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Maximising the performance of a smaller staff

Huw Cooke, 05 January 2010

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With the likelihood that the economy has turned the corner, many businesses that reduced their workforce in the last year by making redundancies will now be looking to take advantage of the upturn. Critical to their success will be the way in which they manage and maximise the performance of their remaining employees. But what are the legal claims associated with poor performance dismissals and how can a proper poor performance procedure can help establish a fair dismissal.



The dismissal of poorly performing employees can give rise to a number of potential legal claims against the employer. Typically these will be unfair dismissal, breach of contract and discrimination.

Unfair dismissal

In order to fairly dismiss a poorly performing employee, an employer must rely on the employee's lack of capability as the fair reason for dismissal. Capability refers to the employee's skill or aptitude to do the job that they were employed to do and this may not be as apparent as it seems - for example an employee may be poorly performing because they simply cannot be bothered (i.e. misconduct) or because they are not able to do so (i.e. incapability). In addition to establishing incapability as the fair reason, the employer must carry out a fair procedure and this will entail following the new ACAS code of practice introduced in April 2009, the employer's own policies and procedures and best HR practice. Later in this article, we look at what constitutes a good poor performance procedure. If an employee is unfairly dismissed, a tribunal will award compensation comprising a basic award and a compensatory award (reflecting the employee's loss of earnings). Currently, the maximum compensatory award is £66,200, but for effective dates of termination on or after 1 February 2010, the cap will be reduced to £65,300.

Breach of contract

Wrongful dismissal claims as a result of poor performance are rare because employees usually either work out or are paid in lieu of their notice. Breach of contract claims, however, are more common. For example, they can arise where an employer fails to follow its own contractual procedures or where an employee claims that he has received a low bonus or commission payment based on an incorrect assessment of his performance

Discrimination

It is not uncommon for employees to allege that discrimination underlies a poor performance dismissal. This could be because the employee's line manager sets unreasonable targets for the employee on discriminatory grounds (e.g. race or sexual orientation) or because medical symptoms or absence caused by the employee's disability has led to performance dipping. A proper poor performance procedure should help identify these issues. Unlike the one year qualifying period for unfair dismissal claims, discrimination claims can be brought without any qualifying period of service. Compensation for loss of earnings is calculated in the similar way to that of unfair dismissal, but there is no statutory cap and awards are potentially unlimited. In addition, employees can be awarded an amount in respect of injury to feelings and for personal injury (e.g. where a manager's treatment has led to psychiatric illness). It is also important to note that a failure to comply with the ACAS code of practice can result in an uplift of up to 25% in both unfair dismissal and discrimination compensation.

What is a proper poor performance process?

While each process depends on its own facts and will depend on what is reasonable in the circumstances, an Employment Tribunal is likely to look for the following as a minimum:¹ An investigation into the employee's performance to establish whether there is a gap between what the employee should be doing and what the employee actually is doing.

2 If appropriate, informal action should be taken.

3 If informal action has not resolved the situation or formal action is required, the employer should invite the individual to a meeting setting out the basis for the alleged poor performance, the employer's supporting evidence, offering the right to be accompanied and warning of possible sanctions. It is at this point that the employer will want to ensure that it is following its own policies and procedures and the ACAS code of practice.⁴ At the meeting, the manager should present his concerns, listen to the employee's explanations and discuss any issues with the individual.⁵ Following the meeting, a decision should be made and the employee informed in writing of the failure to reach a required performance standard, the targets to be met by the individual, the date by which such targets must be met, what assistance is being offered by the employer, the level of the warning imposed (e.g. first written warning) and its duration, the consequences of failing to meet the targets or to improve, and offer the right to appeal.

6 Any appeal should be dealt with.

It is important to note that it will be in very rare circumstances where a first incident of poor performance will justify dismissal and, in most cases, an Employment Tribunal will, in line with the ACAS code of practice, expect to see three cycles of poor performance management (i.e. first written warning, final written warning and dismissal) before an employee is dismissed for poor performance.

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