

The underperforming employee: confront the challenge and avoid the pitfalls

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The underperforming employee

- Performance management
- Bullying and harassment
- Negotiated terminations

Introduction

How do performance concerns arise:

- The organisation has upped its standards
- New manager
- Lack of adaptability
- Low productivity levels
- Too many mistakes

Introduction

What are the consequences for the organisation:

- Reduced profitability
- Clients complain of poor service and/or take their business elsewhere
- Time wasted correcting mistakes
- De-motivating for other members of staff

Performance management

What causes inaction:

- Lack of concrete evidence
- Fear of how the employee will react
- Fear of employment tribunal claims

Performance management

Good practice:

- Communicate the required standard
- Apply standards consistently
- Make effective use of probationary periods
- Conduct regular appraisals and keep written records
- Consider whether training might provide a solution
- Consider implementing a Performance Improvement Plan (PIP) if the issue persists
- Have a written procedure in place for dealing with underperformance

Performance management

Taking formal action – points of reference:

- The ACAS Code of Practice on Disciplinary and Grievance Procedures
- Any disciplinary and/or capability procedure already in place

Performance management

Taking formal action – the procedure:

- Gather evidence of the deficiencies and provide it to the employee
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action and communicate this to the employee
- Provide the employee with an opportunity to appeal

Performance management

The importance of properly constituted warnings

- ACAS recommends at least two warnings prior to dismissal
- Set out clearly what is required and the consequences of failing to improve
- Impose a timescale
- Specify the period for which the warning will remain active
- Moving straight to a final written warning or dismissal

Performance management

What if the employee doesn't have unfair dismissal rights?

- To claim unfair dismissal the employee must have two years' service
- Check the terms of any written disciplinary or capability procedure
- Consider whether there is a risk that the employee will argue that the dismissal was discriminatory or related to whistleblowing
- Consider following a condensed procedure to minimise risk

Performance management

Circumstances which can increase the risk of a dispute:

- Exaggerating the shortcomings
- Adopting an overly aggressive manner
- Humiliating the employee
- Setting unattainable goals

Bullying and harassment

- What is bullying?
- ACAS definition: offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient
- Equality Act 2010 definition of harassment: unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual
- Constructive unfair dismissal

Bullying and performance issues

- ACAS Bullying and Harassment in the Workplace cites deliberately undermining a competent worker by overloading and constant criticism as an example of bullying
- Poor performance issues need to be handled carefully to avoid accusations of bullying
- Accusations of bullying can have a negative effect on managers – employers need to ensure that both the underperforming employee and manager are given support
- Policies should be in place to provide clarity

Is there an underlying issue?

- Ill-health or disability – requirement to make reasonable adjustments
- Problems with child care or caring responsibilities
- Poor management within the team
- Harassment or bullying by a manager
- Excessive workload leading to inability to deliver and stress for the employee
- Risk of discrimination and/or unfair dismissal claims if these factors are not considered

Minimising the risk of allegations of bullying

- Most important: do not let matters fester - communicate performance concerns as they arise
- Make effective use of the appraisal system
- Have clear job descriptions and set goals and objectives
- Provide training to managers on how to raise performance concerns
- Avoid humiliation – criticise in private
- Be consistent

Minimising the risk of allegations of bullying

- Clear examples of performance issues should be given and of the remedial steps to be taken
- Follow performance management procedures
- Consider involving a second manager
- Recognise positives
- Have a well drafted grievance procedure
- Encourage staff to raise concerns

Minimising the risk of allegations of bullying

- Consider providing the employee with a mentor
- Consider implementing an anti bullying and harassment procedure
- Have an equal opportunities policy
- Train managers to ensure compliance with policies
- Keep records of any performance issues and how these have been addressed

Dealing with a bullying complaint

- Take the complaint seriously
- Consider whether the matter can be dealt with informally – ask the employee their preference
- Offer access to counseling – employee assistance programmes
- Ensure adherence to policies and compliance with the ACAS Code of Practice
- Investigate complaints promptly and thoroughly
- Be objective – if possible, involve managers from different departments

Dealing with a bullying complaint

- Is the employee complaining of discrimination or whistleblowing detriment?
- Consider any health issues and disability discrimination - requirement to make reasonable adjustments
- Consider changing line management/reporting lines
- Is it appropriate to attempt mediation?
- Disciplinary procedures – does disciplinary action need to be taken?
- Follow up and monitor the situation

Negotiated terminations

- Consider the option of settlement at an early stage
- Let the employee know about the concerns first
- Plan the communication of the proposal carefully and follow up in writing
- Don't be tempted to suggest to the employee that the alternative is dismissal

Negotiated terminations

- What can go wrong:
 - Breach of trust and confidence – constructive dismissal
 - The forgone conclusion argument
- Understanding the without prejudice rule
- There has to be an existing dispute
- No protection where there has been ‘unambiguous impropriety’

Negotiated terminations

- Pre-termination negotiations – the new rules
- Definition:

“...any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee”
- Inadmissibility only applies in cases of ordinary unfair dismissal
- Protection can be lost if there is improper behaviour

Negotiated terminations

The ACAS Code of Practice on Settlement Agreements:

- Allow a reasonable period of time for the terms of settlement to be considered – 10 calendar days
- Allow the employee to be accompanied at any meeting
- Examples of improper behaviour:
 - Harassment, bullying or intimidation
 - Victimisation
 - Discrimination
 - Undue pressure

Negotiated terminations

- How much to offer and whether to negotiate
- Know the job market
- Consider what the employee is likely to be thinking
- The pros and cons of a settlement agreement
 - A clean break with no come back
 - The employee's expectations may change once they have seen a solicitor

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