, who then receives severance and pay in lieu of notice in full, will often assume the matter is closed: the money arrived and the employer had a reason. In law those payments answer only two questions. A third question has not been touched.

An employee who keeps the three apart knows which entitlements are simply owed without proving anyone was at fault, and which one has to be established. One who does not tends to sign the matter closed, on the view that a company with a reason owes nothing further, when the particular facts of their own case might well point the other way.

In this article I will set out, in plain terms, which statute each of the three sums comes from and how they differ, and what the Supreme Court actually measures when deciding whether a restructuring is an adequate reason or merely a stated one, comparing cases the employer won with cases where the explanation carried no weight. I will also cover the receipt that can genuinely close off the claim.

Chapter 1

The heart of the matter

The first thing to be clear about is that the question whether the employer had adequate reason to dismiss and the question what the employee is entitled to receive are answered separately, under different statutes. The two answers need not point the same way.

Severance and pay in lieu of notice arise from the dismissal itself and require no finding that the employer did anything wrong or unfair. Damages for unfair dismissal require proof that the stated reason genuinely existed and that it was serious enough to warrant dismissal. Fall short on either limb and the standard for an award has not been met.

Note

The commonest error runs in both directions: treating the payment of severance as an admission that the dismissal was unfair, and treating a business reason as closing off every claim. Neither is right.

Chapter 2

The first sum: severance

Severance is an entitlement under Section 118 of the Labour Protection Act. It is tied to length of service on a sliding scale, and tied to one fact only, namely whether there was a dismissal. It is not tied to anyone's fault.¹

¹ **Labour Protection Act B.E. 2541 (1998), Section 118, paragraph two** provides:

Termination under this section means any act by which the employer no longer allows the employee to work and no longer pays wages, whether by reason of the expiry of the contract of employment or for any other reason, and includes the case where the employee does not work and receives no wages because the employer is unable to continue its business.

The words for any other reason are wide enough to cover restructuring, the closing of a unit, and headcount reduction. Restructuring has therefore never been a reason for withholding severance. The grounds that do remove the entitlement are the six in Section 119 of the Labour Protection Act, and all six concern misconduct by the employee. None of them mentions the employer's commercial position.

Chapter 3

The second sum: pay in lieu of notice

This sum comes from the rule that a contract of employment without a fixed term must be terminated on notice. An employer who wants the employee to leave at once may do so, but must pay for the period the employee should have been allowed to work.²³

Like severance, this sum does not turn on whether the dismissal was fair. It turns only on whether proper notice was given.

^{2.} **Civil and Commercial Code, Section 582** provides:

If the parties have not fixed the duration of the hire, either party may terminate by giving notice at or before one of the times for payment of remuneration, to take effect at the next following time for payment; but no party need give more than three months' notice.

Moreover, where such notice is given, the employer may pay the employee the whole of the remuneration payable up to the time of termination stated in the notice, and release the employee from work at once.

^{3.} **Labour Protection Act B.E. 2541 (1998), Section 17/1** provides:

Where the employer terminates the contract without giving the employee the advance notice required by Section 17 paragraph two, the employer shall pay the employee an amount equal to the wages the employee would have received from the day the employee is required to leave until the day the termination takes effect under Section 17 paragraph two, and shall pay it on the day the employee is required to leave.

Chapter 4

The third sum: damages for unfair dismissal

The third sum appears nowhere in the Labour Protection Act. It sits in a different statute, Section 49 of the Act on Establishment of Labour Courts and Labour Court Procedure, and that fact is what makes sense of everything else here.⁴

Notice that Act on Establishment of Labour Courts, Section 49 directs the Court to take into account the severance pay to which the employee is entitled. The statute therefore assumes the employee has received severance and still goes on to provide for damages. Had receiving severance closed off this sum, there would have been no reason to write that line at all.

Chapter 5

The first two sums do not answer the third

Supreme Court Judgment No. 2347/2543⁵ shows the point from the other side. The employer dismissed for lack of liquidity with no new investor. The Court accepted that as an adequate reason,

⁴. Act on Establishment of Labour Courts and Labour Court Procedure B.E. 2522 (1979), Section 49 provides:

In a case where the employer has dismissed the employee, if the Labour Court is of the view that the dismissal was unfair to the employee, the Court may order the employer to take the employee back at the wage received at the time of dismissal. If the Court is of the view that employer and employee cannot work together any longer, the Court shall fix the damages the employer is to pay instead, having regard to the employee's age, length of service, the hardship suffered by the employee on dismissal, the underlying cause of the dismissal, and the severance pay to which the employee is entitled.

⁵. Supreme Court Judgment No. 2347/2543

so the dismissal was not unfair, then held that the reason was not one of the Labour Protection Act, Section 119 grounds and so did not relieve the employer of severance or pay in lieu of notice.

Note

That was a case where the employee received the first two sums but not the third, which is proof enough that the three travel separately rather than as a set.

Chapter 6

What unfairness is measured against

Act on Establishment of Labour Courts, Section 49 does not define unfairness, so the case law supplies it. Supreme Court Judgment No. 3738/2536⁶ explains it as dismissal without cause, or with some cause but not one necessary or sufficient to warrant dismissal.

Supreme Court Judgment No. 4099/2561⁷ states the same test in words that can be applied directly: whether a dismissal is unfair turns principally on its cause, that is, whether the employer had a necessary or adequate reason serious enough to require the dismissal.

⁶. Supreme Court Judgment No. 3738/2536

⁷. Supreme Court Judgment No. 4099/2561

Note

The question is not merely whether the company was in difficulty, but whether the difficulty was such that this employee had to go. Those are different questions, and a great many cases turn on the second.

Chapter 7

Restructuring can genuinely be an adequate reason

It should be said plainly that the case law accepts restructuring as an adequate reason in a good many cases. Supreme Court Judgment No. 2124/2555⁸ is a clear example. The employer reorganised its whole management structure, reduced headcount, closed and shrank units, and cut departments and divisions down to the level of functions. The purchasing division the employee headed became a purchasing function, and the post of purchasing division manager no longer existed.

What the Court emphasised was that the exercise did not single this employee out. It followed that the dismissal had an adequate reason and was not unfair.

Supreme Court Judgment No. 667/2544⁹ runs the same way on facts that arise more often. Warehouses and staff were merged with another company until one warehouse and one warehouse

⁸. Supreme Court Judgment No. 2124/2555

⁹. Supreme Court Judgment No. 667/2544

manager post remained. The employer considered that the other candidate was better suited on warehouse management and computing, kept that person, and dismissed this employee, with nothing to suggest discrimination or victimisation. The Court held there was a necessary and adequate reason.

Note

The lesson is that keeping someone else instead of you does not by itself make the dismissal unfair, provided the choice had a reason behind it and was not victimisation.

Chapter 8

But the restructuring has to have actually happened

Supreme Court Judgment No. 7939/2540¹⁰ is the one to read most closely, because the employer paid in full and still lost. The employer said it had to shrink the organisation and cut headcount. But the facts found below were that the customer relations unit the employee ran had not been closed at all, only renamed, and the employer had appointed someone else to her post without adequate reason, although she had never caused the company any loss.

The Court's own words were that although the employer dismissed her while paying severance and a special assistance payment, the dismissal still lacked an adequate reason, and so

¹⁰. Supreme Court Judgment No. 7939/2540

was unfair.

Note

That is the direct answer to the question in the title of this article. Paying severance and an assistance payment does not turn a dismissal that lacked an adequate reason into one that had it.

Chapter 9

A case where the restructuring explanation carried no weight

Supreme Court Judgment No. 4099/2561 shows how closely the Court will examine a restructuring explanation. The employer said it had been restructuring since 2013. The facts were that only three employees had resigned, no unit had been closed or reduced, and the 2015 profit and loss statement showed the company trading at a profit.

The Court went on to note that the dismissal came little more than two months before the company returned to profit, which showed that this dismissal was not what restored profitability. The reason was therefore no more than a policy of trimming cost, and nothing showed what steps the employer had taken to reduce expenses, or on what basis it had selected who would be dismissed. The Court held the reason was not adequate and the dismissal was unfair.

Supreme Court Judgment No. 3974/2545¹¹ runs the same way. The employer pleaded overstaffing and an economic downturn requiring restructuring to control costs. The facts accepted were that the company was not making losses but a profit, that no criteria had been set, that no appraisal of this employee had been carried out, and that after the dismissal someone else was taken on to do the work.

Chapter 10

The four questions that decide these cases

Laying the five cases side by side, the Court asks the same set of questions in each. Only the answers differ.

1. Did the restructuring actually happen? Was a unit genuinely closed or reduced, or merely renamed?
2. Did the employee's post genuinely disappear, or does it still exist with someone else in it?
3. Was this employee singled out, or did everyone in the affected unit go?
4. Were there criteria and a process for choosing who would be dismissed, and had other ways of cutting cost been tried first?

¹¹. Supreme Court Judgment No. 3974/2545

Note

The fourth is where employers most often fall short, and it is the point the Court in 4099/2561 raised expressly, saying nothing showed how the selection had been made.

Chapter 11

The trap in the receipt and the settlement letter

This matters more than people expect, because it is the point at which the claim can genuinely be closed off even where the dismissal was unfair.

In Judgment No. 4099/2561 the employer had a letter stating that this payment was the final payment in full of all the employee's claims under the contract of employment. The Court held that such wording meant only that the employee acknowledged receiving in full what the contract entitled her to. It did not extend to waiving damages for unfair dismissal, because that right arises from not having been treated fairly on dismissal rather than from the contract. She therefore retained the right to sue.

Judgment No. 2666/2556¹² shows the other side. There the employee accepted an assistance payment after dismissal without any reservation or objection at all. The Court treated that as an

¹². Supreme Court Judgment No. 2666/2556

agreement to settle the dismissal, meaning no further claim about it was intended, and held he could not bring the case.

Note

The line falls on what the document says and on whether anything was reserved. In practice: do not sign anything in the room that day, ask for time to read it, and if the money is to be accepted, accept it with a written reservation about the unfairness rather than in silence.

Chapter 12

If the restructuring comes from machinery or technology

There is one situation in which the statute imposes extra duties on the employer, and it is becoming more common: reorganisation arising from the introduction or change of machinery or

technology which requires headcount to be cut. ^{13 14}

Note

If your case falls here, check two things: whether the labour inspector was notified sixty days in advance, and, if you have more than six years' service, whether the extra special severance under Labour Protection Act, Section 122 was paid. Neither depends on fairness, and both are frequently overlooked.

Chapter 13

How the Court fixes the damages

Act on Establishment of Labour Courts, Section 49 directs the Court first to order reinstatement, and only if employer and employee cannot work together any longer to fix damages

13. Labour Protection Act B.E. 2541 (1998), Section 121 provides:

Where the employer will dismiss employees by reason of reorganising its work units, production process, distribution or services owing to the introduction or alteration of machinery or technology, which requires a reduction in the number of employees, Section 17 paragraph two shall not apply, and the employer shall notify the labour inspector and the employees to be dismissed of the dismissal date, the reason for it, and the names of those employees, not less than sixty days in advance.

Where the employer fails to give the employees such advance notice, or gives less notice than paragraph one requires, then in addition to severance under Section 118 the employer shall pay special severance in lieu of notice equal to sixty days of the final wage.

14. Labour Protection Act B.E. 2541 (1998), Section 122 provides:

Where the employer dismisses an employee under Section 121 and that employee has worked continuously for more than six years, the employer shall pay special severance in addition to severance under Section 118, of not less than fifteen days of the final wage for each full year of work, provided that special severance under this section shall not exceed three hundred and sixty days of the final wage.

instead, having regard to age, length of service, hardship, the underlying cause, and the severance to which the employee is entitled.

One ruling in Judgment No. 4099/2561 is worth knowing. The Labour Court there considered that the sums paid after dismissal came to 11.9 times the final monthly salary, thought that appropriate and fair, and awarded no unfair dismissal damages on top. The Supreme Court disagreed, because the figure it had relied on included wages, pay in lieu of notice, pay for untaken annual leave and other sums the employee was entitled to under the labour protection legislation and the contract. Refusing damages on that basis did not comply with Act on Establishment of Labour Courts, Section 49.

Note

The principle is that sums already owed cannot simply be set off against damages for unfairness, because the employee was entitled to them whether the dismissal was fair or not.

Chapter 14

Routes and time limits

The three sums can travel by different routes. Severance and pay in lieu of notice may be claimed before the labour inspector under Section 123 of the Labour Protection Act, or by suing in the Labour Court. Damages for unfair dismissal under Act on

Establishment of Labour Courts, Section 49 must be brought in the Labour Court; the labour inspector has no power over that question.

Judgment No. 3974/2545 also held that no statute requires a Act on Establishment of Labour Courts, Section 49 unfair dismissal claim to be filed with an official or to go through any prior step, so it may be brought in the Labour Court directly.¹⁵

That fifteen per cent is well above the ordinary default rate and runs from the date of default, which on dismissal means within three days of the dismissal under Labour Protection Act, Section 70 paragraph two. Over a matter that stretches into years it makes a real difference to the total.

Chapter 15

What to do on the day you are told

In practice, what decides the case is often settled on that first day, before anyone has taken advice.

Always ask for a letter of dismissal that states the reason in writing, because the reason the employer commits to that day is the ground it must stand on in court. If it later emerges that no

¹⁵. Labour Protection Act B.E. 2541 (1998), Section 9, paragraph one provides:

Where the employer fails to return a cash guarantee under Section 10 paragraph two, fails to pay under Section 17/1 on terminating without notice, or fails to pay wages, overtime, holiday pay, holiday overtime and other sums payable under this Act within the time set by Section 70, or severance under Section 118, or special severance in lieu of notice or special severance under Sections 120, 120/1, 121 and 122, the employer shall pay the employee interest during the default at fifteen per cent per year.

unit was closed, or that someone was brought in to do the work, that letter becomes the strongest document you hold.

Note

And do not sign a waiver in the room. Ask for time to read it through. Asking for time is not refusing the money, and it costs you nothing.

Chapter 16

In summary

It comes together as one picture. Severance under Section 118 of the Labour Protection Act, and pay in lieu of notice under Section 582 of the Civil and Commercial Code read with Section 17/1 of the Labour Protection Act, require no proof of anyone's fault.

Damages for unfair dismissal under Section 49 of the Act on Establishment of Labour Courts require proof that the stated reason existed and was serious enough to warrant dismissal.

Restructuring genuinely can be such a reason, as in Judgments No. 2124/2555 and No. 667/2544, but it must be a real restructuring carried out on some basis, not a renamed unit as in Judgment No. 7939/2540, nor a plea of losses by a company trading at a profit as in Judgments No. 4099/2561 and No. 3974/2545.

Someone who understands this will not sign the matter closed on the first day on the view that the money arrived and so it is over, and will know what to keep from that day onward. Because in the

end, a restructuring dismissal is not decided by whether the company had a reason, but by whether that reason actually happened or merely appeared in the letter.



Frequently asked questions

Q The company says it restructured and paid severance in full. Can I still sue for unfair dismissal?

A Yes, because the two rights sit in different statutes: severance in Section 118 of the Labour Protection Act, and unfair dismissal damages in Section 49 of the Act on Establishment of Labour Courts. In Judgment No. 7939/2540 the employer had paid severance and a special assistance payment, and the Court still held the dismissal unfair, because the unit had not in fact been closed.

Q I signed a receipt saying it was the final payment. Have I lost the claim?

A It depends on the wording. In Judgment No. 4099/2561 the letter said the payment was the final payment in full of claims under the contract of employment, and the Court held that did not extend to waiving unfair dismissal damages, since that right does not arise from the contract. But in Judgment No. 2666/2556 the employee took an assistance payment with no reservation at all, and the Court treated the matter as settled, so he could not sue.

Q The company really was making losses. Can the dismissal still be unfair?

A Genuine losses can be an adequate reason, and in Judgment No. 2347/2543 a lack of liquidity was accepted as one, so the dismissal was not unfair. But the second question remains: were the losses such that this employee had to go, and was there any basis for choosing? In Judgment No. 4099/2561 the Court held that where nothing showed how the selection had been made, the reason was not yet adequate.

Q Must I go to the labour inspector before suing for unfair dismissal?

A No. Judgment No. 3974/2545 held that no statute requires a Act on Establishment of Labour Courts, Section 49 unfair dismissal claim to be filed with an official or to follow any prior step, so it may go straight to the Labour Court. For severance and pay in lieu of notice you may choose between the labour inspector under Section 123 of the Labour Protection Act and the court.

In summary

If this is happening to you, or you are weighing what to do next, you are welcome to get in touch.

An initial conversation carries no obligation, and what you share is kept confidential as a lawyer's duty requires.



What to do next

- 1 Ask for a letter of dismissal stating the reason in writing, and if you were told verbally, ask for it in writing.
 - 2 Do not sign a waiver that day. Ask for time to read it through first.
 - 3 If you are going to accept the money, record a written reservation about the unfairness rather than accepting in silence.
 - 4 Keep the organisation chart and the company's job advertisements so far as you can access them, since they show whether the post really disappeared.
 - 5 If you have more than six years' service and the restructuring came from machinery or technology, check whether the extra special severance was paid.
 - 6 Take advice before time runs, because the three sums travel by different routes with different time frames.
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Notes and references

Statutes and judgments cited in this book, with the chapter and footnote number.

Statutes cited

1	Labour Protection Act B.E. 2541 (1998), Section 118, paragraph two	Chapter 2 · note 1
2	Civil and Commercial Code, Section 582	Chapter 3 · note 2
3	Labour Protection Act B.E. 2541 (1998), Section 17/1	Chapter 3 · note 3
4	Act on Establishment of Labour Courts and Labour Court Procedure B.E. 2522 (1979), Section 49	Chapter 4 · note 4
5	Labour Protection Act B.E. 2541 (1998), Section 121	Chapter 12 · note 13
6	Labour Protection Act B.E. 2541 (1998), Section 122	Chapter 12 · note 14
7	Labour Protection Act B.E. 2541 (1998), Section 9, paragraph one	Chapter 14 · note 15

Supreme Court judgments cited

1	Supreme Court Judgment No. 2347/2543	Chapter 5 · note 5
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2	Supreme Court Judgment No. 3738/2536	Chapter 6 · note 6
3	Supreme Court Judgment No. 4099/2561	Chapter 6 · note 7
4	Supreme Court Judgment No. 2124/2555	Chapter 7 · note 8
5	Supreme Court Judgment No. 667/2544	Chapter 7 · note 9
6	Supreme Court Judgment No. 7939/2540	Chapter 8 · note 10
7	Supreme Court Judgment No. 3974/2545	Chapter 9 · note 11
8	Supreme Court Judgment No. 2666/2556	Chapter 11 · note 12

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Published July 2026

Supreme Court judgments can be read in full through the Supreme Court's judgment search
(deka.supremecourt.or.th)



From the author

If this is happening to you

If you are in this situation, or you are unsure whether the evidence you hold is enough, you are welcome to ask. We can look at what your documents and messages establish as a matter of law, and what options lie ahead.

What to gather before seeking advice

- ☐ The original letter of dismissal and every document handed over that day, including the covering email, because the reason stated in it is the ground the employer must stand on.
 - ☐ Anything you signed, or were asked to sign and have not, particularly a receipt or settlement letter, and a copy of it if you did sign.
 - ☐ Proof of every sum received, with a breakdown showing which is severance, which is pay in lieu of notice, and which is something else.
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- ☐ At least six months of payslips, and the employment certificate or contract, to establish the final wage rate and the start date.
- ☐ Evidence of whether your unit or post still exists: organisation charts before and after, job advertisements for the same role, or information that someone has taken over the work.
- ☐ Who else went with you and who stayed, so far as you know, because singling out an individual is a point the Court weighs heavily.
- ☐ A rough timeline of when you were told, when the dismissal took effect, and when each sum was paid, since this bears on interest and on time limits.

1

Tell us the matter and any deadlines

2

Agree the scope and fees

3

Carry out the work and report

An initial consultation carries no obligation, and everything discussed is confidential under professional privilege. Call 065-145-5546 or reach us through whichever channel suits you.

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This article is general information, not advice on any specific case. A small change in facts can change the entire legal outcome, and the law may be amended, so please consult an attorney before acting.





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