Harper James Solicitors video transcript: Performance Management of Employees

I’m Sean Walsh and I’m an employment solicitor for Harper James Solicitors.

I do get asked from time to time about performance management of employees and, although this is not always with a view to potentially dismissing the employee, unfortunately, it is sometimes an inevitable consequence of such a procedure. If it does end up in dismissal, the fairness of that dismissal depends on the reasonableness of the decision to dismiss and, more often than not, on the procedure followed. Certainly, if an employee has less than two years’ service they can’t bring an ordinary unfair dismissal claim. However, there are other claims that he or she could bring and the more important one of these is discrimination. It might be, for example, by disability discrimination because of something that they have a lifelong condition that amounts to a disability under the Equality Act that they can’t perform in the role. It might also come about where, for example, you dismiss one employee but retain another where they both perform equally. It’s also possible for a claim for harassment where the procedure itself and the performance management procedure is carried out in a way that would be deemed harassment.

Certainly, I would recommend following a fair procedure, even if the employee has less than two years’ service. The first thing to consider is what is the required standard for the role and is the employee aware of that required standard? Certainly, using a probationary period effectively can be very good for performance management procedures. The probationary period is the ideal time and is recognised as so to see if an employee is suitable for the role. I also can’t stress enough the importance of honest appraisals. It’s evidence of poor performance that is documented and can be referred to again. If, however, the appraisal is unduly positive or flattering in any way, it can be a problem then because that is important evidence to show that they have actually been performing (the employee). A performance management procedure would entail carrying out a reasonable investigation and I would certainly recommend trying to deal with it informally at first. I would also say that you should keep the notes of that investigation because, if it does need then to turn to a formal procedure, you will have those notes to hand and can use them. You need to consider whether it is a training issue and whether in fact it is capability or it’s conduct. I get asked questions time and time again with regards to lateness - considering it a capability or performance issue - where in fact lateness is a conduct issue.

The formal procedure I’m talking about is first of all an invite letter, or it can be by email, but certainly what it needs to include is the employee’s right to be accompanied to a meeting, what’s going to be discussed at the meeting with regards to the poor performance, what evidence you’re going to rely on as the employer with regards to the performance and the potential sanctions and consequences should their performance still remain below the required standard. Best practice, ACAS guidelines and case law suggest that the employee should be warned before dismissal is considered and ACAS actually considers two warnings before dismissal. Certainly, you will have to explain to the employee what standards are expected and the targets to achieve. You will then have to give the employee a reasonable period in which to perform and get up to the required standard

and review that periodically. You will also need to consider what support and training the employee needs during that process. After warnings, if the performance is still not up to scratch, you can then consider dismissal. If you do dismiss, certainly what I would suggest is you allow an appeal.

As an alternative to a performance management procedure, you could consider a settlement agreement. However, you do need to be careful that all conversations are on a without prejudice basis and with a view to coming to a settlement.