

It is inevitable that there will be occasions when employers have to part company with employees. This happens because of poor conduct, problems with performance, sickness absence, changes in demand which may mean that posts are made redundant, and a host of other reasons.

When these events happen, employees have the right not to be dismissed unfairly once they have accrued 24 months service (the 'qualifying period') if they started their employment after 5th April 2012 (previously only 12 months service was required).

Unfair dismissal is the most common claim that is made before Employment Tribunals, and, put simply, it means that somebody has been dismissed without a fair reason, and or without a reasonable procedure being followed.

'Given all this, why do we still get advised that we have to go through all our procedures or reach a compromise agreement with an employee without sufficient service to make a claim?'

A common question from people that phone us after having got this sort of cautious advice, often from an insurance or subscription based advice service that will be worried about having to fund other types of claims that the employee could still make.

In many cases it will be safe to terminate employment without going through an elongated dismissal procedure, and employees without the 'qualifying period' are not even entitled to know the reason for their dismissal.

There are, however, good reasons for explaining the reasons properly, and following at least a basic procedure of giving the employee the opportunity to discuss the situation with you.

A failure to do this may impact negatively on your 'employer brand' and the motivation of other staff, and it may make it harder to defend other claims that can still be made without having the 'qualifying period's' service.

For these reasons, many large organisations will always use their disciplinary procedure, but smaller organisations may find this harder, as a poor performing or attending employee will have a more significant influence on their business. One poor performing employee in a business of 5 people is 20% of the business underperforming!

'What are the other things that can be claimed?'

Due to the recent change in the 'qualifying period' for unfair dismissal, aggrieved employees may well seek to make other, some times more complicated, claims in front of the Tribunal.

These include:-

- ▶ **Discrimination.** Here the employee will be claiming that the real reason they were dismissed was because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

They will, for instance, claim that the real reason you dismissed them was that they were gay, and will evidence this by reference to homophobic comments that had been made to them in the workplace.

- ▶ **Automatically unfair dismissals.** This category of dismissals includes things like health and safety, rights under the Working Time Directive, being a Trade Union member, being a part time worker, or on a fixed term contract.

A typical example is where an employee refuses to work in an environment which

they perceive to present 'serious and imminent' danger. If the worker is then dismissed for this, they will have a claim for automatically unfair dismissal.

- ▼ **Whistleblowing.** Regulations exist to protect workers who draw attention to wrong doing.

A worker with a strong interest in environmental issues makes a lot of fuss about a stream being illegally contaminated by effluent from the factory. Unrelated to this, they get sacked for poor performance at the end of their probationary period.

They cannot claim 'unfair dismissal', so they assert that the real reason they were dismissed was that their ex employer regarded them as a trouble maker because they drew attention to the contamination.

This claim can be resisted if the employer has evidence of the poor performance and a proper review of the probationary period or other procedural evidence. Without anything, it may be tough!

- ▼ **Breach of Contract or Wrongful Dismissal.**

In some situations, an employee may have a contractual right to a procedure when they are dismissed. For instance, in many public sector organisations the Staff Handbook may be contractual, and the employee may have the right to a full series of warnings regardless of their length of service.

In this instance, the Tribunal is likely to award the employee an amount equivalent to the additional time they would have been in employment had the employer followed the full contractual process, even if they think that the employee would still have been dismissed anyway.

In other instances, the wrongful dismissal may just be about the period of notice that should have been given.

'So, what can I do then?'

First of all, the answer to our headline question is that it has not really got easier to dismiss employees, but the period when it is easier, has increased from 12 to 24 months.

It's easier because ex employees cannot claim that you did not have a fair reason, that you did not go through a reasonable procedure, or even that you did not explain to them why they were being dismissed.

You can see from this explanation that that does not make it risk free, because if they feel aggrieved, they can claim other things. If there are not any other matters involved, apart from, for instance, their conduct, performance or attendance, then we would categorise these dismissals as 'low risk'.

It's because of these other things that you sometimes get cautious advice about not dismissing new employees without a procedure, but it can be done. The law intends that it should be easier to dismiss people during the first one or two years of their employment.

Before you take any action, review the checklist that follows.

Has it really got easier to dismiss employees?

✓ list

A basic checklist

1. Ideally, make sure that the individual has been told about your concerns, and if it is appropriate, give them the opportunity to improve.	
2. If there is a hint of other issues, such as discrimination etc., ensure that you are clear that the reason for the dismissal is nothing to do with these issues.	
3. In case you might have to defend one of these other claims, have some documented evidence of the real issue. For instance, write up some notes on any conversations you have, and keep any documentary evidence.	
4. If there have been incidents of whistleblowing, or the employee has raised a grievance about discrimination, leave some time before dismissing the person so that the two events are less likely to be seen as connected.	
5. Always treat concerns raised by employees seriously so that you can show that you are not dismissive of, for instance, equal opportunity matters.	
6. If you are going to dismiss without following your full procedure, then make sure that they are given notice at least one week before the second anniversary of their employment. In fact, it's dangerous to go too near this one week deadline, as it may cause a Tribunal to scrutinise what is going on more closely than they otherwise might do.	
7. Make sure you dismiss in accordance with your contract. This usually means paying them for the notice they are due, and making sure they get their outstanding holiday money. You don't want them going to a solicitor over these minor things, only to find that other matters begin to feature in the claim.	
8. If you are absolutely sure that they are not being dismissed for anything to do with discrimination or something that is 'automatically unfair', then you are probably safe to proceed.	
9. If there are other issues, or you are getting close to the one (for employees engaged before 6 th April 2012) or two year deadlines, then you need some advice!	
10. Get your Contract or Staff Handbook amended so that it is clear that employees without the necessary qualifying period may be dismissed without the use of the full disciplinary procedure.	

All reasonable efforts have been taken to ensure that the advice contained in this checklist represents both best practice, and the law as it stands at the time of publication. It should not be relied on as a substitute for taking advice about specific situations.

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