

### Dismissing an employee

This newsletter sets out the steps a business should follow when it is considering dismissing an employee.

#### **Why is it important to follow the law when dismissing an employee?**

Dismissing an employee for a reason other than one allowed by law, without following the correct procedure or giving adequate notice, may lead to a claim for unfair or wrongful dismissal against the business. Compensation for a successful claim can potentially be substantial. Regardless of whether a claim succeeds, the costs of defending it, in terms of management time and legal costs, may be significant and are not usually recoverable.

#### **Establish whether there are grounds for dismissal**

There are several potentially fair reasons for dismissing an employee:

- Their conduct at work (for example, they have filed a fraudulent expenses claim or persistently arrive late at work).
- Their inability 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).
- Their absence on long-term sick leave and inability to return to their job.
- Their job is redundant (for example, if the business is declining or the 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.
- Their continued employment would be illegal (for example, the business has discovered that an employee’s immigration status

**If you would like to discuss any of the matters raised in this newsletter please contact:-**

Jane McKee  
[jmk@blackgraf.com](mailto:jmk@blackgraf.com)  
**Tel: 020 7586 1141**

Mike Sutton  
[ms@blackgraf.com](mailto:ms@blackgraf.com)  
**Tel: 020 7586 1141**

*The information in this newsletter is not meant as a substitute for advice on particular issues and is written in general terms. You should seek specific advice before taking any action based on the information in this newsletter.*

Black Graf LLP 100 Baker Street London W1U  
6WG

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*This newsletter outlines the law as it stands at the date of writing in August 2015.*

does not permit them to work).

- They are being dismissed for what is known as “some other substantial reason”, that is something not falling into one of the above categories which nevertheless warrants dismissal, such as where the relationship between the parties has broken down.

Dismissing an employee for any reason other than those listed above will be unfair.

### **Always follow the correct procedure**

- Even if a business has established a potentially fair reason for dismissing an employee, it must still follow the correct procedure. Failure to do so could lead to a claim for unfair dismissal.
- Generally, an employee must have completed a qualifying period of service before they can bring a claim for unfair dismissal. The qualifying period is two years.
- 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
  - a TUPE transfer.

## **Check the employee's contract**

It is possible to dismiss an employee fairly but still be in breach of contract if the business has not given them the correct notice under their contract. A 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 an employee going to work for a competitor).
- The employee may have a claim for wrongful dismissal in breach of contract (for example, if the business fails to give them their contractual notice period or pay a contractual bonus).

## **PILON clauses**

- A payment in lieu of notice (PILON) clause is a contractual right that enables a business to pay an employee a lump sum rather than require them to work out their statutory or contractual notice period.
- Before terminating employment and making a PILON, the business should ensure that the contract of employment they wish to terminate allows for termination in this way. If the contract does not allow for a PILON to be made, then it will probably be a breach of the contract to do so.
- If a business decides to make a PILON, it must notify the employee that a PILON is being made to them in exercise of the employer's contractual right to terminate the employment with immediate effect. Simply making the PILON will not be sufficient to bring the contract to an end.