

# Managing poor performance



Managing poor performance can be a time consuming process for employers, but it is also one where process is key to achieving a fair result – whether this be an improvement in the individual's performance or a series of warnings leading to dismissal.

This fact sheet highlights the key issues that a business should consider when dealing with poor performance. Failure to follow the correct procedures can have serious financial and commercial implications for businesses.

## General good practice to help avoid potential claims

Businesses should follow good management practices to help avoid potential claims relating to a dismissal:

- Make sure that any employee-related policies and procedures are up to date and always followed (for example, an equal opportunities policy);
- Consider the appropriate time to address any issues with employees and try to do so as soon as they arise. Generally, an employer's position deteriorates the longer the delay;
- In many circumstances, an informal chat with an employee will be enough to resolve a problem. However, employees must be made aware that a formal process could be used if an issue remains unresolved, or there is no improvement;
- Keep records of any emails, letters, conversations or meetings (formal or informal) that the business has with employees relating to their performance;
- Conduct regular appraisals with employees to enable the business to give an honest assessment of performance and allow the employee to raise any concerns;
- Do not give flattering performance reviews if they are undeserved. They could make it more difficult to dismiss an employee in the future as they will seek to rely on what's been said before. Further, it does not give the employee the opportunity to improve prior to a formal process being implemented;
- Use probationary periods effectively. If the business has any legitimate concerns about a new employee, it may be able to extend the period or dismiss them at the end of it. A business will have to provide at least one week's notice to dismiss (although it may be more, depending on what the contract says);
- Employees should not be sidelined, bullied or shunned in order to "push" them to leave. If an employee can demonstrate that they resigned because of the business' conduct, they could have a claim for constructive dismissal (if they have the requisite period of service);
- If possible, establish the reason(s) as to why the employee is underperforming. Have they received appropriate training? Have they been suitably supervised? If not, can this be arranged?;
- Be very careful if stress may be a reason for an employee's poor performance (for example, they are struggling to cope with an increased or challenging workload). In these circumstances, take legal advice;
- Always take any employee grievances or claims raised against the business seriously and deal with them in line with your grievance policy;
- When going through a capability procedure, ensure that you act in line with your own policies and procedures and also in line with ACAS guidance;
- Where appropriate, give the employee a series of warnings and a chance to improve prior to dismissal;
- In some circumstances, it may be appropriate or desirable for the business to explore the possibility of entering into a Settlement Agreement with an employee – in which the

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employee specifies that they will not bring a claim against their employer (and waives their right to do so), usually in return for a sum of money.

## How can we assist you?

- Drafting or updating your capability policy to assist you in effectively managing capability and performance in your workplace;
- Provide advice and practical assistance to you during a capability process;
- Drafting Settlement Agreements and assisting with negotiations with the employee.

If you would like any further information about our specialist employment law and HR services, please contact a member of the team.

## KEY CONTACTS



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Catharine is a very experienced employment lawyer and HR advisor. She advises clients on a wide range of matters, providing sound and practical support as needed. Catharine is commercially focussed and helps to position clients so they achieve the best results for their organisation. She adopts a proactive approach as she guides her clients on daily legal and HR matters – from positive initiatives to more formal issues usually arising from disciplinary and grievances. As Head of HR, Catharine brings hands-on experience and can deal with disciplinaries, redundancies and training within our clients' businesses. She also acts for clients in the Employment Tribunal. Catharine is praised highly for her in-depth knowledge, timely and straight forward responses.



**Kevin Barnett**

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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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