

LEGAL UPDATES AND FACTSHEETS

MANAGING POOR PERFORMANCE

1 INTRODUCTION.

- 1.1 Optimising organisational performance becomes a priority in a challenging economic climate. As a result, organisations are generally sharpening their focus on managing poor performance. However, while it is good business practice to do so, an employer must ensure the performance issues are dealt with in a professional and consistent manner.
- 1.2 Frequently companies don't tackle poorly performing individuals, either out of fear of legal challenge, or to avoid a difficult situation, or simply on account of lack of skill in how to manage weaker performers.
- 1.3 This paper reviews performance management in the workplace. The points made here could serve as a checklist/ or a reminder whenever employers need to deal with poorly performing staff members.

2 HOW TO MANAGE PERFORMANCE AT WORK.

- 2.1 Employers need to develop a well-defined and consistent approach. They must develop and motivate their staff to achieve their full potential. Employers also need to be clear and consistent in managing those who do not achieve the desired standards. They should have a procedure on how to deal with under-performance.
- 2.2 Best practice for managing poor performance includes the following 5 points:
 - 2.2.1 Communicate.

This will entail frequent and ongoing communication by management with employees. In particular, employers should:

 - Hold regular performance meetings; and
 - Inform staff if performance is not to an acceptable level.
 - 2.2.2 Be clear about expectations and objectives.

This entails a well structured and properly communicated process for performance management. At the very least, managers must:

 - Articulate expected and acceptable standards
 - Formulate clear objectives. Have these in place; and review & agree them regularly.
 - 2.2.3 Practice early intervention.
 - Managers must be sufficiently focussed on performance so that they can *identify under-performance early*; and
 - *Communicate the problem as soon as possible* – before the level of performance is assumed to be acceptable performance.
 - 2.2.4 Engage & train skilled managers.

An employee is unlikely to be motivated to perform if the manager is not doing so. Managers must therefore be motivated to lead by example. They should:

 - Be trained in people management, specifically in managing poor performance.
 - Use appropriate skills to understand the source of the problem; and be able to identify an appropriate solution (including appropriate support/ development of the staff member).
 - 2.2.5 Employee Responsibility.

If there is no 'buy-in' from employees it will be very difficult to achieve a satisfactory result. Nevertheless if the first 4 points above are in place and have been actioned timeously, worker cooperation will be greatly facilitated. Ideally, from an employer's perspective, the business will want each employee to:

 - Acknowledge that performance is a problem.
 - Understand that they together with the employer have responsibility for their performance.
 - Share responsibility for achieving a resolution.

3 DISTINGUISH RECURRENT UNDER-PERFORMANCE FROM EPISODIC INSTANCES.

- 3.1 It is frequently the case that there are mitigating circumstances in instances of poor- or under-performance. If that is so, the situation can be managed discreetly and resolved to the satisfaction of all concerned. Even the best performers will experience dips in performance from time to time and for various reasons. For example, they may be affected by issues outside work. Infrequent or 'one-off' episodes should be treated differently from persistent or recurring under-performance.
- 3.2 Where informal attempts to resolve under-performance are not successful, a more formal process is the next step. Ensure, firstly, that a performance management policy (also entailing an appropriate procedure or process) is in place. This must be communicated so that all staff members are fully aware of the potential consequences of poor performance.

4 HOW TO ADDRESS RECURRING UNDER-PERFORMANCE.

- 4.1 If under-performance is a recurring problem, implementing a Performance Improvement Plan (the PIP) may be required. The PIP should:
- Stipulate clear goals and objectives.
 - Agree employee and employer responsibilities and commitments in respect of the objectives and the support to be provided.
 - Agree a development plan with appropriate training and coaching where necessary.
 - Describe the consequences of not meeting the performance standards, and communicate these clearly. (*It is difficult to discipline an employee if they have not been made aware of the potential consequences of not meeting agreed objectives*).
 - Review, deliver feedback and record regularly.
 - Record the PIP and ensure both parties sign the plan to acknowledge agreement.
- 4.2 The objective of implementing formal performance management is to try and improve performance. This is the spirit in which the process should be entered and administered.

5 THE LAW ON DISMISSAL FOR POOR PERFORMANCE.

- 5.1 In the context of Unfair Dismissal (*Part XI* of the *Employment Rights (NI) Order 1996 (the Order)*) a *capability* dismissal is potentially fair (generally, *article 130* of *the Order* refers). The onus will be on the employer to justify the dismissal. "Capability" relates to the ability of an employee to carry out his or her job (or the way in which he or she does so) (*art 130(2)*); and capability is assessed by reference to an employee's "*skill, aptitude, health or any other physical or mental quality*" (*art 130(3)(a)* of *the Order*).
- This means that in practice an employer is afforded the potential for fair dismissal in relation to the performance of an employee.
- 5.2 However in addition to an employer's substantive right to dismiss in these circumstances *the manner in which the dismissal is carried out must also be fair*. A good, fair and robust process will include the following:
- It will ensure continuous appraisal.
 - It will refer to performance figures and/or data on key performance indicators – where these are available.
 - Be supported by a clear and communicated capability procedure.
- 5.3 An accurate record of performance is essential because dismissal is more difficult when there has not been a continuous process of performance appraisal and no objective data is available. If employees cannot be assessed against numerical or financial targets, performance appraisals are invaluable.

6 WHAT IF YOU DON'T HAVE RECORDS; OR THE RECORDS ARE INADEQUATE?

- 6.1 Employers are not entirely without remedy in these circumstances. The process isn't lost to those without adequate HR performance appraisal records. But matters are significantly more difficult.
- 6.2 If problems must be addressed, targets should be set and a timescale for review agreed, as outlined in the PIP (par 4.1 above). Failure to meet the terms of a PIP may result in a Capability Hearing (see par 7 below). This needs to be clear in the documentation.

7 THE CAPABILITY HEARING.

The employee has the right to be accompanied and the usual statutory dispute resolution procedures (SDDPs) will apply in the normal course of events. The purpose of a capability hearing is to:

- Set out why and how the employer considers the required standards have not been met.
- Provide an opportunity for the employee to explain the poor performance and ask any relevant questions.
- Discuss measures, such as additional training or supervision, which may improve performance.
- Set targets and a timescale for improvement and review.

8 THE PROCEDURE/PROCESS AFTER THE CAPABILITY HEARING.

- 8.1 Following the hearing, a *first written warning* may be given, setting out the areas discussed and the consequences of failing to improve within the review period, or of further unsatisfactory performance.
- 8.2 If performance does not improve satisfactorily, the matter may be progressed to another stage or the review period may be extended. In the case of a second capability hearing, the process and discussion points are similar to those in the first stage, but the emphasis is on why the targets have not been met. A timescale for review will be set and, if appropriate, a *final written warning* will be given. This would set out the matters already discussed and the consequences of failing to improve within the timescale, or of further unsatisfactory performance. A final written warning will normally remain active for between six and 12 months.
- 8.3 A failure within the final review period or further poor performance after a final warning will lead to a further hearing. This will, again, look at the failings and possible reasons for them. Dependant on the response, it should be established whether there is any reasonable likelihood of the required standard of performance being met within a reasonable time frame. Any practical alternative to dismissal, such as redeployment to another available job of the same grade (or lower, if permissible under the contract), should also be considered. *If no options exist, dismissal will be appropriate.*
- 8.4 *Appeal.* Dismissal will normally be with full notice or pay-in-lieu of notice. Appeals should be offered following all stages of the formal capability procedure. You should ask the employee to state their grounds for the appeal but note that the statutory procedure does not actually require them to provide any grounds for appeal, albeit the chances of a successful appeal will be slim without them.
- 8.6 NOTE: The level of performance expected of an employee will depend on salary, status and seniority. A capability dismissal will generally require a more blatant failure to meet standards for those employees lower down the employment ladder than those at the top. However, if employers are able to show that they have genuinely attempted to avoid dismissal, tribunals will often take a more sympathetic approach.



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