



Matt Gingell™

Making sense of employment law

Dismissing a problematical employee: A guide for employers

PROBATIONARY PERIODS

If employees are dismissed during or at the end of their probationary periods, employers can usually terminate their employment – provided appropriate notice is served. Some contracts of employment allow employers an option to extend probation if needed.

DISMISSING EMPLOYEES UNDER THE TWO YEAR MARK

Generally, employees need to have at least two years' service to bring unfair dismissal claims. So that means employers do have more scope to get rid of problematic staff before they hit the two year mark. If things don't work out during that time, you're normally able to dismiss the employee without much fuss – again, as long as the right notice is given.

But be warned: an employee could try to bring claims, such as discrimination or whistleblowing, which have no length of service requirement. It's therefore advisable to follow some sort of process wherever possible (including when the employee is on probation) – so you can account for your decisions.

Also beware that employees can take the minimum statutory notice into account in getting over the two year mark. This is one week for continuous service of less than two years but over one month. So if you dismiss an employee a few days before their two years' service without serving them notice, an extra week can be added for the purpose of calculating the two year period.

POOR PERFORMANCE PROCESS

Sometimes it might be appropriate to put the employee on a performance improvement plan. They should be given objectives and have an opportunity to improve. If they don't improve, they could be required to attend a meeting and then issued with a warning. This process can be repeated, which might result in a final warning and a last chance to turn things around. If they still don't improve, after another hearing, dismissal could be an option.

If you don't follow a proper process, the employee may have grounds to bring an unfair dismissal claim.

REACHING A DEAL

Even if there is no dispute with the employee you may still be able to have an off-the-record conversation with them and try and reach a deal. As long as there is no improper behaviour, such as blackmail, the "protected conversation" would be inadmissible in any general unfair dismissal proceedings. However, be careful. There are some exceptions for unfair dismissal claims including where the dismissal relates to pregnancy, where you don't get that protection. Also other claims such as for discrimination aren't protected. It's therefore sensible to speak to your lawyer before having those discussions. When a deal is reached the parties would normally enter into a settlement agreement; the employee being obliged to obtain independent legal advice on such an agreement.

This guide is intended for guidance only and should not be relied upon for specific advice.
The law is also subject to frequent change. © Matt Gingell 2017

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