



Berg Kaprow Lewis

Dismissing employees

Contrary to popular wisdom, fair-minded employers have little to fear from employment-protection legislation. The issues are fairly straightforward and most problems can be avoided by following a few simple rules.

This briefing outlines:

- Dismissing employees for misconduct.
- Other forms of 'fair' dismissal.
- Unfair, unlawful and wrongful dismissal.
- Handling complaints.

1 Misconduct

A friendly word from a supervisor or manager can resolve most problems (see **Everyday workplace policies**). But, if necessary, dismissing an employee for misconduct is usually relatively straightforward.

1.1 Write down **clear, reasonable** rules and procedures. They should include:

- What the disciplinary offences are.
- What procedures will be followed if an employee commits a disciplinary offence. These procedures must now be at least as good as the statutory minimum (see **Discipline and grievance issues**).
- Which offences provide grounds for summary dismissal.
- What rights of representation and appeal employees have.

1.2 Make employees **aware** of the rules.

- Give each employee a copy of the rules and explain them. It is difficult to discipline

employees for breaking rules they are not aware of.

- You are legally required either to include the rules and procedures in the written terms of employment or make it plain where a copy is available.

1.3 Most offences will lead to a series of oral and written **warnings** before any dismissal.

- Investigate the circumstances before taking any formal action.
- Typically, you might give an employee one spoken warning and two written warnings before dismissal. Spoken warnings will often be removed from an employee's disciplinary record after six months, and written warnings after 12 months (if there are no further disciplinary offences).

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- A formal warning should include a time limit within which you expect improvement, and an explanation of the consequences otherwise.
- Apply the rules fairly and consistently. An employee who can show that you applied the rules inconsistently may be able to claim unfair dismissal (see 4).
- Keep written records of all disciplinary action you take. Include a record of any steps you have taken to investigate and address the cause of the problem.
- All employees have the right to be accompanied by a colleague or trade union official at any disciplinary hearing.
- Remind employees of their right to explain their conduct or suggest counter-proposals.

1.4 'Gross misconduct' can provide grounds for summary dismissal, but the statutory procedure must still be followed.

- Gross misconduct typically includes theft, fighting or physical assault, drunkenness or drug-taking, wilful damage to company property, and intentional or reckless disregard for safety rules.
- In most cases the standard procedure involves three steps: a written explanation of the problem, a face-to-face meeting, and an opportunity to appeal must be followed.
- In exceptional circumstances, you might be justified in using a 'modified', two-step procedure — a written explanation of the problem, with details of why you think the employee is the guilty party, and an opportunity to appeal.

Short service

Employees with less than one year's service cannot usually claim unfair dismissal. However:

- You are now legally obliged to apply the new statutory minimum procedures to all employees, regardless of length of service. Although there are exceptions (see **Discipline and grievance issues**), in most cases this means applying the 'three-step' procedure.
- Any employee dismissed for unlawful or inadmissible reasons (see 4.2 and 4.3) can claim unfair dismissal, regardless of length of service.
- Short service employees are entitled to the appropriate notice (see 1.6).
- Any employee with at least one month's service is protected against unreasonable dismissal on certain medical grounds.

- In very few circumstances — such as where you reasonably believe that there is a serious danger of violence or harassment, to you or a third party, or of damage to property — you are exempted from the statutory procedure.

In practice you should always investigate the incident thoroughly (suspending the employee on full pay if necessary) before making any decision to dismiss.

1.5 Employees have the right to appeal against all disciplinary decisions, including dismissal.

- State the name or job title of the person responsible for hearing any appeals.
- Where possible, the person dealing with the appeal should not have been involved at any prior stage of the proceedings.

1.6 Give employees the appropriate notice, unless they have been summarily dismissed.

- After a month's service, employees have a statutory entitlement to one week's notice (unless summarily dismissed). After the first year, an employee is entitled to an extra week's notice for each additional year of continuous service. The maximum statutory entitlement is 12 weeks' notice (after 12 years of service).
- The contract of employment may entitle the employee to a longer period of notice.

An employee dismissed without proper notice can claim wrongful dismissal.

1.7 Provide written reasons for the dismissal. You are legally required to do this:

- Within 14 days of a written request from an employee who has completed at least one year's continuous employment.
- Whenever you dismiss an employee who is pregnant or on maternity leave, and regardless of how long she has worked for you.

2 Inability to perform

Normally, new recruits who are incompetent or under-qualified will be discovered fairly quickly. They can then be dismissed without running the risk of a claim of unfair dismissal (see box).

2.1 There are four '**permitted**' reasons for dismissing employees who are unable to perform their jobs:

► Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

“Dismissing an employee is a last resort. When you must do it, be professional. Explain quickly and clearly, but with compassion, and give details of any help you have available.”
Frank Thaxton,
Thames Valley
Partners business
advisers

- Incompetence (lacking the skills or aptitude to carry out duties effectively).
- Lack of relevant academic, technical or professional qualifications.
- Sickness or injury (usually associated with frequent or prolonged absenteeism). However, a long-term sickness or injury may qualify as a disability (see 4.3). (See **Sickness issues and SSP**)
- Because it would be illegal for the employee to carry on working in the job. For example, if the employee loses the required driving licence.

2.2 You must be able to demonstrate that you acted **fairly** and **reasonably** both in deciding to dismiss and the way you did it.

- Was the employee really unable to perform or was it an excuse for dismissal? For example, has the employee worked satisfactorily, despite no qualifications?
- Did you (where needed) provide appropriate support or training?
- Did you investigate the circumstances fully?
- Did you consider alternative options?
- Did you set out your concerns in writing, give the employee time to consider them, then discuss them with him or her?
- Did you ensure that the employee knew about his or her right to appeal?

2.3 Where dismissal is contemplated, you must go through the statutory minimum 'three-step' **procedure** (see **Discipline and grievance issues**).

- If an employee is dismissed, he or she must be given appropriate notice and may be entitled to written reasons.

3 Other permitted reasons

3.1 You can dismiss an employee because of **redundancy** (see **Redundancy**). For example, if a business (or part of a business) closes, relocates or is restructured, or there is a reduced need for employees doing a certain kind of work.

- The redundancy must be genuine.
- There are special rules governing the selection of employees for redundancy.

3.2 You can dismiss an employee for '**some other substantial reason**'. For example, a refusal to co-operate with a generally accepted change in working practices which is required for the profitability or survival of the business.

Again, you must use the statutory procedure.

4 Unfair and unlawful dismissal

4.1 An employee with at least **one year's service** who is under 65 (or the normal retiring age for a person doing that job) is protected against dismissal. Unless the employee was reasonably dismissed, he or she can claim unfair dismissal.

Compensation for unfair dismissal is made up of a basic award, taking account of age and service and capped at £9,300, and a 'compensatory award'. The upper limit on these compensatory awards is £66,600.

4.2 Regardless of age or length of service, it is an **inadmissible** reason (and automatically unfair) to dismiss any employee for:

- Being pregnant, giving birth or taking advantage of statutory maternity rights. (See **Rights for working parents and carers**.)
An employee who fails to return to work after maternity leave will be held to have terminated her own employment (unless the leave is extended on medical grounds).
- Carrying out (or proposing to carry out) functions as an appointed or elected safety representative or as a member of a safety committee.
- Carrying out (or proposing to carry out) functions as an employee representative.
- Pointing out or reacting to imminent risks to health and safety.
- Membership (or non-membership) of a trade union, or for taking part in the activities of an independent trade union. It is unwise to dismiss a shop steward, for any reason, without first discussing it with a full-time union official.
- Carrying out (or proposing to carry out) functions as a pension scheme trustee.
- Questioning or challenging your apparent disregard for statutory employment rights.
- Reporting superiors or colleagues for illegal or dangerous activities to an internal or external authority ('whistleblowing').
- Jury service.

4.3 Regardless of age or length of service, it is **unlawful** to dismiss any employee on the grounds of:

- Sex or marital status (including civil partnerships).
- Race, nationality or national or ethnic origins.
- Sexual orientation, actual or perceived.

➡ Acas publishes a Code of Practice on discipline (0870 242 9090 or www.acas.org.uk). A handbook called 'Discipline and Grievances at Work' is also available.

➡ The Law Society's 'Lawyers For Your Business' initiative can provide you with a free information pack and a free half-hour consultation with a participating firm of solicitors (020 7405 9075).

“ Anyone with at least one year's service can claim unfair dismissal. Remember that employees may be able to include their contractual notice period when calculating length of service — whether they receive it or not. ”

Tim Russell,
Employment
Law Consultant
and part time
Employment
Tribunal Chair

- Disability — this may include a physical or mental illness likely to last at least a year.
- Religion or philosophical belief.

4.4 An employee with the requisite service may resign and claim unfair **constructive dismissal** if your conduct as an employer has breached a fundamental term of the employment contract. This might include anything that makes it impossible or intolerable for the employee to continue doing the job.

- Cutting (or attempting to cut) an employee's wages or salary or other contractual benefits.
- Transferring an employee to a different job or location in the absence of any express or implied contractual right to do so.
- Subjecting a supervisor or manager to unwarranted public abuse or criticism.

Employees must try to get matters redressed through the grievance procedure, before they can claim constructive dismissal.

4.5 Dismissing employees in connection with the purchase, sale or **transfer of a business** is usually unfair under the 'TUPE' regulations.

You cannot dismiss employees unless you have a sound economic, technical or organisational reason requiring a change.

- Dismissing an employee to facilitate the sale of a business is likely to be unfair.

Unless the correct disciplinary procedures are followed (which usually means the 'three-step' procedure), employees who claim unfair dismissal will be automatically awarded it. Their compensation may be increased by up to 50 per cent.

5 Special cases

Some of the more common situations which lead to confusion or problems are outlined below. If in doubt, take legal advice.

5.1 Many **directors** are both office-holders and employees.

- A director may be removed from office in accordance with the company's Articles of Association or the requirements of the Companies Act 1985 but may nevertheless remain an employee.
- A director who is also an employee has the same legal protection against unfair or unlawful dismissal as other employees.

5.2 You cannot usually dismiss employees taking 'protected' (official) **industrial action**, unless this has gone on for more than 12 weeks. You must also have taken reasonable steps to resolve the dispute.

- If you get this wrong, it will be unfair dismissal.
- Employees taking unofficial strike action can be dismissed.

5.3 You can dismiss a **temporary replacement** once the permanent employee returns to work (eg after maternity leave).

6 Complaints and help

6.1 An employee must normally raise a **grievance** with you before complaining to an employment tribunal. Treat the grievance seriously, and apply the statutory procedure.

- Once a complaint has been made an Acas conciliator will contact both you and the employee.
- A conciliator cannot help without the consent of both you and the employee.

6.2 It may be possible to reach an '**out of court**' agreement. Only two forms of agreement are legally binding:

- A 'COT3' agreement reached with the participation of an Acas officer.
- A 'compromise agreement' in a suitable form where the employee has had appropriate independent legal advice.

6.3 Once an employee has complained to a tribunal, you will be sent **form ET 3**. The form asks whether you intend to contest the complaint and if so, what your grounds are.

- Return the completed form within 28 days of the date it was sent out. Otherwise you may lose your right to take part in the tribunal hearing.

6.4 Most experienced personnel managers will have little difficulty justifying their actions before an **employment tribunal**. But involve a specialist consultant or solicitor if you are unsure of your grounds.

Expert contributors

Thanks to **Frank Thaxton** (Thames Valley Partners business advisers, 020 7637 1727); **Martin Phillips** (Lawrite employment law consultancy, 020 7917 2742); **Tim Russell** (Employment Law Consultant and part time Employment Tribunal Chair, 07767 646 656).

Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Everyday workplace policies**.

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