
Capital

Employment Law

Capability and performance

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Agenda

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- 02 Achieving effective performance management – the Do's and Don'ts

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01. Performance management: What is it?

No standard definition, it describes activities that:

- aim to monitor, maintain and improve employee performance
- improve performance of the organisation overall
- hold employees to account for their performance by linking it to reward, career progression and, sometimes, termination of contracts
- ensure employees have the opportunity to discuss their performance
- compare employees' performance against performance measures and record it as an ongoing process

01. Performance management: What are the benefits?

If done effectively, it has huge benefits including:

- reinforcing the link between organisational and individual objectives
- providing feedback that motivates employees and helps them improve (personally and by making a valuable contribution towards organisation goals)
- developing staff (internally)
- recognising and acknowledging the good work of employees
- identifying and improving poor performance quickly

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Achieving effective performance management



02. The Do's...

DO be clear of your aims:

The purpose of performance management can vary from organisation to organisation. Is the aim to:

- celebrate good work?
- reward employees?
- better meet organisational goals?
- support and improve staff performance?
- develop staff?
- identify and remedy problems with performance?

Need to be flexible!

0.2 The Do's...

DO set clear objectives:

Definable achievements that an employee is expected to accomplish. They should be:

- accurate in reflecting the employees' role and the tasks they actually carry out
- fair and focused on areas where the employee has control over the outcome
- SMART
 - Specific
 - Measurable
 - Achievable
 - Relevant
 - Timebound
- agreed with each employee

02. The Do's...

DO consider expected behaviours:

How an employee carries out their work can be as important as the end result.

Behaviours focus on how an employee should approach the work and duties that their role requires.

Example:

A sales rep will have a sales target as their main SMART objective. What behaviours would be expected of them?

02. The Do's...

DO try to be:

1. transparent
2. consistent
3. fair

02. The Do's...

DO engage employees in performance conversations.

- Essential part of performance management arrangements.
- Time must be set aside to allow performance to be reviewed and plans agreed to move forward
- Meetings should be planned in advance, in private and free from interruptions. Both the manager and the employee should be prepared to discuss:
 1. what things have gone well during the year, and what has been more challenging.
 2. any concerns or areas where further help may be useful e.g. further training
 3. how they have performed against their performance measurements
 4. ways to build on their achievements next year.

02. The Do's...

DO keep a record

Keeping a record of an employee's performance can be important.

It can:

- assist discussions between a manager and employee when they have performance-related meetings
- be used as evidence for promotion or other job opportunities
- be used as evidence in future capability/disciplinary related issues

02. The Don'ts...

DO NOT see performance management as a one-off exercise



02. The Don'ts...

DO NOT engage in performance measurement that discriminates against employees because of their:

- age
- race
- sex
- gender reassignment
- disability
- religion or belief
- sexual orientation
- marriage and civil partnership
- pregnancy and maternity

02. Other “top tips”...

- Effective management
- Identify training needs for managers and employees on how to effectively utilise performance management
- Allow time
- Get everyone onboard
- Keep performance management aligned with organisational values and aims
- Keep it under review

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When things go
wrong...

Capability – poor
performance



03. Dealing with Poor Performance: fair reason for dismissal

One of the five potentially fair reasons for dismissal (section 98 Employment Rights Act 1996)

- conduct
- **capability and qualifications**
- redundancy
- breach of statutory restriction
- “some of substantial reason

The Act gives a statutory definition of “capability” which encompasses **competence, health and qualifications**.

03. Fair procedure

Points a tribunal will consider :

- whether the employer honestly believed, on reasonable grounds, that the employee was incapable of performing their job; and
- whether management failed to discharge its own responsibilities towards the employee

Fairness – what are the key elements?

Acas Code of Practice on Disciplinary and Grievance Procedures and Discipline and grievances at work: The Acas guide (non-statutory).

03. More Do's and Don'ts...

- **Do...**
 - intervene early
 - check performance is really the issue
- **Don't...**
 - avoid the problem
 - be heavy-handed in your approach

03. Managing performance before it becomes a problem

- Setting the required standard
- Probationary periods
- Appraisal system

04. Conduct v Capability

Conduct is about an employees' ***behaviour*** at work.

It can usually be identified as actions which the employee has control over e.g. calling in sick when they are not genuinely ill.

Capability is about an employees' ***ability*** to do their job.

It can usually be identified as an issue which the employee has no control over e.g. unable to do their job due to an illness or underlying work or personal issues.

Not always clear!

04. Conduct v Capability: Examples

- *A driver goes deliberately slowly to his last job to avoid having to do another delivery within his prescribed working hours*
- *A local delivery driver is slower on his route because he is unfamiliar with the area*
- *A factory worker's output is poor because he takes smoking breaks and exceeds his breaks allowance*
- *A technician doesn't complete paperwork because he perceives it as being a waste of time*
- *A warehouse worker whose output is low because of a back condition*
- *A care worker who takes longer to dispense medication because his English is poor*

04. Conduct v Capability: Examples

Mr A was employed as a contract manager for shopfitters. He was competent and experienced. He had "detailed knowledge of building law and was loyal, conscientious and meticulous". However, he was argumentative with clients and unable to compromise with them on their particular requirements. Some of the clients refused to deal with him.

Conduct?

OR

Capability?

04. Conduct v Capability: Examples

Ms B is dismissed for assembling 471 out of 500 components incorrectly. She claimed this was the way she had been shown how to assemble them. The employer denied having ever shown her how to do it.

Conduct? OR Capability?

05. Informal management

Step one:

Performance issue identified - arrange informal meeting with employee.

- Purpose of the meeting
- Preparing for the meeting
- Clarify purpose at meeting
- Explain goals
- Agree improvements

05. Informal management

Step Two:

Follow up with the employee, in writing:

- exactly how their work is not meeting the required standard
- the expected standard(s)
- the timescale of expected improvement
- support, coaching and/or training that will be given to the employee
- that formal action may follow if there is no improvement

05. Informal management

Step Three:

Invite the employee to attend a review meeting to assess performance against agreed action plan.

Possible outcomes:

1. action plan achieved to a satisfactory standard
2. action plan partly met
3. action plan not met, reasons given not reasonable and/or acceptable

06. Formal management

Step One:

Invite the employee to attend a first formal capability meeting.

Before the meeting, the employee should be notified (in writing), of the:

- shortcomings in their performance
- date, time and place of the capability meeting
- relevant information and any documents to be relied on at the hearing
- procedure to be followed
- possible consequences if performance is found to have fallen short of the required standard
- right to be accompanied by a trade union official or a fellow worker

06. Formal management

The aim of the **meeting** will be to:

- clarify the required standards the employee has failed to meet and examine the evidence
- allow the employee to ask questions, respond to the evidence put forward, provide any evidence they may have and put their views across
- establish the likely reasons for the employee's poor performance
- identify what can be done to assist them in improving their performance, such as additional training or supervision
- set targets for improvement and a timescale for review

06. Formal management

Decide on the outcome and confirm the decision in writing.

If no sufficient improvement, give the employee a **first written warning**

- Review period
- Right of appeal

06. Formal management

Step Two:

Invite employee to a second capability meeting.

- The employee will have the same rights as at the first meeting
- Advise the employee there has been insufficient improvement
- Check again there are no training or other issues affecting performance and ask for their views.
- If the performance hasn't improved sufficiently, give the employee a **final written warning**, setting out the required performance improvement and new timescale for improvement and next review date.

06. Formal management

Step Three:

If the decision is whether to proceed to **dismissal**:

- Write to employee inviting them to disciplinary meeting and provide copies of relevant supporting documents
- Hold disciplinary meeting (right to companion)
- Decide on the outcome

07. The decision to Dismiss

Considerations:

- Have you provided support and training?
- Have you given reasonable time for the employee to improve?
- Have you considered alternative employment or redeployment?
- Has the employee received appropriate warnings in line with the disciplinary procedure?

Right of appeal

07. Decision to dismiss:

Potential claims:

A capability dismissal may give rise to possible employment tribunal claims such as:

1. Breach of contract
2. Constructive Dismissal
3. Unfair dismissal
4. Discrimination or harassment

An employer can defend the claim if they are able to show the dismissal was fair

07. Common Issues

1. *Is it possible to fairly dismiss instantly for a single act of incompetence?*
2. *Can a final written warning be given for the first instance of poor performance?*
3. *How do you deal with employees whose performance lapse once the warning period finishes?*

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When things go wrong...

Capability – ill-health



08. Procedural fairness: General principles

- Need to follow a fair procedure
- Governed by case law - Acas Code of Practice does not apply to genuine ill health dismissals
- Need to investigate medical condition and consult with employee:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position".

08. Procedural fairness: Key aspects

Ascertaining the medical position:

- Seek up-to-date information about the nature of the illness and the likely length of absence or prognosis.
- Report may be obtained from more than one health professional
- The onus is on the employer to take reasonable steps to ascertain the medical position
- Access to Medical Reports Act 1988
- Confidentiality of medical information

08. Procedural fairness: Key aspects

Consulting with the employee:

- Key to the fairness of any dismissal for ill health
- Only in exceptional cases consultation will not be necessary
- Consider arrangements for meetings

Length of service:

- Length of service should be weighed in the balance

Consider reasonable adjustments or alternative employment:

09. When absence becomes a problem

- Most absence issues can be managed without the need for escalating matters.
- An employer should deal with matters formally when the absence levels present an unacceptable level of disruption to the business.
- Sickness absence policies and use of “trigger” points

10. Formal management: Long-term absence

First formal meeting to discuss long-term absence:

Employer should explore:

- The likely date of return (arrangements for future contact, further medical review and further meetings under the procedure) and whether the employer can continue to wait for the employee to return
- Whether the employee has a disability
- Whether the employee perceives they can return to their previous job, without adjustments

10. Formal management: Long-term absence

- Whether the employee perceives they can return to their previous job, provided that adjustments are made
-
- What alternatives the employee may wish to explore: redeployment or application for employment benefits
- The mechanics of a return to work programme.

A second or further meeting would be called for in cases where dismissal is contemplated.

10. Formal management: Persistent short-term absence

First formal meeting to discuss short-term absence:

Employer should explore:

- The effect of the pattern of absences on the employee's colleagues, department and the employer's business
- The likelihood of continuing absences and the impact they are likely to have
- Whether there are changes to the employee's job or redeployment opportunities that would assist in attendance, reduce the effect on colleagues or the employer's business
- Whether the employee has a disability and, if so, whether there are any reasonable adjustments that could be made
- Whether it is appropriate to give the employee a formal warning that their attendance levels need to improve

A second or further meeting would be called for in cases where dismissal is contemplated.

11. The decision to dismiss

In cases of **long-term absence**, case law has established fairness will involve the following key elements:

- Ascertaining the up-to-date medical position.
- Consulting with the employee.
- Considering the availability of alternative employment.

Can the employer be expected to keep the employee's job open any longer?

11. The decision to dismiss

Need to write to employee.

For **long-term absence**, the letter should set out:

- the length of their absence
- the effect it has had on the business
- any medical advice
- the result of previous consultations with the employee regarding the duration of their absence and the possibility of any adjustments to their work or working environment.

11. The decision to dismiss

In the case of **persistent short-term absence**, case law has established the proper approach is to:

- Review the pattern of absences and the reason for them.
- Warn the employee of the required improvement in attendance, giving them the chance to make representations.
- Consider whether there is the required improvement in attendance; if there is not, dismissal is likely to be reasonable.

11. The decision to dismiss

Need to write to employee.

For **short-term persistent absence**, the letter should set out:

- the fact that the employee's attendance is unacceptable and the reason(s) why.
- details of the employee's absences and the steps taken to deal with them to date

Copies of any relevant documentation should be included

11. Decision to dismiss

Relevant factors when considering reasonableness of decision to dismiss:

- The nature of the employee's illness.
- The prospects of the employee returning to work and the likelihood of the recurrence of the illness.
- The need for the employer to have someone doing the work.
- The effect of the absences on the rest of the workforce.
- The extent to which the employee was made aware of the position.
- The employee's length of service.

11. Decision to dismiss

Alternatives to dismissal:

Possible alternatives to be considered:

- Alternative employment
- Ill-health retirement
- Permanent health insurance

11. Decision to dismiss

Potential claims:

A capability dismissal may give rise to possible employment tribunal claims such as:

1. Breach of contract
2. Constructive Dismissal
3. Unfair dismissal
4. Discrimination or harassment

An employer can defend the claim if they are able to show the dismissal was fair

**Thank you for
listening, any
questions?**