

OVERVIEW

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FAQS

A Regular performance reviews

1. Why is it important to review performance regularly with employees?

Reviewing performance on a regular basis allows the employer to monitor performance and to spot any issues as soon as they arise. It gives employers the opportunity to set the required standard and give employees targets or objectives, so that it will be clear whether performance management action is required.

If formal action is required, appraisals will provide evidence of the standard at which the employee has been performing and will avoid the risk of an employee claiming that they did not understand what was required of them.

2. If an employer decides not to review performance on an ongoing basis, will this cause any problems if it ever decides to take performance management action?

It is best practice to operate a performance review process. It is expressly referred to as good practice in the Acas Guide to Discipline and Grievance Procedures, which supplements the Acas Code, and which provides good practical advice and guidance for employers.

Further, when dismissing for capability, part of a fair procedure requires the employer to demonstrate that it had a reasonable belief in the employee's lack of capability. Review processes provide evidence that the employee knew what was required of them and that they were not performing at the required standard.

B

Taking action on poor performance

1. Do employers need to have a specific performance management policy?

No. Employers do not need to have a separate capability or performance management procedure. All companies should have disciplinary procedures in place and it is common to use a disciplinary procedure to deal with capability issues. However, in these circumstances, the requirements of the Acas Guide which apply specifically to performance management should be complied with, for example the requirements for a review period following the issue of an improvement notice are different to the steps required by an employer following a written warning for misconduct.

2. Performance management has been initiated by an employee's manager. Does a separate person need to hear the performance review meeting?

No. The Acas Guide requires a separate person to deal with the investigation and decision stages of a disciplinary matter. The same requirement does not apply to performance issues. In many cases, it will be appropriate for the employee's manager to deal with the performance review meeting as they will be best placed to explain the standards of performance required and set the objectives for the review period.

3. Does the right to be accompanied apply to performance management procedures?

Yes. The right to be accompanied applies to performance meetings as well as to disciplinary hearings. Employees also have the right to be accompanied at an appeal meeting. However, employees do not have the right to be accompanied in any investigatory meeting which may take place first.

4. A manager intends to take performance management action against a team member. There is no clear evidence of poor performance but the manager feels that the employee "doesn't get the Company's way of doing things." Does the lack of demonstrable evidence matter?

Potentially. As discussed above, when there is no clear evidence of poor performance, it is harder to take action. However, a performance management process will usually involve at least two warnings or improvement notices and periods of review. In this case, it will be important for the improvement notices to be clear as to what the problem is, what improvement is required and the timescale. If the manager is unable to set out clear targets for the review, the process is likely to be unfair.

5. A manager spoke to a team member informally about their performance in a team meeting. The employee complains, saying that this was humiliating. The manager says that they were taking informal action and that this was appropriate as a first stage. Who is correct?

The Acas Guide does recommend informal action as a first step in any performance management process. However, it is clear that this must take the form of constructive criticism and that it should take place in private. If the manager spoke to the employee in front of colleagues, this was inappropriate. In future, the manager should ensure that any informal discussions take place in private and are handled sensitively. Further, the Acas Guide recommends that a note should be kept of discussions. This does not make the discussion a formal process, but it does provide a record of the discussion should it be required for future reference.

6. Can employers avoid performance management for senior staff and ask them to resign by way of a "without prejudice" discussion instead?

It is common for employers to shy away from performance managing senior employees. However, whether or not a "without prejudice" discussion is viable will often depend on what level of settlement the employer is willing to pay to the employee.

At this stage, there is no existing dispute, so any discussions are unlikely to be genuinely “without prejudice”. This means that the employee can refer to them in tribunal or court in any subsequent dispute. The employer should therefore couch any discussions in terms of a negotiated settlement being an option but stressing that it will follow a formal process if the employee wishes and that the outcome has not been pre-determined. This is inherently risky, however, and while the employer may be prepared to pay a sum equivalent to a maximum wrongful and/or unfair dismissal award, there is also a risk of uncapped liability if the employee alleges discrimination or whistleblowing.

Settlement discussions may also be protected from admissibility if they qualify as “pre-termination negotiations”. However, pre-termination negotiations protection is typically of limited use as it only applies to ordinary unfair dismissal claims (not other types of employment claim) and only if the employer has not acted ‘improperly’ in the discussions.



Sanctions

1. A new employee proves to be no good. Can the employer dismiss them without following any form of performance management procedure?

If the employee is new and is still subject to a probationary period, the Acas Guide does suggest that it is permissible to dismiss without following a full performance management procedure. However, if there is no probationary period in force and the employee’s performance is not so poor that it amounts to gross negligence, dismissing without giving at least two warnings is contrary to the Acas Guide.

An employee needs two years’ service to claim unfair dismissal, so the employer may decide to dismiss anyway. However, extra care should be taken if there is a risk of a discrimination / whistleblowing claim. The employee does not require two years’ service to bring one of these claims and there would be a risk of an uplift of up to 25% of any compensation awarded if their claim was successful and the employer has unreasonably failed to follow the requirements of the Acas Code.

2. An employee is given a final warning at the first stage of performance review for a mistake which affected customers. The employee appeals, saying that a colleague made the same mistake and was given a first warning. Is it necessary to be consistent?

The Acas Guide does permit employers to move straight to a final written warning or improvement notice in circumstances where the poor performance has had a “serious, harmful effect” on the employer. This is likely to apply here. However, a key principle of the Acas Code is that matters should be dealt with consistently. This is also a factor that would be considered in assessing the fairness of a dismissal for capability if the employee was ultimately dismissed. Therefore, the employer should consider the way the colleague was treated and only differentiate if there is a logical reason for doing so.

3. An employee who has always performed well makes one very serious mistake. His manager does not want him performing the role any more. Can he be dismissed?

Yes, if the employee’s mistake is so serious that it would amount to gross negligence. A decision to dismiss for a single act of poor performance should be taken very carefully, having regard to the Acas Guide’s requirement for the poor performance to have had a “serious, harmful effect on the business” and for consistency and fairness.

Generally, the circumstances would need to be extreme to amount to gross negligence. Case law examples of a fair dismissal for capability with no warnings are:

1. a senior employee who made serious failings in his financial reporting obligations; and

2. a pilot who crashed an aircraft.

4. An employee is given an improvement notice because they could not use a new accounting system. They are given three months to improve and show no improvement at all. The employer thinks it is pointless to give another improvement notice. Can it dismiss?

This is unlikely to be fair. As well as being given a period to improve, the employee should also be given support and any necessary training. This does not appear to have happened in this case, so dismissing because there has been no improvement may well amount to an unfair dismissal. The safest course of action here is likely to be to give a further improvement notice and offer the employee training during the review period. If there is still no improvement at the end of the second period, a dismissal is more likely to be fair.

5. An employer gives an employee an improvement notice with a three month review period during which it has set clear sales targets. The employee appeals, on the basis that this period is unfair because it is the company's quietest sales period. The policy specifies that review periods will be three months. Can the employer reject this appeal?

The employer should not reject the appeal without considering the employee's concern. While a three month review period will often be fair, the overriding concern is to ensure that the period is "reasonable in the circumstances." If the review period is likely to produce an unusual result (for example because it covers a Christmas shutdown period or the summer when sales are usually slower) then it would be appropriate to extend the period to take this into account. Alternatively, the targets given could be adjusted to reflect the usual decrease in average sales over the period in question.

6. An employee was given an improvement notice because they were consistently late for work. Their timekeeping improved for the review period but then dipped as soon as the first improvement notice lapsed. The employer is going to take further action. What can it do to prevent this happening again?

Unfortunately, this problem does arise from time to time. There are a couple of steps that the employer can take in these circumstances. First, any further warning given can be stated to remain live for a longer period. Second, the employer may consider whether the issue is actually a misconduct one (if the poor performance issue is deliberate) in which case a disciplinary procedure could be used instead. This can be slightly quicker, as action can be taken every time the employee is late. Finally, it is worth considering with the employee if there is a reason for the lateness, in which case the employer might consider changing the employee's working hours.

7. A high performing employee was promoted to team leader. Their performance in the new role was inadequate. They were given two improvement notices, the second one stating that dismissal would be considered if the required improvement was not made. The employee has not improved and has asked for their old role back. Their role has been filled. Is the employer required to create a role for them?

There is no requirement for an employer to find a poor performing employee an alternative role, even if they were previously a good performer who has been over-promoted. However, as part of a fair dismissal, the employer should at least consider whether an alternative role is a possibility. This may depend on the resources of the employer. There is no requirement to create a role or to 'bump'. However, if the employer has a vacancy at the employee's previous level, there should be a good reason for not offering the employee the role.

8. An employer believes that performance management takes too long and wishes to issue an improvement notice with a one month improvement period. Is this permitted?

The timescale given for any improvement review period should be reasonable in the circumstances. That means it should give the employee a genuine opportunity to achieve the required improvement. Generally, a period of three months is likely to be the shortest fair period and a one month period is likely to be too short unless there are sound business reasons for this. If the reason for the short period is to speed up the process, this is likely to be unfair. However, this does need to be balanced against the nature of the required improvement.

D

Problem areas

1. An employee who is being performance managed for lateness claims that their lateness is due to medical appointments for a sick child. They are booking the time off but the appointments sometimes overrun. Is the employer obliged to take this excuse into account?

It would be wise to take this into account. The employee's child may be disabled, in which case there is a risk of an associative discrimination claim. The employee may also claim that it is indirect sex discrimination. It would be sensible to discuss the issue further with the employee and attempt to find a way to manage this situation outside of a formal performance management process. For example, a procedure could be put in place for the employee to notify in advance if they may be late for this reason, or their working hours could be amended slightly on these days.

2. A 65 year old employee cannot use the employer's new computer system. The employer does not want to performance manage the employee because it feels it would be embarrassing for them. Can the employer ask the employee to retire instead?

Asking the employee to retire would be risky as it could amount to age discrimination. This is particularly the case if assumptions have been drawn about the link between age and the employee's ability to use the new computer system and/or if inadequate training on the new system has been given.

In these circumstances, informal performance management should be the first step. If the employee does not improve, performance management should be carried out in the same way as for an employee of any age. Any discussions about retirement should only be entered into with extreme caution (see question B6 about 'without prejudice' discussions above).

3. In a performance review meeting, an employee claims that they are not making their sales targets because they are being picked on by other members of their team. The manager thinks this is untrue. Can the employer ignore it?

No, this issue should be investigated before a final decision is taken. Taking the manager's word above the employee's is risky as the employee's performance issues may be due to bullying and/or harassment.

4. An employer is planning to dismiss a probationary period employee because the employee's manager says their performance is poor. The employee has told HR that the manager does not like them because they raised concerns about the manager's regulatory compliance. The employee does not have sufficient service for an unfair dismissal claim. Should the employer consider the complaint?

Yes, in these circumstances, the employer should be considering the risk of a whistleblowing complaint. The employee has alleged that their treatment may be due to them raising concerns about the manager's compliance with regulatory requirements. This could amount to a protected disclosure and so the employee

could claim that their dismissal is automatically unfair. There is no requirement for two years' service to bring this claim and compensation is potentially unlimited.

If the issue is investigated and found to have no substance, the employer can still dismiss, but should be aware that there will still be a risk of a complaint.

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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