

Managing poor performance at work: five frequently asked questions

1 I have an employee with a negative, “can’t do” attitude. I need to tackle this but I am confused as to whether this is a performance or a misconduct issue?

Managing difficult employees is a challenge most in HR will face from time to time, and a negative attitude does nothing for team morale. Some employees are inherently incapable of behaving in a constructive and professional manner – put simply, a negative attitude is a part of their character. For others, a continually negative attitude is due to a lack of desire, for whatever reason, to improve their behaviour.

If you can determine the root cause of the poor attitude, this may help – an inability to improve attitude will normally be a capability issue, a deliberate refusal to improve attitude and behaviour would be misconduct. However, this will not always be easy to ascertain.

In practical terms, the choice of procedure typically only becomes an issue if the employee is dismissed and claims unfair dismissal. If you can show you carefully considered which procedure was the most appropriate (capability or disciplinary) and followed that procedure in accordance with best practice, you should be in a good position to argue that the process applied was fair.

Remember, though, atypical behaviours and reactions can arise as a result of certain medical conditions, so be aware of this when assessing your approach.

2 I’ve got an employee whose performance improves for a month or two, but inevitably drops back. What do I do?

This can be incredibly frustrating for a business – you think you have nailed the problem only to find the employee’s performance dips once more, usually just after the written warning has expired.

One practical way to address this is to consider whether you can lengthen the time frame for improvement and/or extend the length of time that the warning will remain live.

If you do this, set out why you feel the extension is justified – namely that you have concerns about the employee’s ability to maintain acceptable performance levels for a sustained period (particularly if you are deviating from a written policy). This will ensure the employee understands why they are being treated in this way and offers protection from allegations of discriminatory treatment.

3 How do I assess what is a reasonable period of time for an employee to improve their performance?

This is one of the most difficult questions that HR can be asked by a line manager as the answer is: “it depends”. While employment tribunals are nowadays more realistic than the 1976 case of *Sibun v Modern Telephones Limited*, where it was decided that a salesman with 20 years’ service was entitled to three



years to improve his performance, there is no simple answer to this question and each case will turn on its own particular circumstances. However, in assessing whether a period is reasonable, the following factors will be relevant:

- The nature of the job – an employee will be able to improve some things more quickly than others. For example, an employee who has to cold call a certain number of leads per day will require a considerably shorter period of time to improve their performance than a salesperson whose performance is measured on sign-off of orders (particularly where there is significant investment of time and effort to generate a sales pipeline).

- Your own procedures and practices – many employers will have written procedures which set out the time frames for improvement or will have a standard

Managing poor performance is rarely simple or swift, particularly for those employers with detailed capability procedures in place. Huw Cooke looks at five of the more challenging questions HR advisers may face when dealing with underperformance.

approach (either across the business or in parts of the business) that will need to be taken into account.

- The employee’s past performance – generally speaking, if an employee’s performance has been good for a considerable period of time, they should be given longer to improve their performance.

- The size and administrative resources of the employer – larger employers are expected to give employees longer to improve as they will be considered to have the resources to tolerate the underperformance and to support the employee in a way that small employers do not.

- The employee’s personal circumstances – if the poor performance is as a result of personal circumstances, for example, a divorce or bereavement, the employer will need to take this into account when assessing the period of improvement.

- Agreement with a trade union – in some cases, an employer will have agreed time frames with its recognised trade union.

In any event, the time frame needs to be reasonable so it is helpful to agree the improvement period with the employee. If an employee agrees the time frame, it will make it more difficult for them to argue that the period was not reasonable.

4 A line manager in my business unit is always complaining that his sales team are underperforming, but he can never give me any concrete evidence. I can’t start disciplinary proceedings without this information. What should I be asking him for?

One of the most important steps in any poor performance process is to identify the performance gap – ie, the gap between what an employee should be doing and what the employee is actually doing. This is important not only in supporting the employee to improve their performance, but is also a prerequisite of a fair dismissal (if performance does not improve).

You need to speak to the line manager and get him to articulate the underperformance in specific terms. This

is easier said than done, but vague expressions of dissatisfaction will not be sufficient.

The line manager should be able to show the baseline performance required of his sales team. This may be measured on objective criteria (for example, specific monthly sales targets) and/or subjective criteria (for example, demonstrate good teamworking skills). It is also important that employees know the expected baseline and that this knowledge can be evidenced.

Once the line manager has demonstrated the baseline (and, importantly, that the sales team are aware of it), he needs to provide you with clear evidence of where proper standards have not been reached. This might include examples of specific work, 360-degree reviews, emails from other members of the team or other managers, the outcome of any informal performance process, and employee appraisals.

It is worth encouraging your line managers to carry out this exercise on a regular basis (for example, pre-appraisal) to make sure the employee is clear as to what is expected of them.

An additional word of warning – train and encourage line managers to deal with appraisals/performance reviews honestly. A string of appraisals which give no indication that anything is awry makes a fair dismissal for capability considerably more difficult to achieve.

5 Performance processes can take so long to carry out – are settlement agreements the panacea?

The length of time involved, the disruption caused to the business and the possibility of litigation all mean that many employers will consider making a “without prejudice” offer for an agreed exit from the business to be the lesser of two evils.

“Without prejudice” negotiations need to be handled carefully to ensure that, if a deal cannot be achieved, the discussions cannot be raised in subsequent litigation. An employer will often start the process by establishing their “open” position by kicking off the capability procedure. Once the procedure has been initiated, you may want to approach the employee on a “without prejudice” basis indicating that you might be prepared to consider an agreed exit from the business.

At the same time, in order to protect yourself from allegations of unfair dismissal if you cannot reach a deal, you should make it clear to the employee that the business is prepared to go through with the capability process, if necessary. The employee should also understand that no decisions on the outcome of the process have been taken.

The use of settlement agreements should be carefully planned to ensure that you have considered your open position, the legal position, possible claims and potential costs (including legal costs).

Settlement agreements certainly have their uses, particularly for senior exits, but employers should be wary of using settlement agreements as their “default” position to avoid workplace perceptions that poor performers will always receive generous pay-offs.

THE AUTHOR

■ Huw Cooke is a senior associate at Burges Salmon LLP.

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