**Managing underperformance at work**

**Employee performance is key to the success of an organisation and getting the most out of each one of your employees is crucial. From career progression, reward and recognition to managing underperformance, there is a wide range of measures employers can implement within what is known as “performance management”. In this feature, CIPD HR-inform take a look at what employers need to know about managing poor performance.**

**Background**

Performance management is an umbrella term that has no single standard definition. There are a range of activities that fall within it that cover everything. From supporting employees to reach their full potential to managing those who don’t meet the required standards to do so, or should it become necessary, managing them out of the organisation in the fairest way possible.

Having effective management performance processes in place not only makes the organisation an attractive option for new employees, aiding recruitment, but it can also motivate individuals to stay within it by giving them access to the tools and support they need to grow, develop and progress. In that way, it can also be an excellent retention tool, benefiting both the individual and the organisation as a whole.

On the other side, effective performance management processes can manage employee capability in a way that supports the individual and reduces the risks that underperformance can pose to the business. These risks come not only in reduced productivity and business performance but also the legal risks that can arise when employee performance is not dealt with fairly and reasonably. Below, we look at ways that this can be

achieved.

**Poor performance can be a fair reason for dismissal**

Section 98 of the Employment Rights Act 1996 provides a list of potentially fair reasons for dismissal, one of which is “capability”. For such a dismissal to be fair, a reasonable process must be followed to achieve that dismissal, considering the organisation’s size, resources and the circumstances of the case.

For a capability dismissal to be reasonable, the employer must be able to show that steps have been taken to ensure the employee understands the standards expected of them and that measures have been put in place to support the employee in raising their performance to meet those standards.

This reasonableness extends to the way in which in which improvement is sought, especially if the procedure may end in dismissal. Employers need to be able to show that they have treated the employee in a fair and consistent manner and that realistic goals have been agreed upon and reviewed.

**Acas Code of Practice on Disciplinary and Grievance Procedures**

Alongside reasonableness is the requirement to follow the Acas Code of Practice. Performance capability is not a conduct issue, although sometimes it can be hard to tell the difference between the two and the procedures used to deal with these issues are very similar. Whether poor performance is because of conduct or capability essentially comes down to one question — is it the case that the employee can’t do as expected, or that they won’t? Only a thorough investigation can uncover this.

In accordance with the Acas Code of Practice, employees should be given at least two levels of warning before dismissal. These warnings should be accompanied by clear targets and a plan to help the employee to improve; a Performance Improvement Plan (PIP) is a common way to do this. In addition, the employee must be informed that failure to improve could lead to further formal action and potentially dismissal.

The formal requirements of the Code should be followed, including:

* the right to be accompanied at any meeting that could result in a formal warning
* to be provided with specific reasons of how their performance has not met the standards expected
* the right of appeal to any formal action.

**Having a capability policy is recommended**

By having such a policy, employees can be made aware of the potential consequences of their underperformance and how it will be managed. It also provides a useful guide for managers on the processes they should follow, helping to ensure consistency across the organisation.

However, having a policy in place is not enough — it must be followed consistently. Failing to do so can result in serious consequences, as was seen in the Scottish case of *Briggs v The Trustees of the National Museums of Scotland*. In this case, the employee worked as a digital media content producer and the employer was responsible for operating four museum sites across Scotland.

Briggs was put on a series of three PIPs to support them to improve the quality of their work and frequency of output but these concluded without satisfactory improvement. In November 2023, they produced no content and in December 2023 they produced six social media posts, compared to a colleague who produced 73.

A formal hearing was held under the employer’s performance policy. Briggs was dismissed because of lack of capability to perform the role and brought an unfair dismissal claim. The employment tribunal in Scotland found that the dismissal was not within the band of reasonable responses as there were no formal warnings issued under the employer’s performance policy. It was decided that Briggs had been unfairly dismissed and they were awarded £22,210.75 in compensation.

**Takeaway**

Dealing with poor performance takes a combination of skill and time and it is not always straightforward, but it is a worthwhile task. In order to reduce the legal risks that can arise in connection with the management of employee performance, it’s necessary to follow what is set out in the Acas Code of Practice; a well drafted capability policy is one of the best ways to do this, as long as those responsible for implementing it are well trained on how to do so.

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