

# Managing Poor Performance

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## Introduction

This Employer's briefing looks at the law and good practice on capability, including dealing effectively with instances of poor performance and the necessary communication skills for an investigatory or standard-setting meeting. It also explores the situation where a promoted employee fails to make the grade.

## Meaning of capability

"Capability" refers to an employee's skills, ability, aptitude and knowledge in relation to the job that he or she is employed to do.

Lack of capability will in most cases lead to unsatisfactory job performance, which is likely to cause problems both for the employee's manager and for the employee's colleagues.

The key feature of lack of capability is that it is not the employee's fault. Very few employees choose to perform their work badly, make mistakes, fail to complete tasks or have poor relationships with colleagues or customers.

In the event that an employee is underperforming the manager should, therefore, be prepared to examine the circumstances and give support to the employee to help him or her to improve to the required standard of competence, rather than contemplating disciplinary action.

Appropriate action should be taken promptly as soon as it is noticed that the employee is not performing certain aspects of his or her job satisfactorily. Delaying - or worse doing nothing - may cause the performance problem to escalate. The result of this could be that the manager subsequently has to face a major crisis caused by underperformance rather than dealing with the problem while it is still in its infancy.

## Distinction between capability and conduct

A lack of capability exists where, no matter how hard an employee tries, he or she is simply unable to perform the job to the standard required by the employer. It is the agreed standard that is relevant, and not the manager's personal opinion of the employee.

If an employee fails to come up to the required standard as a result of his or her own carelessness, negligence or idleness, this will not constitute incapability, but could be regarded as misconduct.

One of the key distinctions between capability and conduct is that lack of capability will usually be outside the employee's direct control, while the same employee obviously will have control over his or her conduct at work.

For example, it would be unrealistic to blame an employee for poor job performance where the root cause of the problem was that the employer had failed or declined to provide adequate training. Lack of effort in applying skill and knowledge is, however, a factor within the employee's control and an individual may freely choose either to apply him- or herself diligently or to shirk responsibilities and do as little work as possible.

It can sometimes be difficult to establish whether an employee's poor performance is due to inherent incapability or to lack of effort, laziness or negligence. In some cases, there may be an element of both. The manager should, however, give the employee the benefit of the doubt initially and proceed to performance manage the employee, rather than instituting disciplinary proceedings.

## **Possible causes of unsatisfactory performance**

In the event that problems are being experienced with an employee's performance, it will be very important for the manager to try to identify the root cause of the problem and deal with it accordingly.

It is a natural human reaction for a manager to blame an employee when mistakes are made or where work is not completed satisfactorily. Managers should, however, refrain from assuming automatically that such performance problems are due to the employee's lack of effort or carelessness as there are many other possible causes of poor performance.

These include:

- inadequate or insufficient training;
- poor systems of work, out-of-date policies or inadequate procedures that do not permit efficient or effective work;
- tools and equipment that do not work properly or frequently break down;
- poor quality or inadequate supervision and/or support;
- lack of understanding on the employee's part about his or her job duties, priorities or goals, which may arise because no one has properly explained these issues or given the employee feedback;
- unclear instructions;
- work overload, causing stress and fatigue;
- unrealistic targets or deadlines that are virtually impossible for the employee to achieve;
- poor working relationships causing the employee worry, upset or stress;

- bullying or harassment;
- physical or mental ill health, for example where the employee's state of health, or medication taken to deal with it, is causing tiredness; and
- personal problems that would inevitably affect the employee's concentration.

Clearly none of these issues will be the employee's fault. Other than the last two items on the above list, they are all arguably within the control of the manager.

The first step for the manager will therefore be to investigate the underlying cause of the employee's unsatisfactory performance through discussion with the employee. The solution to the problem will flow on from the cause, and may involve actions such as training the employee's supervisor in "people management" skills, coaching the employee, instituting more effective two-way communication, rewriting procedures or reappraising the employee's job duties and targets. If the manager can effectively remove or reduce the cause of the problem, the employee's performance is likely to improve.

## Dealing effectively with instances of poor performance

As explained above, the manager should proceed to investigate the possible cause or causes of the employee's unsatisfactory performance. This should be done at a meeting with the employee, which will have the additional aim of identifying and agreeing actions to achieve improvement.

Because the meeting is investigatory, and not disciplinary, there will technically be no statutory right for the employee to be accompanied. Nevertheless, the manager may wish to allow this if the employee so requests.

The steps in dealing with poor performance will be as follows.

- Set up a meeting with the employee to discuss the possible cause or causes of the substandard job performance, making sure that he or she knows that the meeting is investigatory in nature, and not part of the disciplinary procedure.
- At the meeting, clearly state the nature of the problem and explain why it is a problem, for example the consequences for the business when the employee makes mistakes or misses deadlines.
- Give the employee specific examples of instances where his or her performance has fallen below the required standard or where tasks have not been completed on time or satisfactorily.
- Remind the employee that he or she is not being blamed for the problem and that you are on the employee's side.
- Ask the employee what he or she enjoys about the job. This may help to make the discussion easier and reduce any defensiveness on the employee's part.
- Seek the employee's agreement that there is a problem with certain aspects of his or her performance.
- Ask the employee what he or she thinks the root cause of the problem is.

- Consider any mitigating factors put forward, for example problems in the employee's personal life.
- Restate what is expected in terms of job duties, outputs and targets. Avoid assuming that the employee knows everything that is expected of him or her.
- Ask the employee's opinion on what he or she can do to achieve improvement in performance.
- Seek to agree specific action points with the employee, the details of which will depend on whether or not any specific cause of unsatisfactory performance has been identified.
- Agree a timescale for the improvement to be achieved.
- Arrange training where appropriate.
- Schedule a follow-up meeting to review the employee's performance and make sure that the meeting takes place.
- Keep a record of the meeting and what has been agreed.

### **Keeping records**

Full records should always be kept of all meetings with employees about job performance, whether they are formal or informal, as well as the meeting outcomes, for example agreed targets for improvement.

Such records should be held confidentially, preferably by the organisation's HR department.

The records will be necessary in case performance continues to be unsatisfactory despite the measures taken. They will allow the manager to proceed to formal action at a later date if necessary.

### **Behaviour and attitude problems**

Inadequacy in terms of behaviour or attitude is one of the most difficult issues with which a manager is likely to have to deal.

Examples of this problem are where an employee regularly behaves in a way that is uncooperative, where his or her behaviour is antagonistic or where he or she displays a lackadaisical attitude towards the work.

Such behaviour may be as a result of lack of capability or may be viewed as misconduct, depending on the circumstances. In either case, it will fall to the employee's manager to address the matter through a meeting with the employee.

In such circumstances it will be important for the manager not to launch into a personality attack against the employee, but instead to focus on facts and actual examples of the employee's behaviour.

It will be essential for the manager to pinpoint specific examples of things that the employee has said or done rather than accusing the employee of having a bad attitude. The examples should be quoted in a neutral, factual way with an explanation from the manager as to how the particular behaviour came across, or how it affected others, and why such behaviour is unacceptable.

The employee may or may not be aware that his or her attitude, manner or behaviour is perceived in a particular way and the manager will need to treat the matter with sensitivity and patience if he or she is to succeed in persuading the employee to accept the need to change.

## Communication skills for an investigatory or standard-setting meeting

Conducting a meeting with an employee to discuss unsatisfactory performance is never an easy task and it is understandable that a manager may have doubts and worries over such a meeting. Open, honest and unambiguous communication will be essential if such a meeting is to succeed.

In terms of communication skills, the manager should:

- stick to facts and avoid expressing personal opinions;
- be specific, avoiding vague, woolly statements;
- avoid generalisations, for example "you're always late";
- ask open questions;
- listen actively to what the employee has to say and take it on board;
- ensure that the tone used is friendly and not accusatory;
- use positive words such as "improvement" and "achievement", rather than negative words such as "failure" or "weakness";
- focus the discussion on future improvement rather than on past inadequacies;
- always check for understanding, for example by asking the employee to state or summarise his or her understanding of what has been discussed.

### What to say and what not to say

Don't say	Do say
You're always making mistakes.	There are three mistakes in this piece of work.
You tend to shout at people.	I noticed at last week's meeting that you shouted somewhat aggressively at Jim when he ...
You're hopeless - you never meet your deadlines.	You've missed the monthly deadline six times this year so far, on each occasion by at least two days.
You're very aggressive.	I appreciate that you may not realise this, but sometimes

### What to say and what not to say

Don't say	Do say
	your tone and manner come across to others as aggressive. For example ...
Your work is not up to scratch. You'll have to pull your socks up.	This piece of work falls short of the standard we require because ...
You're lazy. I can't ever rely on you to complete a piece of work.	It has been brought to my attention that you have not completed ...
You have a lousy attitude towards the rest of the staff.	What do you think you could do to improve your working relationship with your colleagues?

## Training

If it becomes clear that the reason for an employee's poor job performance is lack of knowledge or skill, the manager should take positive steps to assess the employee's specific training needs, and to meet these by providing formal training, coaching or simple supervisory guidance.

This will be particularly important where:

- the employee has recently joined the organisation;
- the employee has been transferred to a different job or promoted;
- the employee's job has changed;
- new technology has been introduced; or
- work methods have changed or new work methods have been introduced.

It is important to bear in mind that individual employees' needs vary. While one employee may cope well and adapt quickly to new job duties or new methods of work, another may require more extensive training and coaching before he or she can perform to a satisfactory standard.

## Considering alternative employment

If, despite adequate training having been given, an employee continues to perform unsatisfactorily, the manager may need to consider other options.

One such option may be to review if alternative work to which the employee could be transferred exists within the organisation.

However, unless transfer to a different job is authorised by the employee's contract, usually by means of a suitably worded flexibility clause, the manager would need to discuss the proposed change with the employee to establish whether or not he or she was prepared to agree to the move.

Forcing an employee to move to a different job without his or her express agreement would constitute a breach of contract, entitling the employee potentially to take legal action against the employer.

There is no positive duty on an employer to create a job for an employee who is incapable of performing his or her own job. However, a failure to offer alternative work where it exists may lead an employment tribunal to make a finding of unfair dismissal in the event that the employee is dismissed and brings such a claim.

If, therefore, a vacant job that the employee could reasonably do, after a reasonable amount of training, exists, and provided that he or she is willing to transfer into it, the manager should offer it rather than contemplating dismissal.

## Managing poor performance during the probationary period

When new employees join the organisation, it is common for them to be placed on probation for a defined period of time, often between three and six months, although the exact period should be specified. A probationary period should be long enough for the manager to assess the employee's competence to perform the job, and no longer.

Probationary periods have no status in law - an employee's continuity of service begins on his or her first day of employment. However, probation is a useful management tool when used properly.

During the probationary period, the employee should receive supervisory support, regular feedback on performance, guidance on what needs to be done and the required standards to be reached and, where appropriate, training and coaching.

At the end of the probationary period, there should be a formal meeting for the manager to advise the employee whether he or she is performing satisfactorily or whether any further training or other action is recommended.

It is obviously better for all parties if any unsatisfactory performance or behaviour on the part of a new employee is identified and addressed during or at the end of the probationary period, rather than being disregarded or overlooked.

It is much better for the manager to tackle such issues while they are relatively new, rather than allowing them to continue and possibly escalate. In addition it is better for the employee to receive immediate feedback, and therefore a fair opportunity to change the way that he or she does things, learn and improve.

Ultimately if an employee fails to meet the organisation's standards during the probationary period, the employer may dismiss the employee for that reason. An employee whose employment commenced before 6 April 2012 and has less than one year's continuous service or whose employment commenced on or after 6 April 2012 and has less than two years' continuous service as at the date of the termination of his or her employment does not generally

have the right in law to bring a claim for unfair dismissal to an employment tribunal. Despite this, it is still good practice to follow all the steps of the organisation's disciplinary procedure.

## **Failure of a promoted employee to make the grade**

Managers should give careful consideration as to an employee's suitability for promotion in the first place, and make sure that the employee is given adequate training before the promotion takes effect.

Just because an employee is a competent technician, accountant or secretary, for example, does not mean that he or she will be a competent supervisor of staff. The skills and knowledge needed for the promoted post may be quite different to those that the employee is accustomed to using in his or her current post.

The principles for handling a situation where a promoted employee fails to make the grade would be the same as for any other lack of capability situation, with the individual being granted a full and fair opportunity to discuss the problem areas without being blamed for the fact that he or she has not succeeded in meeting the standards required in the new job.

Where a promoted employee continues to fail to reach the standards required in the new job, the employer is not under an obligation to offer the employee his or her old job back, unless there is agreed provision for this. Such a move could, in any event, create other problems if, for example, someone else has been appointed to the post left vacant by the promoted employee.

Nevertheless, a way out of the problem may be to offer the employee an alternative position elsewhere in the organisation if this is possible and if the move is acceptable to the employee. The manager should discuss all the available possibilities with the employee concerned.

## **Dismissal on grounds of unsatisfactory performance**

If, following a series of formal warnings and the provision of the required support to improve, the employee's performance has remained at a level that is clearly unsatisfactory, the employer may be able to dismiss the employee fairly.

It is usual for two or three warnings under the organisation's formal procedure to be given before dismissal is contemplated. Dismissal should not be undertaken lightly and should normally be a last resort after all other possible courses of action have been explored.

Dismissal for unsatisfactory performance will be unfair if the manager has not first taken the appropriate steps to give the employee an opportunity, and sufficient time, to improve to the standard required. Where management has not given the employee a fair chance to perform the job to the standards required, it would clearly be unjust to penalise the employee for the management failure.

The reason for the dismissal of an employee who is failing to perform to a satisfactory standard will be "lack of capability", which is a potentially fair reason for dismissal.

For a dismissal to be fair, however, the employer also has to show that the employee's performance was sufficiently bad to justify dismissal and that it acted reasonably in dismissing the employee for this reason.

Although there are some exceptions, to be eligible to bring a complaint of unfair dismissal before an employment tribunal, an employee whose employment commenced before 6 April

2012 is usually required to have a minimum of one year's continuous service as at the date of termination of his or her employment, and an employee whose employment commenced on or after 6 April 2012 is usually required to have a minimum of two years' continuous service as at the date of termination of his or her employment.

## Settlement agreements

An alternative approach to dealing with poor performance is for the employer to enter into an agreement with the employee to end his or her employment on agreed terms, for example on payment of a cash sum to the employee. This may be appropriate where, for example, it is clear to the line manager that giving support to the employee will not help to improve his or her performance. Employers can also have **'Protected Conversations'** with employees now as from 29 July 2013 which we have covered on a separate line manager briefing. However, it is imperative that you seek advice in these if you are unfamiliar with the process to ensure you do not act outside the guidelines.

Employers should not rush into this process because it might seem like an easier option than performance managing the employee. In most circumstances, supporting the employee, for example through training and coaching, will help his or her performance to improve and avoid the hassle of having to fill the employee's position.

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