

CAPABILITY AND POOR PERFORMANCE TOOLKIT



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A WHISTLE STOP TOUR OF:

- Investigating and managing poor performance
- Capability procedures
- Conducting a performance review meeting
- The decision



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Managing performance before a problem arises

Setting the required standard

Express terms aside, it is implied into every contract of employment that an employee will perform the role to a minimum required standard. What the required standard is will vary from role to role and may encompass not only the technical aspects of the job, but more subjective aspects, such as the employee's attitude or ability to interact with clients and colleagues. Those in very senior roles are expected to be more aware than most of what is required of them and to be capable of judging for themselves when something falls below the required standard.



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Managing performance before a problem arises

Setting the required standard

Some requirements of the job are so obvious that the employee's attention does not need to be drawn to them. For example, as was observed in the case of *Burns v Turboflex Ltd* EAT/377/96:

"a van driver ... does not need to be warned that he should not drink before he drives; the personnel director of a large company does not need to be told that he should not make racist or sexist comments about or to members of his staff; a pilot does not need to be warned that he should not crash the plane."



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Managing performance before a problem arises

Setting the required standard

- Aside from very obvious requirements of the job, it is important for the employer to have drawn the employee's attention to the required standard, usually at the outset of employment and then, if it becomes necessary, for the purposes of a capability procedure. If performance targets apply, for example, a tribunal will want to be satisfied that an employee could reasonably be expected to have known about them. Were targets brought to their attention and were they made aware of the possible consequences of not meeting certain targets?



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Managing performance before a problem arises

Setting the required standard

Implied contractual terms. For example, the duty of the employee to take reasonable care in the performance of his duties, work obediently and diligently and to obey the employer's lawful and reasonable instructions.

Express contractual terms. For example, job title and description, probationary periods, qualifications required and performance targets (for example, sales or income) where these are incorporated into the contract.

Non-contractual policies and procedures. For example, operating procedures or quality manuals set out in the non-contractual section of a staff handbook or other reference document.

Industry and local practice. For example, health and safety operating requirements, professional body standards of performance and the historic standards of performance which the employer has accepted.

Managing performance before a problem arises

Setting the required standard

- Effective use of probationary periods
- New recruits
- Existing employees
- Importance of appraisals



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Managing performance before a problem arises

Setting the required standard

- **Importance of appraisals**
- Evidence of targets and performance. While this may be gleaned from data such as sales or productivity reports, records of customer complaints or a demonstrable fall-off in trade, the most important evidence will often be provided by those managing and supervising the individuals concerned.
- A performance appraisal system that is diligently pursued by the employer can provide important evidence of performance problems which can later be used to support a fair dismissal. In the event of dismissal, the employer is also likely to be better placed to demonstrate that opportunity for improvement has been given if regular appraisals have been undertaken.
- In order to be effective, appraisals should be conducted honestly. Managers who provide unduly positive or flattering feedback, which does not reflect the employee's true performance, may find that this is later used to undermine an employer's argument that belief in incapability was reasonably held. Employers who fail to tackle performance issues through an appraisal system may also find it will hamper their future business decisions in other respects. For example, in redundancy situations, employers wanting to give someone a low score for performance will be hindered if a low score is not corroborated by past appraisals.



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Where a problem arises

- Examples of poor performance
- Poor performance can take many different forms, but some common examples include:
 - Lack of productivity or slowness
 - Inflexibility
 - Failure to establish good working relationships with colleagues or customers

The employer should characterise the problem correctly as the approach taken may differ, for example, if the matter is one of serious misconduct rather than underperformance. For example, in *Hotson v Wisbech Conservative Club* [1984] ICR 859, the employee was dismissed for her failure to explain cash shortages in the till of the bar where she worked. Although the employer based its dismissal on capability grounds, it changed its argument at the tribunal hearing to one of dishonesty. The EAT held that an employer can normally change its mind as to the label it puts on the reason for the dismissal, provided that the same facts were relied on and the employee was not put at a disadvantage. However, a change from capability to dishonesty, even based on the same facts, was not a mere "change of label". A dismissal for suspected dishonesty was such a serious matter that it should be put with sufficient formality and at an early enough stage in the case to provide a full opportunity for answering it.



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Where a problem arises

- In Sutton and Gates (Luton) Ltd v Boxall [1978] IRLR 486, the EAT commented that "capability" should be construed "narrowly and strictly", and that cases where a person's poor performance is due to carelessness, negligence or idleness may be more appropriately dealt with as misconduct. Where the dismissal is unfair, and the case is in reality one of misconduct, then the tribunal will, in deciding compensation, have to consider the degree to which the employee's conduct may have contributed to their dismissal



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Where a problem arises

- The risks of a heavy-handed approach
- In seeking to address performance issues, it is unlikely that an employer who follows a reasonable procedure will break trust and confidence. However, the employer should take care not to unduly criticise or humiliate a poorly performing employee in front of colleagues. In *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316, the claimant's supervisor reprimanded her severely in front of other employees. Upholding her claim for unfair constructive dismissal, the EAT found she had been "humiliated, intimidated and degraded to such an extent that there was a breach of trust and confidence which went to the root of the contract". This was so, despite the fact the supervisor would have had no authority to dismiss her.



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Unfair dismissal – Poor performance

- Potentially fair reason for dismissal
- There are five potentially fair reasons for dismissal under section 98 of the Employment Rights Act 1996 (ERA 1996): conduct, capability and qualifications, redundancy, breach of statutory restriction and "some other substantial reason".
- The statutory definition of "capability" as a reason for dismissal under section 98(3)(a) of the ERA 1996 encompasses competence, health and qualifications. Section 98(2)(a) of the ERA 1996 provides:



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Unfair dismissal – Poor performance

- "A reason falls within this subsection if it:
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do."
- Section 98(3) puts a further gloss on this:
- "In subsection 2(a):
 - (a) "capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) "qualifications", in relation to an employee, means any degree, diploma, or other academic, technical or professional qualification relevant to the position which he held."



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Fair Procedure

- Provided one or more of the above potentially fair reasons for dismissal applies, whether a dismissal is fair will depend on the reasonableness of the employer's decision in the particular circumstances (section 98(4), ERA 1996) and the procedure followed
- In the context of dismissal for capability reasons, the tribunal will not only want to be satisfied that the employer honestly believed, on reasonable grounds, that the employee was incapable of performing their job but, with regard to the overall reasonableness of that decision, will consider whether management failed to discharge its own responsibilities towards the employee. An important element of this will be the extent to which the employer has clearly communicated the requirements of the role to the employee or, where applicable, has provided necessary support and training.

What is important

It is a basic principle of fairness that a decision to dismiss or take other disciplinary action should not be taken without a disciplinary hearing or meeting. Generally, case law has established that a dismissal for poor performance will not be fair unless the following key elements (which are considered in detail below) are present:

A proper investigation into the problem has taken place.

The employee has been made aware of the problem and been given an opportunity to improve within a realistic timescale.

The employee has been provided with appropriate support and possibly training.

The employee's progress is reviewed during the review period.

The employee is offered a right of appeal against the decision to dismiss.



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Dismissing fairly for poor performance

Is the reason capability?

It is for the employer to establish the reason or principal for dismissal in any unfair dismissal claim. Lack of clear evidence of poor performance is therefore likely to prevent the employer demonstrating that as a reason for dismissal. In *Smith v Glasgow City Council [1987] ICR 796*, the House of Lords confirmed that, if the employer fails to show a clear reason or principal reason for dismissal (dismissal in that case arising on the basis of a mixture of alleged conduct and capability issues), they will not be able to demonstrate reasonable reliance on poor performance and the dismissal will be unfair.



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Dismissing fairly for poor performance

- Does the employer have a reasonable belief in the employee's incompetence?
- Reasonable investigation

The Acas Code reiterates the important principle that, before embarking on any course of action, an employer should carry out an assessment or investigation, provide the employee with the findings of that investigation and allow them the opportunity to respond.



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Dismissing fairly for poor performance

Poor performance hearings

Where the employee fails to improve sufficiently, a formal meeting should be arranged. The employee should be notified, in writing, of the following:

- The nature of the shortcomings in their performance.
- The date, time and place of the capability meeting.
- Summary of relevant information and any relevant documents.
- The procedure to be followed.
- The possible consequences if performance is found to have fallen short of the required standard.
- The right to be accompanied by a trade union official or a fellow worker (for more on the right to be accompanied



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Dismissing fairly for poor performance

The **aim** of the meeting will be to:

- Enable both employer and employee to explain their cases fully.
- Give the employee ample opportunity during the interview to respond and give their explanation to the issues raised in relation to their performance.
- Explore and, if possible, identify the cause of the underperformance.
- Determine what, if any, remedial action can be taken.
- Obtain the employee's commitment to reaching the required standard.
- Set a reasonable period for the employee to reach that standard.
- Agree on a monitoring system during that period.
- Tell the employee what will happen if that standard is not met.



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Dismissing fairly for poor performance

What do we call the required outcome - The non-statutory Acas guide distinguishes "disciplinary warnings" (which are more familiar in a misconduct context) by referring to first written warnings in poor performance cases as "improvement notes". Providing the meaning is clear, the employer can adopt whatever terminology it chooses. Most importantly, the employee should be notified in writing of the outcome of this meeting and their right of appeal, along with any time limit applicable.



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Dismissing fairly for poor performance

The decision to dismiss

Considering alternative employment

While there is no absolute obligation on an employer to consider alternative employment or demotion before taking the decision to dismiss, it may be unreasonable in the circumstances not to do so, depending on the size and administrative resources of the employer. This principle was stated in *Gair v Bevan Harris Ltd* [1983] IRLR 368, a case in which a small employer had not been obliged to consider demotion or alternative employment, despite the fact that the employee had 11 years' of previous good service. The EAT followed *Bevan* in *Awojobi v London Borough of Lewisham* UKEAT/0243/16, confirming that there is no general principle that an employer will be acting unreasonably if it does not give an employee the opportunity of alternative employment in a less demanding role, even if it were the employer who placed the employee in the more demanding role. This is a question of fact and evaluation for the employment tribunal in every case.

In *Sonvadi v Superdrug Stores Plc* ET/57554/94, a manager of more than four years' service was dismissed fairly when his employer took the view that his failure to communicate and motivate staff meant that his promotion to manager would not work, despite the fact that he had been successful as an assistant manager. There was no obligation on the employer to consider demoting him to his previous position.



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Issues that commonly arise

Is it possible to fairly dismiss instantly for a single act of incompetence?

It will be relatively rare that poor performance, in the absence of any wilful element, will be so grave as to justify instant dismissal for a single act of incompetence. Inherently hazardous roles may provide an exception (*Alidair Ltd v Taylor* [1978] IRLR 82). However, in the vast majority of situations, employers are expected to investigate and to consider offering support to facilitate improved performance before they can reasonably contemplate dismissal.



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Issues that commonly arise

Employees who lapse after improvement

This is acknowledged in the non-statutory Acas guide, which contains good practice advice and states:

"There may be occasions where an employee's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where a pattern emerges and/or there is evidence of abuse, the employer's disciplinary record should be borne in mind in deciding how long any warning should last." *(Page 33.)*



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Issues that commonly arise

In such cases, it may well be reasonable for an employer to impose a longer warning period than usual (longer than, for instance, six or 12 months), pointing out to the employee that there needs to be a sustained improvement. In cases where it is suspected that such behaviour is deliberate, amounting to wilful underperformance, it may be appropriate to deal with the matter as a misconduct issue. The dividing line between inherent incapacity and idleness can be a thin one, as was observed in *Sutton and Gates (Luton) Ltd v Boxall [1978] IRLR 486*. It was recognised that capability issues will be down to "inherent incapacity to function" whereas conduct issues will relate to "failure to exercise to the full such talent as is possessed".



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Issues that commonly arise

Can a final written warning be given for the first instance of poor performance?

Since the poor performance procedure is staged, with the time allowed for improvement often being somewhere between three and six months, it can take some time for the employer to get to the point where it is possible to dismiss, particularly if more than one warning is involved. While the Acas Code recommends that employees should usually be given more than one warning before they are dismissed, there may be cases where it is appropriate to move straight to the final written warning stage:

"If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation."



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Issues that commonly arise

Can a final written warning be given for the first instance of poor performance?

An example is given in the non-statutory Acas guide of a final written warning being administered to the employee of a small firm who promises impossible delivery dates to a key customer, with the result that the customer threatens to take his business elsewhere. This is only an example, but it is often the case that those in client-facing roles will place the organisation at risk of greater harm than those in roles which do not involve contact with third parties. This might be a factor which leads an employer to decide that a final written warning is appropriate. Where possible, the employer should document the particular risk or prejudice to the business.



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Alternatives

Is it acceptable to use a settlement agreement as an alternative to the capability procedure?

Yes but be careful about pre termination discussions and have a look at the ACAS guide.



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Questions and request for
further information



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