

## Technical factsheet

### Managing performance

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

The contract of employment

The standard statement of terms and conditions

Working time

Age discrimination

Dealing with sickness

Managing performance

Disciplinary, dismissal and grievance procedures

Unlawful discrimination

Redundancy

Settlement offers

Family-friendly rights

Employment status: workers

#### **Why do we manage performance?**

A well-managed workforce is generally a happier and more productive one:

- Managing performance is about recognising good performers and motivating them to stay and grow the business.
- Managing performance is also about addressing poor performance and helping people to improve.
- If you fail to deal with underperformance:

- you may lose good staff
- profitability and productivity are likely to slide
- you will spend a long time managing your underperformers at the expense of other staff
- morale will be adversely affected.

This factsheet concentrates on dealing with poor performance, which, particularly in a small business, can cause many difficulties.

### **Performance in the probationary period**

In managing performance, or at least anticipating later problems, probation is a useful management tool. Most employers will set a probationary period of either three or six months. All probationers, particularly those who are not performing as expected, should have been receiving appropriate feedback throughout their probationary period and, if a decision is taken to terminate their employment, it should not be a surprise at the final meeting. A fair basic procedure should be followed as a matter of good practice (see [Technical factsheet: Disciplinary, dismissal and grievance procedures](#)), and you should at least ensure that the full reasons for the termination are properly backed up and documented. Where there are concerns about performance but where the employer believes there are grounds for optimism, the probationary period can be extended, with objectives for improvement set out and communicated to the employee.

Please note that the employee who is dismissed for poor performance currently has no right to make a claim of unfair dismissal until they have completed two years of continuous employment. Therefore, even after most probationary periods are over, there is usually a window in which the employer can dismiss a poor performer with very little risk of litigation, unless the employee is able to argue that there is some hidden motivation behind the dismissal, which may amount to unlawful discrimination.

Note that the new government is proposing to provide protection from unfair dismissal from day one of employment, which will represent a significant shift for employers. It is probable, although not confirmed, that this may be subject to a defined probationary

period. Details on this are awaited.

### **What are the employee's legal duties in relation to job performance?**

The employee must:

- obey lawful and reasonable orders. Obedience is the basis of any employment contract and the employee must do what the employer requires, which includes adapting to new techniques and skills, as long as proper training is given. There is also a basic understanding that the employee should be reasonably flexible in terms of job duties, especially in small businesses. However, it is not acceptable for the employer to require the employee to do something that is beyond their capability, unsafe or impossible.
- exercise reasonable care and skill in the performance of their employment. This is not an obligation to be 'perfect' but to be reasonably competent in the context of the skills and experience the employee has, their job responsibilities and the training they have received, adhering to the employer's rules and abiding by its policies.

### **Obedience and competence: the detail**

These two obligations form the basis of what is required of the employee under the employment contract.

A wilful refusal to obey a lawful and reasonable order without justification is a fundamental challenge to the employer's authority, and is misconduct rather than poor performance. In fact, it is generally regarded as gross misconduct and may well result in dismissal. With a misconduct allegation, the employer must initially carry out an investigation, which concentrates on a number of issues:

- an explanation of the refusal
- an evaluation of those reasons
- an assessment of the impact of disciplinary action
- a decision as to whether to take it.

If the employer finds that there is no excuse or justification for disobeying such an

instruction, then disciplinary action should be taken on the basis of misconduct in accordance with [Technical factsheet: Disciplinary, dismissal and grievance procedures](#).

On the other hand, where the employer is alleging that the employee is guilty of poor performance, rather than insubordination, then the issue is about competence/ability to do the job. This is not misconduct, but where it does impact seriously on the employment, it may lead to a fair dismissal. The rest of this factsheet covers what is required for the employer to deal with poor performance.

In tackling incapability/incompetence, there are a number of relevant issues that the employer may need to consider, depending on the circumstances.

### **Job or role description**

A very useful document in managing performance is a job description. It is an opportunity for the employer to set out broadly what is expected of the employee in terms of range of tasks. Some employers fear that specifying tasks may lead to inflexibility, but job descriptions should also contain broad umbrella clauses requiring the employee to perform 'ancillary tasks' or to carry out 'such other duties as are specified by line management'.

### **Training, supervision and support**

In considering whether the employee has demonstrated incompetence, the employer needs to look at the evidence to decide whether proper training has been given, and whether the employee has been properly supervised and supported. Any tribunal will want to see clear evidence that the employer has done all that is reasonable in providing an environment in which the employee has been enabled to perform their role to an acceptable standard and it will need to be convinced that the employee understood what was required of them.

### **Annual appraisal**

Where there have been concerns about performance, they must be dealt with proactively and not swept under the carpet. An annual review has an important role in performance management and in communication with staff. It will often be the first place at which

concerns are raised about performance. It has also become a particularly important forum since the removal of the retirement age, as discussed below. Generally, the appraisal should include:

- performance to date against targets, activities and outcomes
- developmental and training needs
- future plans (employer)
- short-term, medium-term and long-term aspirations (employee)
- future performance – what the employer is looking for the employee to achieve.

The appraisal therefore provides a platform for discussion about performance. Sometimes it provides a convenient occasion to discuss any concerns the employer may have, but it should be stressed that the employer does not have to wait until appraisal time to deal with these issues. Indeed, performance concerns should generally be raised promptly as and when they arise.

The appraisal is not part of the formal procedure set out below, but it certainly does assist any employer who is alleging incompetence to be able to demonstrate that the problems have been clearly flagged in an appraisal(s) in the past; this helps to provide evidence that a competence issue has been recognised and that the employer has tried to address it from an early stage. Conversely, it is never helpful to any defence where an employer raises issues around competence and even moves to dismiss, yet the last annual appraisal indicates that there are no problems with the employee!

### **Retirement planning**

The default retirement was removed some years ago and, as a result, both performance management and retirement planning will be key for employers in dealing with older workers. Employees can retire when they choose to do so, and employers cannot rely on enforcing a retirement age as part of their performance management process, which has been the case in the past. Neither can they plan staffing based on a cut-off at, say, 65. This would be likely to be contrary to age discrimination rules.

The annual appraisal, as noted above, will be very important. It is a forum in which

employers should discuss with all staff their long-term plans as far as their career is concerned, and establishing this line of communication will be critical in staff planning. This regular conversation also gets the employee used to discussing future plans and makes it less likely that an older worker might suspect some form of age discrimination when their future plans, including those for retirement, are discussed.

## **GENERAL PROCEDURE FOR DEALING WITH PERFORMANCE MANAGEMENT**

The process for dealing with poor performance follows the [Acas Code of Practice](#) as indicated below, and will consist of a number of meetings.

### **Key aspects of all meetings**

All performance management meetings are similar, whether informal or part of the formal procedure, and they should include:

- **Setting of standards.** The expectations of the employer should be clearly documented as far as possible in terms of performance and objectives, and time frame within which this is expected – see process below.
- **Communication with the employee.** The employee should not be in any doubt as to where they are failing to meet these objectives and this should be clearly explained. Although any initial meeting is informal in tone and is not part of any formal disciplinary procedure, the whole conversation should be documented and actions to be taken should be recorded. The employee should always have an opportunity to state their case; this might include issues around sickness or home- or work-related difficulties that are affecting performance. The content and outcome of the meeting should be confirmed in writing.
- **Outcome of the meeting.** This might include
  - Training to be planned – whether formal or ‘on the job’. If the latter, then who is to do it and when?
  - Addressing particular issues that have been raised, eg relationships at work, health of the employee etc
  - Mentoring or coaching – where this is appropriate, what arrangements have been/will be made?
  - Where are the goalposts? What is the employee expected to have achieved

realistically by the time of the next meeting, and when will that be? What other action should have been taken by each side, and when?

- Feedback – when is the next meeting, and where should the employee go if they have problems or issues to raise before this?

All meetings should be properly documented.

### **How do I set objectives?**

Any requirements you have or goals that you set should relate to specific business objectives, eg fee income, profitability of a department, competence and efficiency in defined tasks etc. What is required of the employee can be first looked at in terms of the key results areas for which the person is responsible as indicated in their job description.

Objectives can be expressed in any of the following ways:

1. targets or budgets that state in quantifiable terms the results to be achieved over a period of time: for example, the jobholder is expected to generate £x income, or collect fees within a certain period, or operate within a budget of £x
2. tasks or projects that define a particular objective that has to be completed by a specified date
3. performance standards that describe the observable behaviour, indicating that the job has been well done.

Please note that behavioural issues around poor treatment of work colleagues, rudeness to clients and general poor attitude should be dealt with as misconduct rather than as a question of poor performance.

### **SMART objectives**

When setting objectives, it is important that the following points are taken into consideration if the objectives are to be of any use in determining whether or not the desired outcome has been achieved. A good objective should be a **SMART** objective, which can be defined as follows:

**SPECIFIC:** describes the specific outcome or result for which the staff member will be held accountable. Objectives must pinpoint exactly what is to be achieved in terms of the targets or standards to be reached and must relate clearly to a key result area. Objectives that are non-specific or vague make it difficult to assess actual achievement. Where the objective is related to a particular behaviour, it is important to include 'behavioural indicators' that specify clearly what is expected. Often, objectives may stretch the employee where they have been underperforming in a responsible role, in order to set them the task of managing their personal development.

**MEASURABLE:** identify the criteria that will be used to measure performance; in other words, how will you know if an objective has been accomplished? Valid measures include quality and quantity standards, completion time and budgetary guidelines. Where the objective is linked to behaviour, the measure should include clear behavioural indicators.

**AGREED/ACHIEVABLE:** the objective must be achievable given the current environment, resources available and the experience and skill level of the staff member. It is worth noting that objectives should also include an element of 'stretch' that will challenge and develop the individual.

**REALISTIC:** the objective must be realistic in terms of the context within which the individual operates and it must be seen as reasonable. As it is the individual's perception that is important, it may be that some support and encouragement is needed as opposed to changing the objective so that the individual no longer feels it to be beyond them.

**TIME-RELATED:** define the timescale within which the objective must be completed or indicate if it is ongoing.

Finally, in addition to the SMART criteria outlined above, the objectives should be discussed with the employee and, as far as possible, mutually agreed on, together with the success criteria. Once objectives have been agreed, the manager and the individual should discuss how they will be achieved. For some objectives, little or no discussion will be necessary because the individual is clear about the course of action to be taken. In



other cases, however, it may be necessary to review what the individual will need to do, and this may include the need to acquire new skills or enhance existing ones. It may also focus on the need for training and support from the manager and other people in the organisation. However, please note that although it is desirable that both sides agree to the objectives, ultimately it is for the employer to set the standards that it expects of its employees, and the manager is free to set targets and objectives that they believe are achievable.

### **Other reasons for poor performance**

It may be that, during this informal preliminary meeting or later in the process, the employee discloses that they have another problem that is leading, or contributing, to the problem of poor performance:

- **Illness or disability.** The employee may indicate that they have a medical condition or health concerns. It will be inadvisable for the employer to take any further action until the extent and effect of this has been determined. Once it has, if the condition is a disability, the employer will have to consider what reasonable adjustments can be made to accommodate this. For further details on this, please see [Technical factsheet: Unlawful discrimination](#) and [Technical factsheet: Dealing with sickness](#).
- **Stress.** The employee may state that they are under stress for personal reasons or because of work-related issues. Again, the employer will need information about the nature and extent of the stressor. If it is a personal issue, such as a divorce, debt or serious illness in the family, most employers would give the employee some latitude in the short term. A tribunal would almost certainly take a dim view of a dismissal for poor performance in the teeth of serious personal problems unless those problems persisted beyond a reasonable time. If the employee raises a work-related issue, such as excessive workload or bullying, then the employer should carefully investigate the allegations in order to decide whether they are justified, taking appropriate action, eg reduction of workload or disciplinary action against the bully where appropriate. The employer should not be deflected from dealing with the performance issues by the introduction of the allegation of stress, unless there is a clear basis for this.

### **Initial performance management meeting**

Where concerns are initially raised about an individual's performance, the appropriate manager should hold an informal meeting in order to lay out the employer's concerns, listening to any representations by the employee, and to set objectives or discuss matters further. It will not normally be considered acceptable for an employer to proceed to formal performance management until it is clear that reasonable efforts have been made to bring the concerns to the attention of the employee and assist them to improve.

Once this process has been started, a continuing failure to meet objectives and to perform effectively is dealt with, normally in a three-part procedure, as laid out below.

### **Formal performance management procedure**

Once the informal stage has taken place, if there has been no improvement or insufficient progress towards the objectives, the employer should move into a more formal process. Many employers have a performance management procedure, but if there is no such written procedure it is acceptable to follow the pattern of the standard disciplinary procedure. The employee is effectively taken through three stages similar to the three warnings, but the tone of these meetings is different from the disciplinary meeting in that there is no allegation of misconduct or wilful behaviour; it is competence that is being discussed. The emphasis is on support to improve rather than on investigating misconduct and deciding whether it merits punishment.

The employer will set objectives and a timescale for improvement (as laid out above), discuss with the employee how they may be achieved and decide what training and support might be required. If, despite this, the employee does not reach a satisfactory standard, then the employer moves to the next stage. Ultimately, the employee may be dismissed at the third meeting after a second failure to meet formal objectives, dismissal to be with notice.

It is critical, as always, that the employer carefully documents these meetings, and confirms what has been discussed in a letter to the employee stating the outcome of the discussions. The dismissal procedure should conform with the Acas code, otherwise there is a danger that the dismissal could be seen to be unfair and damages could be increased. For details of the standard disciplinary process and procedure, see [Technical factsheet:](#)

### [Disciplinary, dismissal and grievance procedures.](#)

For this reason, performance management processes tend to follow the standard three-stage structure used in disciplinary matters, ie a first 'warning' (although this may have another name such as 'performance notice'), a final warning and then dismissal. It should be noted that any policy should include a proviso that the warning or notice lasts for one year. This means that even if the employee meets the short-term objectives set out in the formal process – for example, increasing sales by 10% in three months – if they fall back and underperformance resumes within one year from the date of the warning/notice, the employer can still move on to the next stage of the formal procedure.

### **Settlement offers**

Where the employer is confident that a particular employee has no future in the business and wishes to short circuit further procedures and avoid the risk of a potential claim for unfair dismissal, making a settlement offer may be an option. This may cost slightly more but gives the employer the comfort of knowing that no legal action can be taken in respect of any termination of employment. The employee has no obligation to enter discussions about this, and no obligation to agree to the offer. Settlement offers are covered in [Technical factsheet: Settlement agreements](#), and involve making the relevant employee an offer at any stage in the process, or even before it starts, to terminate the employment on agreed terms. Many employers will attempt to reach a settlement with the employee rather than go through a lengthy performance management process, which may be difficult to manage in a small team and take up a great deal of management time.

Note in particular that such offers should not be made without professional advice; in situations where there is the possibility of an allegation of discrimination against the employer it is normally inadvisable, and also in various other circumstances. It is important to be fully informed about this process: see [Technical factsheet: Settlement agreements](#) for more details. In addition, Acas provides a [code of practice](#) on settlement agreements. Employers should always seek legal advice when dealing with performance management issues.

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