

## WHAT TO DO WHEN A PERFORMANCE ISSUE ARISES

- ✓ Be proactive and deal with the issue promptly.
- ✓ Performance should be reviewed continually, not just when problems in performance arise.
- ✓ Consider the requirements of any existing contractual or non-contractual capability procedure. Where no separate policy is in place, capability may also be dealt with within a disciplinary policy.
- ✓ Remember that the Acas Code of Practice on Disciplinary and Grievance Procedures applies to performance management cases.
- ✓ Consider whether the issue could be dealt with informally or whether it is sufficiently serious to require a formal procedure.
- ✓ If the employee is or may be suffering from a disability, consider the duty to make reasonable adjustments at every stage of the process.
- ✓ Be wary of any areas of particular risk. For example, consider whether the employee has raised allegations of age discrimination or whether the employee recently took a period of family related leave.

## POOR PERFORMANCE

Capability/performance and conduct/disciplinary matters may sometimes overlap. Each performance issue should be classified based on the issue's circumstances. An example of this is poor timekeeping.

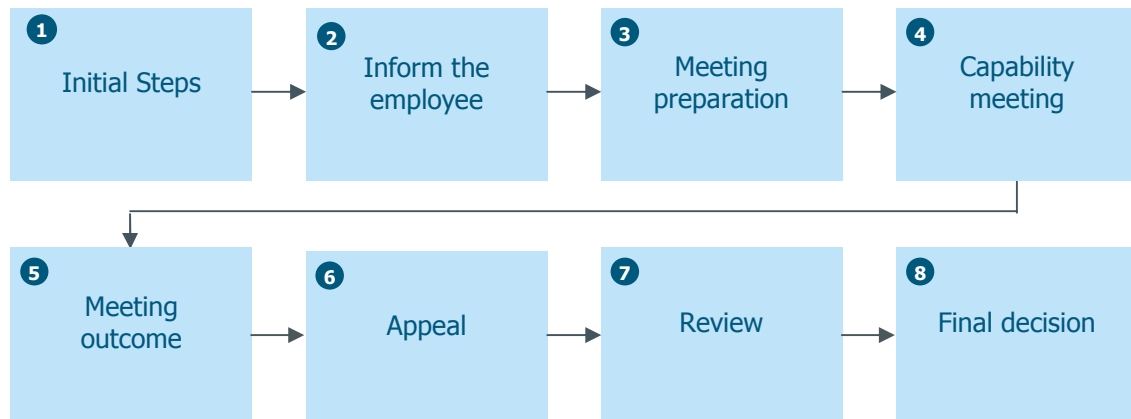
	Capability/performance issue	Conduct/disciplinary matter
Relates to individual's:	<ul style="list-style-type: none"><li>• Skills</li><li>• Aptitude</li><li>• Health or other physical or mental quality</li></ul>	<ul style="list-style-type: none"><li>• Attitude</li><li>• Behaviour</li></ul>
Examples	<ul style="list-style-type: none"><li>• Failure to meet performance targets</li><li>• Making mistakes</li><li>• Inability to use new technology</li><li>• Inability to perform an aspect of the role</li></ul>	<ul style="list-style-type: none"><li>• Rudeness/insubordination</li><li>• Deliberate refusal to perform aspects of a role</li></ul>
Procedure	<ul style="list-style-type: none"><li>• See this guidance note</li></ul>	<ul style="list-style-type: none"><li>• See Disciplinary procedure guidance note</li></ul>

## APPRAISALS

Ongoing appraisals and performance reviews are key in managing performance and provide evidence if a capability procedure is invoked.

It is vital that appraisals are honest. Giving underperforming employees inflated appraisals makes it harder to dismiss fairly if poor performance continues.

## TACKLING POOR PERFORMANCE



### 1 Initial steps

- Consider who should conduct the investigation.
- Gather information from relevant sources (appraisals, comments from other managers who work with the employee etc).
- Consider the relevant documents.
- Hold an initial investigation meeting with the employee. There is no formal right to be accompanied at this meeting.
- Consider any issues raised by the employee. Confirm that the matter is a performance issue and not a disability/ill-health issue. Check that there are no other matters to consider, for example does the employee raise concerns about bullying or harassment by a manager?
- Decide whether a formal performance management meeting should take place.

### 2 Inform the employee

If there is to be a formal meeting, notify the employee in writing. Notice should include:

- sufficient information about the alleged performance issue to enable the employee to prepare the case to answer at the hearing;
- information about the employee's right to be accompanied;
- time and date of the meeting (the employee should have sufficient notice to enable them to prepare for the hearing);
- the procedure to be followed.

Ask the employee whether they wish to call any witnesses or rely on any documents (this is less likely than in a disciplinary meeting but should still be considered).

### 3 Meeting preparation

- Consider whether to have a note-taker present.
- Ensure all relevant facts/documents are available.
- Check if there are any special circumstances to take into account.

**4**

## Capability meeting

### Attendees

The employee is entitled to be accompanied by an appropriate colleague/trade union representative.

Decide who should attend from the Company, for example:

- decision maker (ensure that this person has the authority to make the decision);
- HR representative (to advise on procedure);
- a note-taker (if appropriate).

### Meeting format

- Introduce attendees at the meeting.
- Explain the purpose of the meeting.
- Explain how the meeting will be conducted.
- Explain what the performance issue is. Outline why it has arisen, the investigation undertaken and the issues investigated.
- Deal with witnesses, if any are required by either side.
- Ask for comments and representations from the employee - the employee should have the opportunity to state their case.
- Question the employee carefully and encourage the employee to speak freely.
- Sum up the main points and ask the employee if they have anything further to add.
- If the employee raises new issues consider whether further investigation is required before concluding.
- Adjourn before a decision is made.

### What to do if the employee does not turn up

- Consider the reasons for the employee's no-show. Be particularly wary of any ill-health/stress-related issues which arise.
- Consider whether there are any reasonable adjustments which should be made (if the employee is or may be suffering from a disability).
- Rearrange the meeting. If the reason for the postponement is non-availability of the employee's companion, the employee should suggest a reasonable alternative date within five days.
- If an employee is repeatedly unavailable, consider whether to proceed to make a decision on the evidence available. If so, the employee should be warned that this is the case.

**5**

## Meeting outcome

### Consider:

- what level of warning to apply. In most cases, two warnings and periods of review should be given before dismissing for poor performance (unless the issue amounts to gross negligence or the employee is in a probationary period).
- the appropriate length for the review period. This is fact specific but should be in line with the capability procedure and it must be a sufficient period to enable the employee to demonstrate improvement. It will usually be at least three months.
- who will review the employee's progress and what assistance or training the employee will be offered to enable them to show the necessary improvement.

- whether the decision and reasons should be given face-to-face at a meeting. Even where this is the case, the decision and reasons should be confirmed in writing without unreasonable delay.

**Do:**

- ensure that the sanction is consistent with any previous decisions.
- diarise the end of the review period.
- explain what the consequences will be if the employee fails to show the required improvement and explain the right of appeal.
- issue an Improvement Notice (warnings in a performance management context are referred to in the Acas Guide as an "Improvement Notice"). The Improvement Notice should include:
  - i. the performance problem;
  - ii. the improvement required;
  - iii. the timescale for achieving this improvement;
  - iv. the review date; and
  - v. details of any support to be provided.

**6**

**Appeal**

- Decide on the appropriate manager to hear the appeal. This should be a manager not previously involved in the case. If possible, it should be a more senior manager than the one who dealt with the original hearing.
- Invite the employee to a meeting (reminding them of their right to be accompanied).
- Ensure any new evidence has been properly considered and the employee has had the opportunity to comment on it.
- Set out the decision in writing without unreasonable delay.
- Inform the employee that this decision is final.

**7**

**Review**

- A review should ideally be held half way through the period as well as at the end.
- Diarise key dates for any performance improvement reviews.
- Arrange for any training or other support the employee needs during the review in order to meet their targets.
- Record and retain any disciplinary matter warnings. Records are required under the Acas Code. Bear in mind data protection storage and retention obligations.
- File a copy of the Improvement Notice on the employee's personnel file.

**The record should include:**

- the complaint against the employee;
- the employee's defence;
- the findings made and the actions taken;
- the reason(s) for the actions taken;
- whether an appeal was lodged;
- the outcome of the appeal;
- any grievances raised during the procedure;

- subsequent developments; and
- notes of any formal meetings.

8

### Final decision

- Hold another meeting with the employee to discuss whether targets have been met.
- The employee should be informed in writing about the contents of the meeting (see above) and given the right to be accompanied. If there is a risk that they will be dismissed at this meeting, this should be stated in the invitation letter.
- Unless the employee was given a final warning at the first stage, a further review period will be required if the employee has failed to meet the required standard.
- If the employee has failed to improve following a final warning, consider alternatives to dismissal. This may include demotion or alternative employment. Whether this is feasible will depend on the nature of the poor performance and the size and resources of the employer.
- If a decision is taken to dismiss, this should be done on notice.
- The employee has the right to appeal against any decision taken.

### Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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