

Managing Performance Issues

Despite the importance of maintaining high standards of performance to an organisation, there is often a reluctance among managers to tackle performance issues. This guide sets out the importance of dealing with performance issues and how performance can be managed effectively.

Generally, management of performance is dealt with through supervision, appraisal systems and pay systems. Unfortunately, there will be occasions where an employee is underperforming. In such cases, it may be appropriate to apply a capability procedure.

The Importance of a Procedure

Whilst some organisations may deal with poor performance as part of the disciplinary procedure, it is advisable to have a separate procedure dealing with performance issues. This is not only because capability and conduct warnings need to be kept separate, but also because tackling performance issues often requires a more supportive approach.

The aim of the capability procedure is to bring about an improvement in the employee's performance and, sometimes, this can be achieved by an informal discussion



or counselling. This may identify that further training or support is required or there may be some other underlying reason why the employee is not performing, e.g. poor working relationships or even bullying or harassment (which the organisation then needs to deal with under the appropriate procedures).

If the informal process does not result in the required standard of performance being achieved, or the performance issue is too serious to deal with on an informal basis, then the formal process should be applied.

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Our example capability procedure adopts the basic principles of fairness set out in the ACAS Code of Practice on Disciplinary and Grievance procedures (the ACAS Code) and accordingly has just two formal warning stages (prior to the consideration of dismissal). This Code of Practice can be found online. An organisation can, if it wishes, choose to have more than two warning stages in the procedure. However, failure to adhere to the minimum standards provided in the ACAS Code can result in any Tribunal awards being increased by 25%.

The ACAS code recommends that 'warnings' are issued during the formal process but many employers, in line with the approach favoured by tribunals in the past, choose to use less formal language. It is acceptable, for example, to issue performance improvement 'notices' or 'cautions' as long as the procedure outlined below is adopted.

As with disciplinary procedures, there is no requirement for capability procedures to actually form part of the employee's contract. It is easier for an organisation if such procedures are not contractual as this enables the organisation to change and update the rules from time to time without getting the employee's agreement to the change. Any changes or amendments should nonetheless be communicated to the workforce.

Applying the Capability Process

In the first instance, unless the matter is particularly serious, any performance issues should be dealt with on an informal basis. The formal process will apply if the informal process does not work, or is inappropriate given the seriousness of the performance issue.



When dealing with issues under the formal capability procedure, there are some key steps that need to be taken to ensure that the process is fair. One of the first steps is to establish the facts of the case. An organisation should investigate the matter to understand the circumstances and, in particular, the expected standards of performance (look at job descriptions and person specifications, if they exist, and ensure they are up to date). Make sure the employee has been made aware of the expected standards and ensure that they are achievable and realistic. If these criteria are satisfied, then you should consider how far the employee falls below that standard. If this investigation supports a case for progressing the matter, then the organisation should act promptly.

Sometimes the standards required in a job role change due to changes in structure, responsibilities and targets set. Employees who have been performing adequately at one level may then underperform as a result of changes to their role. Ideally, measures should be put in place to support such job changes as they occur, and job description documents should be changed accordingly.

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Care needs to be taken if the employee in question is disabled and their disability may be affecting their performance. If so, consideration needs to be given to whether there are any reasonable adjustments that could be made. It is unlawful to treat someone less favourably because of their disability, unless this can be objectively justified.

The next step is for the employee to be invited to a meeting to discuss the poor performance issue. This invitation should be in writing and should provide the employee with sufficient information to understand the poor performance issue and prepare a response. The description of the performance issue should be as specific as possible and not too vague or ambiguous. Obviously, if the performance is measurable, for example, against set targets, this can be easier to illustrate. Behavioural problems, however, are more difficult to describe, but examples of good and poor behaviour may help.

The invitation should also make clear what the possible outcome of the meeting could be. The employee will have the right to be accompanied by a fellow worker or accredited trade union official at any meeting under this procedure which might result in a warning, dismissal or any other action such as demotion, etc.

Although it is usual for the first stage of the procedure to be dealt with by the employee's line manager, where practical for any further stages, the person conducting the capability hearing should not have been involved in the investigation process. A member of staff or HR should usually be present to take notes of the hearing. At the hearing, issues concerning the employee's performance should be fully explained and discussed with the employee. This discussion should progress to talking about what improvement is required and setting targets and timescales for improvement.

Any timescales should be realistic. For example, you would expect to see an immediate, sustained improvement from a receptionist who is not welcoming to customers, but for a salesperson who is not achieving enough sales, it might take longer to gauge an improvement in performance. Ideally, the manager and the employee should agree an action plan between them which can be used for monitoring and review after the hearing. Gaining the employee's agreement is a step towards gaining their commitment to making the necessary changes to meet their job standards. However if, after discussion, the employee does not agree to a particular target, this may have to be imposed. However, you should ensure that the employee understands the rationale behind the target. Always ensure that targets follow the SMART guidelines, which should be well known to the employee through the appraisal system:

- ◉ Specific
- ◉ Measurable
- ◉ Achievable
- ◉ Realistic; and
- ◉ Time bound

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Consideration should be given to whether there should be any additional support provided to the employee to assist their performance, for example, refresher training, assistance from within the team, etc.

If at the end of the meeting your decision is to apply a warning, the warning should make clear the performance issue, the standard required, and the timescale in which you expect that standard to be achieved, or issue an action plan. The warning should be for a specific duration but, during that time, regular reviews should take place with the employee to discuss their performance. The warning should state what may happen if the employee does not achieve the required level of performance, i.e. a further warning, or dismissal.

It may be that the employee has not achieved the required level of performance after the various warning stages and a further capability review meeting is held. If the next level of sanction would be dismissal, consideration should be given to alternatives to dismissal. This could include transferring the employee to another area or demoting the employee. If the contract of employment does not allow for the transfer or demotion of the employee, then their express agreement will be required. It is important that an organisation acts consistently when applying any sanction.

Where any action is taken, i.e. warning, demotion or dismissal, the employee will have the right of appeal and this should be stated in the letter confirming the outcome of the capability review. It is sensible to set a time limit for employees to lodge an appeal, but you should avoid automatically disallowing the appeal if it is lodged outside this period.

Normally, once a dismissal has taken place and has been communicated to the employee, this will have the effect of ending the contract of employment. Some contracts, however, do provide that if an employee appeals a dismissal decision, the employment will be treated as continuing until the outcome of the appeal hearing. Any appeal hearing should be conducted by someone who is impartial, wherever possible, and who has not been involved in any previous stages. However, in dealing with performance issues, it is helpful to use a senior manager who has a knowledge and understanding of the area of work being scrutinised, particularly for more senior employees whose duties may be quite specialised such as roles in finance or engineering.

The right to be accompanied applies to the appeal stage also.



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