

Checklist: dismissing an employee

This checklist highlights the key issues that your business should consider when dealing with poor performance and, more generally, when dismissing an employee for this or other reasons. Failure to follow the correct procedures can have serious financial and commercial implications for your business, including unlimited damages in some cases.

General good practice to help avoid potential claims

Your business should follow good management practices to help avoid potential claims relating to a dismissal:

- Make sure that any employee-related policies and procedures your business has are always followed (for example, an equal opportunities policy).
- Address any issues with your employees as soon as they emerge. Generally an employer's position deteriorates the longer the delay.
- Think carefully before sending any e-mails to your employees (for example, never send any aggressive e-mails as they could be used against your business by an employee in a future claim).
- In many circumstances an informal meeting with an employee can resolve a problem. However, your employees must be made aware that a formal process could be used if an issue remains unresolved. The process of formally disciplining an employee is complicated, so you should take legal advice before you start. Contact Jennie Borgnis on jennie@butcherandrews.co.uk for further information.
- Keep records of any e-mails, letters, conversations or meetings (formal or informal) that your business has with your employees relating to their performance.
- Conduct regular appraisals with your employees to enable your business to give an honest assessment of their performance and allow them to raise any concerns.
- Do not give flattering performance reviews if they are undeserved. They could make it more difficult to dismiss an employee in the future.
- Use probationary periods effectively. If your business has any legitimate concerns about a new employee, you may be able to extend the period or dismiss them at the end of it. Your business will have to provide at least one week's notice to dismiss (although it may be more, depending on what the contract says).
- Employees should not be sidelined, bullied or shunned in order to get them to leave. If an employee can demonstrate that they resigned because of your business' conduct, they could have a claim for constructive dismissal.
- Be very careful if you think that stress could be a reason for an employee's poor performance (for example, they are struggling to cope with an increased or challenging workload). In these circumstances you should take legal advice. For further information, contact [name and e-mail address].

- Fully investigate any claims made by or against an employee before making any decision.
- Do not assume that your business can dismiss an employee simply because their fixed-term contract has come to an end. The employee may have a claim for unfair dismissal. Unfair dismissal is any dismissal that is not for a fair reason or does not follow the correct procedure.
- Always take any employee grievances or claims raised against your business seriously. You must be particularly careful if an employee has raised a grievance or claim in the past. You should make sure that any further allegations are dealt with fairly, to avoid the risk of them bringing a victimisation claim. Victimisation is a type of discrimination where someone treats another less favourably because they have made, or that person thinks they have made, a discrimination claim or have given evidence in connection with a claim.
- Sometimes, from both a practical and commercial point of view, it is simplest to try to reach a financial agreement with an employee to leave your business. You should take legal advice before you enter into any negotiations. For further information, contact [name and e-mail address]. If an agreement can be reached, to protect your business, you should ask your employee to sign a compromise agreement. A compromise agreement is an agreement, usually in return for a fixed sum of money, in which an employee specifies that they will not bring a claim against their employer.
- There is no obligation on your business to provide a reference if one is requested. However, if you do provide a reference (oral or written) for an employee you must ensure that it is accurate. For example, do not give a good reference to an employee whom you have dismissed for poor performance, as this could lead to a claim being brought against your business.

If you want to dismiss an employee

1. Take legal advice

The introduction of new legislation has greatly increased the complexity of the process that you must follow to avoid claims being brought against you as a result of dismissing an employee. For further information, contact [name and e-mail address].

2. Establish whether there are grounds for dismissal

There are several potentially fair reasons for dismissing an employee:

- The way in which they have conducted themselves at work (for example, they have filed a fraudulent expenses claim or persistently arrive late at work).
- They are unable to carry out their job because they lack the necessary skills required (for example, a sales manager has consistently failed to meet reasonable sales targets despite receiving additional support and training).
- They are on long-term sick leave and cannot return to their job.

- Their job is redundant (for example, if your business is declining or your workplace is facing closure). Do not use redundancy as an easy alternative to dismissing an employee for poor performance. The “redundant” employee could make a claim for unfair dismissal.
- They have reached their contractual retirement date or the default national retirement age of 65. Your business is legally obliged to consider an employee’s request to work beyond their retirement age. If you receive any such request contact [name and e-mail address]. Your business is also obliged to comply with the notification requirements in advance of an employee’s proposed retirement date. If you do not comply with the requirements the dismissal will be unfair.
- Continuing to employ them would be illegal (for example, you have discovered that your employee’s immigration status does not permit them to work).

Be very careful when establishing the grounds for dismissal as using any other reasons could result in a claim for unfair dismissal.

3. Always follow the correct procedure

- Even if your business has established a potentially fair reason for dismissing an employee, you still must follow the correct procedure. Failure to do so could lead to a claim for unfair dismissal.
- Generally, an employee must have been employed for one year before they can bring a claim against your business for unfair dismissal.
- However, certain dismissals are deemed to be automatically unfair and an employee is protected as soon as they start work. These include dismissals connected with:
 - pregnancy;
 - parental leave;
 - requests for flexible working;
 - whistleblowing; or
 - jury service.

4. Check your employee’s contract

It is possible to dismiss an employee fairly but still be in breach of contract if you have not given them the correct notice under their contract. Your business does not want to take any action that could breach an employee’s contract because:

- It may lose valuable protections in the contract such as post-employment restrictions (for example, stopping your employee going to work for a competitor).
- Your employee may have a claim for breach of contract (for example, if your business fails to give them their contractual notice period or pay a contractual bonus).



More information

If you have any questions about the content of this checklist, please contact Jennie Borgnis on jennie@butcherandrews.co.uk