Q&A
Talking Tribunals

This month, the East Midlands Business Link team caught up with Simon Bond, an independent employment solicitor and HR specialist about the tricky subject of Employment Tribunals.

A long-standing employee has been consistently underperforming for a while – what's the best way to end their employment?

If the employee has over two years' service with your business, they will have the right to claim unfair dismissal at an Employment Tribunal if due process is not followed. Therefore, it is important to adopt a fair process in managing the employee's under performance before any contract termination. A Tribunal would expect you to take several steps, including warning the employee that their performance is unsatisfactory, making it clear in what way you are dissatisfied with their work and telling the employee how their performance should be improved – for example by setting clear and measurable goals and expectations. Next, you will need to give the employee a reasonable time for them to improve their performance.

What is a reasonable time period to demonstrate improvement?

A good question! There's no legal set period. It will largely depend on the nature of the employee's work and what is needed in terms of improvement. It should be sufficient to enable you to measure the employee's performance and give them a fair opportunity to improve. For example:

- if the employee is a salesperson with monthly targets, you could measure their performance over three months to assess whether sales income improves;
- if the employee is making simple mistakes, such as an administrator making spelling errors, then you could measure the performance over a shorter period of time e.g. one month.

Whatever time period you decide is appropriate, you should also consider what additional support the employee might need to reach the expected standards of work, such as training or mentoring. Also, are there any health issues which are affecting their performance? If so, would a referral to Occupational Health help identify any additional needs?

Failure to consider these issues before terminating an employee's employment could result in a successful unfair dismissal claim against the business.

Could I just make the employee redundant instead?

Termination of employment on grounds of redundancy might feel like a 'kinder' way of dealing with employee underperformance, but it carries similar risks, namely an unfair dismissal claim

being made against your business.

Whilst a redundancy situation can arise at any time, it is important not to conflate a redundancy process with one focussed on the employee's performance. They are separate issues and there is a risk of making it apparent to the employee that you simply want to terminate their employment by whatever means!

In addition, handling redundancy situations can be less than straightforward because the employer ought to consult with all affected employees, devise a fair method of selecting the individuals who will be made redundant and consider alternatives (such as a different role).

Prior to embarking on a redundancy process, it is advisable to take advice from a specialist employment lawyer or HR expert. They will be able to devise the redundancy exercise, map out the require steps and provide the necessary documentation.

What is the chance of being taken to an Employment Tribunal?

According to the latest government statistics, 24,000 claims were made to the Employment Tribunal service in the period April to June 2023, meaning that the volume of claims made has returned to levels seen prior to the COVID-19 pandemic.

How much could an Employment Tribunal claim cost me?

Compensation for unfair dismissal is subject to a statutory 'cap' of £140,700. However, the cap does not apply where a dismissal is due to whistleblowing or for raising certain health and safety issues. In 2022, the average unfair dismissal award was £13,541.

In discrimination cases, there is no cap on the compensation available. The highest maximum award in 2022/23 was £1,770,000 in a disability discrimination case.

Usually in Employment Tribunal cases, each side bears their own legal costs, which means that generally employers do not recover any outlay on professional costs, even if they successfully defend the claim.

As a result, Employment Tribunal claims can prove expensive, and often come with a number of 'hidden' costs, such as the fallout from any adverse publicity and the management time associated with managing the process.

Are there any other options to avoid a Tribunal?

One option is an employee Settlement Agreement, a legally binding agreement that brings an employee's employment to an end and is in full and final settlement of any claims the employee may have against the employer. Invariably the employer will pay the employee a sum of money as an incentive to sign the Settlement Agreement and certain non-contractual amounts can be paid tax free up to £30,000.

Employees should be given adequate time to consider any Settlement Agreement presented to them (Acas recommend 10 days). To be legally enforceable, employees must receive independent legal advice on the terms of the Settlement Agreement. In view of the requirement for legal advice, it is usual for employers to contribute to the employee's legal costs.

Settlement Agreements require sensitive handling and can often be complex from a legal and tax point of view. As a result, it is advisable to take independent legal advice if considering a Settlement Agreement.

What are the main reasons why employers lose Employment Tribunal claims?

I cover this question in a free download at: Resources I www.bondlegal.co.uk