

# Employees performing badly?

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**Helen Crossland sets out an employer's guide to managing poor performers**

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Addressing poor performance is often seen to be such a time-consuming process for employers that it is tempting not to intervene and hope for a natural improvement or conclusion.

Yet underperforming employees can cost a business dear, and a reluctance to manage the situation can send a dangerous message that such behaviour is accepted and tolerated within the organisation. Belatedly tackling unsatisfactory performance can also see the employee challenge the action on the basis of inconsistent treatment.

## Legalities

Capability, focusing on poor performance rather than health-related absence, is a potentially fair reason for dismissal, although the overriding aim of managing unsatisfactory performance is to encourage the individual to improve.

For the employee, the process will generally involve an informal review followed, if necessary, by a formal performance management. Should an employee be dismissed on performance grounds, as with any dismissal, the employee could claim unfair dismissal at an employment tribunal if they have two or more years' service. With a 'capability' dismissal, this could occur where the employee claims to have had their contract terminated prematurely or without just cause, or if the procedure taken was unfair.

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In most cases, tackling performance concerns during the probationary period ? which should be extended if there are any inklings of uncertainty ? will best protect the business from the commercial and management costs that follow from under-performance and the risk of claims.

However, regard should be given to other claims the employee could raise, including discrimination, for which no minimum length of service is required.

In such cases, and particularly where unsatisfactory performance may be connected to a disability, it might then be advisable to follow a formal process to show the dismissal was

not for an unfair or discriminatory reason.

Contractors need not be subject to performance management, and any concerns should be reviewed in conjunction with the contract for services governing the individual's work.

## Correct procedures

Performance issues are commonly dealt with under an organisation's disciplinary procedure, although it is strongly advisable to keep the 2 issues distinct and have a separate policy for each. This will also deter any confusion as to the true reason for any dismissal.

When addressing performance issues formally the correct legal procedure to follow is the [ACAS Code of Practice](#), or the employer's own performance management/capability procedure, provided the measures are not less than the minimum standards set out in the ACAS Code. Taking legal advice is always recommended before proceeding, especially where there is a question mark over whether the person has a disability that may affect their performance.

Minor lapses in performance can often be remedied through informal discussions or normal day-to-day management, and it is important that where such problems arise, line managers come to the fore in highlighting any shortcomings in a fair and reasonable way.

If the performance concerns are not resolved in this way or prove to be more serious, then the following process should be adopted:

1. undertake a reasonable assessment of the employee's performance with evidence gathered
2. write to the employee setting out the concerns regarding their performance, also enclosing the evidence compiled and inviting them to attend a formal capability meeting
3. hold a formal capability meeting at which you:
  - clarify the required standards the employee has failed to meet and examine the evidence in this respect
  - allow the employee to ask questions and respond to the evidence presented to establish any reasons for the poor performance
  - identify what can be done to assist the employee, such as additional training or supervision
  - set agreed targets for improvement and a time scale for review. Any formal improvement plan should involve regular review meetings between the employee and relevant manager at which the employee's progress is appraised, and they are advised of any aspects of their work that still warrant concern
4. write to the employee after the meeting with your decision, advising them of any sanction you have chosen to apply (see below), and offering the right of appeal.

Employees must be advised in any letters inviting them to a formal capability or appeal meeting of their right to be accompanied by a fellow employee or a trade union representative.

## Sanctions

Once the formal capability meeting has taken place, the appropriate outcome can be decided. If concerns remain, the standard scenario would be to issue a written warning,

followed later by a final written warning if problems persist.

However, if the individual's performance has fallen seriously below standard, a first and final written warning may be justified. It would be risky and unusual to terminate an employee on performance grounds without a warning having been given first.

Formal warnings should be in writing and specify:

- the areas in which the employee's performance has fallen below required standards
- targets for improvement and the review period in which improvement is required, e.g. 8 weeks
- any measures the employer will take to assist the employee in improving their performance, such as additional training or supervision
- the regularity of meetings during the review period at which progress is examined, e.g. weekly
- the possible consequences of insufficient improvement by the end of the review period
- how long the warning will remain on file e.g. a fixed term or indefinitely
- the employee's right of appeal. If, after a warning being issued, performance improves to the required standard, no further action need be taken.

Only once the employer is satisfied that it has made reasonable use of sanctions and is confident no further measures can be taken to assist the employee should they consider termination. A further capability meeting will normally be necessary after a written or even a final written warning before the employee can be dismissed.

## Conclusion

Performance issues highlight the need for good, consistent management, whereby employees know what is expected of them and managers understand their responsibilities. Probationary periods and appraisals are useful arenas for assessment, but are purposeful only if managers are honest about the employee's standing and then document and act on any concerns.

Often, there is a desire to avoid a difficult conversation, or to overstate an employee's performance in the belief this will encourage improvement. Other work demands may also intervene. While such factors are valid and understandable, they could lead to missed opportunities to tackle problems early on, when a formal procedure might not be required, and unnecessarily draw out or undermine any process that might then be needed to manage the performance of an employee on a formal basis.

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## Further information

- Related competencies include: [Legal](#)
- This feature is taken from the RICS *Construction journal* (February/March 2016)