

How do I dismiss an employee who is not performing?

The above question is one of the most common questions asked by our clients at CoLaw Employment Law Consultants. Most companies shy away from dealing with the issue and either ignore the issue completely or let it fester often even for several years. According to ACAS poor performance is among the commonest reasons for dismissal.

The above approach results in the issue of a poor performing employee not being dealt with and therefore inefficiencies being tolerated by the Company.

CoLaw often find that poor performance becomes confused with misconduct but in actual fact this is the first decision to take. We therefore need to ask ourselves two questions before deciding what employment law advice to provide and the route to pursue.

Procedure Options

- 1) Is the employee trying their best and genuinely does not have the capability, knowledge or training to do the job

Or

- 2) Is the poor performance caused by a negative attitude, laziness or just not bothering and do not want to put the effort in

Once we can decide whether it is 1) or 2) then we will know which "Procedure" to adopt. If it is the first option then we need to deal with the issue using the Company Capability Procedure but if it is the second option then this is likely to be a misconduct issue and dealt with through the Disciplinary Procedure.

So many times companies mistakenly deal with poor performance as a disciplinary offence through the disciplinary procedure when there is a genuine lack of capability. This then can result subsequently as an unfair dismissal should the subsequently dismissed employee make a claim to an employment tribunal. The decision to dismiss may have been correct but the procedure used is flawed.

However let us go back a few stages. Before taking any action, managers should first establish the facts and before considering dismissal, managers should also see if a more positive approach is likely to be effective.

Poor performance may be a result of inadequate leadership, bad management or defective systems of work and, if so, remedies (often involving learning and development) can be put in place.

Many cases of poor performance can be dealt with by informal advice, coaching and counselling. Improvements can often be achieved through continuing feedback and joint discussion between individuals and their managers to identify the problem, establish the reasons for under-performance and agree the action to be taken.

As long as you act fair and reasonably you are entitled to talk your employees about their performance and how they can improve

Fair Procedure

CoLaw employment law consultants consider the most important matter is to follow a fair procedure. The ACAS Code of Practice sets the general principles for dealing with poor performance as follows:

- Issues should be raised and dealt with promptly and you should not unreasonably delay meetings and decisions.
- You should act consistently.
- Any necessary investigations should be carried out to establish the facts
- Employees should be informed of the basis of the problem and have an opportunity to put their case in response before any decisions are made.
- You should allow employees to be accompanied at any formal performance review meeting.
- Employees should be allowed to appeal against any formal decision made.

Whilst the ACAS Code of Practice has no direct statutory muscle Employment Tribunals will require employers to follow it and make findings against them if they do not. Thus it is recommended that that you thoroughly go through the following steps:

1. Establish the facts – carry out an investigation into the possible causes of poor performance without unreasonable delay. Unless the employee already has one, prepare a job description setting out the level of performance expected for each task or duty. Prepare a further list that sets out where the employee is falling short of the expected level of performance for each of the tasks/duties.

2. Inform the employee of the problem – the employee should be notified of the issue in writing and the notification letter should contain sufficient information about the alleged poor performance matters and the possible consequences to enable them to prepare to answer the case at a formal performance review meeting. Copies of any supporting written evidence (target sheets, billing figures, etc) should be attached to the notification letter. The notification letter should also give details of the time and venue for the meeting and advise the employee of their statutory right to be accompanied.

3. Hold a formal meeting with the employee to discuss the problem – the meeting should be held without unreasonable delay whilst still allowing the employee reasonable time to prepare their answers, and both parties should make every effort to attend the meeting. At the meeting, you should go through each of the performance issues and the employee should be allowed to set out their response and ask questions (see further below).

4. Allow the employee to be accompanied at the meeting – the employee is allowed to be accompanied at the meeting (and at any appeal meeting) by a fellow employee, a trade union representative or an official employed by a trade union.

5. Decide on appropriate action – you should decide whether or not formal action is justified and inform the employee in writing. In the first instance, it is usual to give a performance warning and then a failure to improve performance within a set period would normally result in a final performance warning. It may be appropriate to move directly to a final performance warning if the poor performance is sufficiently serious. The warning should set out the nature of the poor performance and the improvement in performance required (with timescale) and the employee should be told how long the warning will remain current. The employee should be informed of the consequences of a failure to improve performance within the set period following a final performance warning i.e. that it may lead to their dismissal. A decision to dismiss should only be taken by a manager who has authority to do so and the employee should be informed as soon as possible of the reasons for dismissal, the date on which employment will end, the notice period and their right of appeal.

6. Provide employees with an opportunity to appeal – appeals should be heard without unreasonable delay and the employee should let you know the ground for their appeal in writing. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved. The employee should then be informed in writing of the results of the appeal meeting as soon as possible.

The above six steps are their vital to enable to defend any potential employment Tribunal claim for unfair dismissal.

The Performance Review Meeting

Looking in more detail at the formal meeting at the “Performance Review Meeting” there are a number of boxes to tick when going through the meeting.

- Agree the job description.
- Explain the required standard of performance expected for each task or duty.
- Explain the aspects of the employee's performance (in detail) where they fall short of the required standards.
- Allow the employee an opportunity to explain why they are falling short of the required standards and to put forward any mitigating factors or other circumstances that may have detrimentally affected their performance.
- Ask the employee how, as an employer, you can help them reach the required standards and you should then consider any reasonable suggestions.
- Offer training.
- Give them a reasonable period of time in which to improve their performance.

It is also very important to take minutes or record in writing what was discussed of at the meeting. These records will be useful documentary evidence that can be produced at an employment tribunal if needed.

Reviewing the Employee's Performance

If a performance warning is issued then frequent reviews should then be carried out at least on a monthly basis perhaps even on a weekly basis if necessary to assess whether the employee's performance is improving satisfactorily on an ongoing basis. It may be beneficial to carry out assessments after completing a piece of work, and then report back to the employee accordingly.

If the employee fails to reach the required standard at the end of the set period of review outlined in the performance warning, then you should proceed to the next stage in the formal process, following the same procedure again as outlined above. The three formal stages are normally a performance warning, a final performance warning and, ultimately, dismissal and the steps discussed above should be followed at each stage.

Prior to taking any decision to dismiss the employee, you should consider offering alternative employment which is available and which is within their capabilities. This may be on less favourable employment terms, such as a reduced salary. Unless there is a right contained within the employee's contract of employment to impose demotion or a transfer to an alternative post as a disciplinary sanction, it is not permissible to do this without the employee's express agreement. Otherwise, the employee would have a claim for breach of contract or, alternatively, constructive dismissal if they then resigned as a result of your actions.

New employees

Last but not least although of course this really should be an absolute first must whenever new employees are taken.

When a new employee is taken on, it is advisable to give them a job description with the required standards expected for each task or duty. Their performance should then be

assessed on a regular basis (weekly/monthly) during any probationary period. Minutes/notes should be taken of these assessments. Should the employee not reach the required standard and it is decided that they should be dismissed, then there should be no question that there was an ulterior motive for the dismissal.

Finally

Having in place within the Company the right procedures is the foundation to dealing with employee performance issues and then choosing the correct procedure to follow will enable a safe process to be followed to deal with the issue. CoLaw by providing the most practical employment law advice through its team of employment law consultants can of course assist with putting all this documentation in place and advising you best on how to use it.