

Should they stay or should they go? – what you should know

One of our employees is performing poorly and we don't think that they will improve. Can we terminate their employment?

The dismissal of an employee for a reason other than one allowed by law, without following the correct procedure, or without giving adequate notice could lead to a claim for wrongful or unfair dismissal in the Employment Tribunal which could lead to the following negative consequences:

- Risk of having to pay compensation – This would usually be based on loss of earnings and company benefits following any unfair dismissal and could be substantial. For unfair dismissal there is a cap on the compensatory award (£65,300 for dismissals taking place after 1 February 2010). However, compensation in respect of some dismissals is not capped and compensation for any dismissal which is also found to be discriminatory is also uncapped.
- Regardless of whether or not an employee's claims succeeds, the legal costs of defending it are likely to be significant;
- Wasted management time
- Potential damage to reputation;
- Lowered workplace morale.

What can I do to reduce the possibility of an employee bringing a claim?

You may wish to consider the following:

- If you are considering a termination of employment, what would be the reason, and would this be a

potentially fair reason? Potentially fair reasons include (i) Conduct (to include performance and misconduct); (ii) Retirement; (iii) Capability; (iv) Redundancy; (v) illegality– e.g. the employee's work permit expires and they no longer have the right to work in the UK);

- Follow a fair procedure. Unless the employee is guilty of gross misconduct, you will probably be obliged to give the employee a number of warnings and an opportunity to improve. For guidance on the procedure that should be followed to dismiss an employee for poor performance, you should consider with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
- Employers are obliged by law to set out in writing basic details of their disciplinary/dismissal procedures. You should consider your own procedures when deciding on any dismissal process. This will in most cases involve inviting the employee to a hearing to discuss the potential grounds for dismissal and giving them an opportunity to respond to matters before a decision is made.
- You must give the employee sufficient information in writing about the reason for their possible dismissal, and give them an opportunity to consider this and prepare in advance of the hearing.
- Employees should be given a right of appeal against any dismissal, usually to a more senior manager.
- Unless the employee is guilty of gross misconduct, they should normally be allowed to work their notice period of paid in lieu of notice. However, you should consider the effect of this on the contract of employment and in particular on any ongoing contractual obligations that you hope will bind the employee after employment ends (eg restrictive covenants).

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- It would be advisable to carefully consider whether you have grounds for any dismissal and the procedure that you would follow.

I don't necessarily want to go through all these steps. Is there a shortcut?

We recognise that it will not always be practically possible to go through all the necessary stages of a disciplinary procedure. This might not be appropriate for a number of reasons, for example, the relationship may have broken down, or the business may have an urgent need to replace the employee in question. Further, the full process may not be appropriate in respect of the dismissal of senior staff or directors of the business. In these situations, it may be possible to have a "without prejudice" and "off the record" conversation with the employee concerned to try to agree terms by which they leave the business. This is a potentially risky course of action as there are no guarantees that the employee will not seek to rely upon the contents of such discussions at a later stage, in the event that negotiations break down.

However, it may be possible to reach a financial settlement with an employee in order to secure their departure from your business without any nasty repercussions. If an agreement is capable of being reached you should ask the employee to enter into a compromise agreement with the business in order to protect it so far as possible from future claims. The employee will need to obtain their own legal advice on the compromise agreement in order for it to be legally binding, and it is normal for the employer to make a contribution towards the employee's legal fees. The business should take legal advice itself on this process.

Practical suggestions

- Ensure that you have written disciplinary/dismissal procedures in place, that your employees are aware of them, and that managers are trained in using them.

- Try to resolve problems as soon as they emerge by an informal meeting with the employee, but make it clear to the employee that a formal disciplinary process may still have to be followed if the issue cannot be resolved informally. Involve HR and legal advisors at an early stage as the procedural aspects of disciplinary/dismissal procedures can be complicated.
- Keep a record of any e-mails, letters, conversations or meetings (formal or informal) with employees relating to their performance.
- Conduct regular appraisals with employees, give them an honest assessment of their performance and allow them to raise concerns. Give praise when praise is due, but try not to give flattering performance reviews if they are not deserved as it could make proving a fair dismissal in the future much more difficult.
- Do not sideline an employee in an attempt to get them to resign. If the employee can demonstrate that they resigned for such a reason, they could have a claim for constructive dismissal.

The above information is for general guidance only and does not replace the need to obtain specific advice about any given situation.



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