

Performance Management

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An Insight into Performance Management

Once an employee reaches two years of employment they are protected from unfair dismissal. For employers this means that in the first two years you can relatively easily dismiss an employee. As long as there are no glaring risks like discrimination or whistleblowing, you can in theory carry out a Lord Sugar styled “The Apprentice” scenario and give an employee the pointy fingered “you’re fired” exit without fear of facing a successful Employment Tribunal claim. Needless to say this might not be conducive to a happy workforce and you should therefore always try to act in a reasonable manner.

Once an employee reaches the Holy Grail of two years’ complete service, there are only a limited number of fair reasons for which you can dismiss them. Performance is one of them, and it’s the Employment Rights Act 1996 which gives you as an employer the right to dismiss on this basis. When relying on performance as the reason to dismiss, you must be able to show that actually was the reason for dismissal, and that you had a reasonable belief that the employee was underperforming.

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The ACAS Code applies to performance management and, although it isn't law, a failure to follow it will count against you. An unreasonable failure to follow it can also result in an increase in compensation by up to 25%. The key points to bear in mind when it comes to performance management are:

- You must carry out a reasonable investigation – this usually involves gathering all of the relevant evidence, meeting with the employee and providing them with evidence of their underperformance;
- You must give your employee an opportunity to improve, in fact ACAS says at least two warnings should be given. Typically clear objectives for improvement should be set as well as a reasonable timescale for achieving them;
- You should consider what support and additional training could be provided to help your employee improve;
- You should monitor and assess performance throughout the period set for improvement - holding regular review meetings is ideal;
- If after all of the above the employee fails to improve sufficiently, you can move to a final hearing to consider dismissal on the grounds of poor performance.

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Performance is a difficult issue to manage: no one likes to hear that they aren't living up to expectations and if a process is handled badly it can create resentment and leave little chance of a successful outcome. It's important therefore to ensure that you do the best you possibly can to evidence to the individual exactly what the issues are, what is expected, and what you will do to support them. Making it a positive experience is a challenge, but there are ways of reducing the negative impact.



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The Consequences

Compensation

If an Employment Tribunal finds that an employee wasn't in fact dismissed because of poor performance, but for some other reason, that would be an unfair dismissal. Any disgruntled employee is at risk of lodging an employment tribunal claim.

If the employee has less than two years' service then often their only claim would be for breach of contract, which commonly means their notice pay. If you dismissed with notice (which would typically be the case in poor performance situations) then they are unlikely to progress very far with a claim. All this assumes that the employee does not also have grounds to bring a claim for automatic unfair dismissal, such as whistleblowing, or for discrimination, where further compensation could be awarded. An employee does not need to have two years' service to bring discrimination claims and most claims of automatic unfair dismissal.

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If the employee does have two years' service or more then they can bring an unfair dismissal claim. In such cases the employee will be able to claim compensation for loss of earnings, limited to the statutory cap. The cap usually increases each April. As at April 2019 the cap is £86,444 or one year's salary, whichever is lower. They would also be entitled to claim a basic award which is based on their age and length of service (calculated on a similar basis to statutory redundancy pay, without the cap on weekly pay), subject to a maximum of £15,750 (as at April 2019).

It is important to note that the Employment Tribunal doesn't generally dole out awards simply to punish the employer. In other words, a successful Claimant can only claim for their actual loss of earnings, and anticipated future loss of earnings (as judged by the Tribunal). As soon as the individual starts a new job and covers their lost salary, they have reached the limit of the loss they can claim. Claimants are also under a positive duty to mitigate their loss, so compensation may be reduced if they have not made reasonable efforts to find alternative work and replace their lost earnings.

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Reductions

If it turns out that an employee definitely was dismissed for performance reasons, but that the process which led to their dismissal was unfair then there could still be a finding of unfair dismissal.

Compensation in cases of procedural unfairness tends to be limited though, due to what are known as Polkey reductions. In cases where the tribunal considers that the dismissal would have occurred in any event but would have been delayed, compensation may be limited to an amount reflective of the additional period of time the employee would have been employed had a fair procedure been carried out.

EXAMPLE

An employer fails to carry out a fair process and proceeds straight to dismissing their badly underperforming employee. The Tribunal finds that even if the employee had been provided with evidence and attended a meeting to make their representations, they still would have been dismissed although it would likely have been two weeks later. This would be a procedurally unfair dismissal but the employee would receive no more than two weeks' pay as compensation.

In other cases where the tribunal considers that there is a chance that the employee would have retained their job if the employer had followed a fair procedure, the tribunal will assess that chance as a percentage and adjust compensation accordingly.

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Other Implications

Of course the potential financial compensation an employee might be able to recover isn't the only, and sometimes not even the primary, consideration.

- Tribunal claims bring with them a myriad of potential downsides, including:
- Unwanted publicity
- Taking up management time dealing with the claim
- Legal fees
- Poor morale/resentment among the workforce



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Time Limits

A claim can only be brought once the employee's employment has ended (although the ACAS Early Conciliation process could be started whilst they are still employed).

The time limit for bringing an unfair dismissal claim is three months less a day from the date dismissal takes effect (i.e. after notice has expired, or the date of immediate termination if notice is paid in lieu). For example, if the termination date was 4 January, the deadline for the employee to submit a claim is midnight on 3 April.

It's a necessary step to follow the ACAS Early Conciliation process first, and that stops the clock (usually for 28 days). Early Conciliation can skew the timelines significantly, and we have come across other issues (like administrative errors) which have meant that a valid claim has only come to attention of the employer some 6 months after termination. Do bear in mind therefore that you can no longer assume the coast is clear a strict three months following the termination date.

However, if an individual does present their claim out of time, there are very limited grounds on which a claimant can apply for an extension of time, and it is rarely granted.

If you would like more advice regarding performance management, get in touch for a friendly and informal chat today.

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