Managing Performance Issues in the Workplace

Employment Breakfast Briefing – 23 May 2012

Adrian Crawford, Partner
Amy Griffiths, Solicitor
Aim

- Outline the legal framework which applies when dealing with performance management issues
- Outline common practical pitfalls
- Give some practical guidance
Topics to be covered

1. Introduction
2. Managing performance on a day to day basis and appraisals
3. Dismissing underperformers and one minute guide to constructive dismissal
4. Case studies
5. Common problems and practical tips
Reasons for underperformance

- Lack of aptitude/ability
- Lack of skill – maybe remedied by training
- Attitude – is this a conduct issue or a management problem?
- Miscommunication
- Mismatch of expectations/unclear objectives
- Issues outside work
Managing performance

- Effective oversight of performance
- Effective feedback
- Effective influencing

To be done every day not just at appraisals
Effective oversight

- Need facts not opinions
- Feedback must be timely
  - Regular one-to-ones desirable
- Consider all aspects of performance e.g.
  - Technical performance
  - Financial performance
  - Soft skills
Effective feedback

- Feedback is relaying information to someone about their performance or behaviour
- Unless feedback is given clearly and honestly it will not be effective
- It is for the benefit of the employee as well as the organisation
- Do not delay or understate difficult issues
Giving feedback (1)

- Focus on what you see – not what you believe
- Be specific
- Focus on behaviour – not personality
- Keep it neutral – not judgemental
- Make it supportive – not threatening
Giving feedback (2)

- Keep it simple and focused
- Deliver at an appropriate time and place
- Highlight positives
- Make negatives constructive
- Have the right mindset
**AID framework**

- Action – what was/was not done or said
- Implication – what impact or effect it had (on the task, process or individual)
- Do – what needs to be done more (motivational) or what needs to be done differently (developmental)
Response to feedback

DERAC

• Denial – it was not me
• Emotion – anger, pride, frustration, happiness
• Rationalisation – start to think about it
• Acceptance – that the situation occurred as described
• Change/continue – hopefully
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<tr>
<th>Support</th>
<th>Challenge</th>
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<td>High comfort environment</td>
<td>High performing environment</td>
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<td>Low performing environment</td>
<td>High stress environment</td>
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Communication impact (1)

Relative importance of:

- Words
- Tone of voice
- Body language
Communication impact (2)

- Words 7%
- Tone of voice 38%
- Body language 55%

According to Dr Albert Mehrabian
Appraisals – What is the point?

- If employees feel like this, then they are not serving their purpose
- Appraisals should:
  > Help employees develop
  > Identify training needs
  > Improve organisational performance
  > Evaluate performance
  > Essential for career and succession planning
  > Staff motivation tool
Appraisals – How frequent?

- Appraisals whether annual or more frequent should not replace on going feedback
- Appraisals should not be the only source of feedback. Saving up feedback and delivering it once a year is not good for the business or the employee
- Best practice is more frequent informal meetings
- Consider end of project reviews
Appraisals – Remember the future

- Appraisals should not only look back they should also be concerned with development and the future
- Openness and clarity about targets for the future
- Comprehensive discussions about future development and promotion
Appraisals – Principles (1)

- Consider 360 degree feedback
- If feedback is said to be anonymous ensure that it is
- Schedule adequate time for appraisal
- Appraiser must be committed to the process and put time into it for it to be worthwhile
SMART objectives:

> Specific e.g. switchboard must pick up a call within 3 rings or attend a training course on a certain issue

> Measurable – there must be a way to gather data to check whether objective has been achieved

> Achievable – e.g. 95% network uptime may be achievable but 100% is not or write 2 articles

> Realistic – within the employee’s control

> Time – fixed time period
Appraisals – The Appraiser

- Must lead by example, positive approach
- Invest time
- Channel for communication not a judge
- Is feedback motivational (encouraging the employee to do more) or developmental (encouraging employee to do things differently)
- Take the employee’s feedback about the business seriously, act on it and demonstrate how it is acted on
Appraisals – The Appraisee

- Do employees know what is expected of them?
- Realistic expectations?
- Input into objectives?
- What is the appraisal used for?
Employer that dismisses a qualifying employee will be vulnerable to a claim of unfair dismissal unless:

• the dismissal is for a potentially fair reason; and

• the employer acted reasonably in treating that reason as sufficient to justify dismissal – a fair procedure must be followed.

*(Section 98(1) Employment Rights Act 1996)*
Potentially fair reasons

- Capability
- Conduct
- Redundancy
- Breach of statutory restriction
- Some other substantial reason (“SOSR”)

*(Section 98(2) Employment Rights Act 1996)*
Capability

- Relates to the capability...of the employee for performing work of the kind which he was employed to do
  
  *(Section 98(2)(a) Employment Rights Act 1996)*

- Should be assessed by reference to an employee’s skill or aptitude (or health or any other mental or physical quality)
  
  *(Section 98(3)(a) Employment Rights Act 1996)*
Conduct

- Disobeying reasonable orders
- Breach of certain terms of the contract
- Unauthorised absence from work
- Repeated poor attendance
- Violence, alcohol or drug abuse at work
• May want to plead as alternative where difficult to tell what sole/principal reason for dismissal is.

• Relevant examples include:
  ▪ Refusal to accept changes to terms and conditions.
  ▪ Personality clash or irreconcilable differences between colleagues.
Establishing fair reason - capability

• The employer must establish that the reason for dismissal is a potentially fair one
• Where employee is dismissed for incompetence, employer will have to show it had a reasonable belief, after a proper examination of the facts, in the incompetence
• Must be evidence of poor performance, for example, appraisals and other supporting evidence
Fair procedure

- Case law has established key elements that demonstrate fair procedure has been followed
- *ACAS Code of Practice on Disciplinary and Grievance Procedures* applies to performance-related capability and conduct dismissals
- Non-statutory ACAS guidance and any internal disciplinary procedures
- Potential uplift of up to 25% for unreasonable failure to follow Code
Reasonable investigation

• Before embarking on any course of action, employer should investigate and provide employee with findings and opportunity to respond
• Collation of evidence
• If performance management process has been followed, the investigation can constitute a review of that
Chance to improve

- Case law and ACAS Code recommend that employee is given chance to improve before an individual is dismissed for poor performance
- Reasonable timescale for improvement
- Support or training
Invite to formal hearing

• Give sufficient information about the nature of the poor performance and its possible consequences to enable employee to prepare to answer the case at a formal hearing
• Include copies of any written evidence
• Explain procedure to be followed
• Date, time and place of meeting
• Right to be accompanied
Formal hearing

- Hold without unreasonable delay whilst allowing employee reasonable time to prepare their case
- Explain problem and set out evidence relied on
- Allow employee to:
  - Make representations
  - Answer allegations of poor performance
  - Ask questions
Decide on appropriate action

- Decide whether or not disciplinary or other action is appropriate
- Inform employee in writing
- ACAS Code:
  - Usual to give first written warning for first instance
  - If sufficiently serious, it may be appropriate to move directly to final written warning
- Internal policy may include oral warning
Warning

• “Improvement note” (ACAS Code)
• Should set out:
  ▪ Improvement of performance required
  ▪ Support and training provided
  ▪ Timescale/review date
  ▪ Consequences of failure to improve within timeframe
  ▪ Right of appeal
Dismissal

- Further unsatisfactory performance after final written warning may warrant dismissal
- Investigate and call formal hearing
  - Right to be accompanied
- Advise employee in writing of:
  - Reason for decision
  - Appropriate notice/date of termination
  - Right of appeal
Dismissal without warning?

• In absence of wilful element, it is rare for poor performance to be so serious as to justify instant dismissal for single act of incompetence
  
  • Dunn and anor v AAH Ltd [2010] EWCA Civ 183
  
  • Employers are generally expected to investigate and consider offering support/training to facilitate improved performance
  
  • Steelprint Ltd v Haynes EAT/457/95
Constructive Dismissal

- Key elements:
  - The employer commits a fundamental breach of contract
  - The employee resigns as a result of that breach
  - The employee resigns promptly (otherwise they will be deemed to have affirmed the contract of employment)
What can give rise to a constructive dismissal?

- The breach of many express or implied contractual terms can give rise to constructive dismissal
- A key implied term is mutual trust and confidence
- Individual actions can have the cumulative effect of undermining the duty of trust and confidence in every contract of employment
What can amount to a breach of trust and confidence?

• Trying to force the employee to do a different type of work or role
• Trying to demote the employee
• Undue criticism/criticism given in bad faith
• Manner of criticism
Problems – the Manager

- Lack of engagement
- Lack of support
- Lack of energy
- Unrealistic expectations
- Unclear goals - communication or consistency
Common problems – the Employee (1)

- The manager (see above)
- Lack of engagement
- Lack of energy
- Lack of trust
- Unrealistic expectations
Common problems – the Employee (2)

- Unclear goals
- Conflicting interests
- Lack of capability
- Lack of training
Practical tips (1)

- Attitude – like the people you are working with
- Engagement/energy
- Be positive (but do not gloss over issues)
- Think about influencing styles
- Be supportive – most people want to do well
Practical tips (2)

• Do not wait
  > No surprises at appraisal
  > Performance problems will not go away if they are not addressed
  > If there is a problem you are not doing the employee any favours by not telling them

• Consider training – appropriate if there is a lack of skill/knowledge
### Practical tips (3)

- Is the manager the problem?
  - Training/performance management for the manager?
  - Move the employee elsewhere (but is this postponing the issue of dealing with the manager?)
- Is the person in the right job?
- If someone is disruptive consider promoting them
Practical tips (4)

- Start a performance management process when improvement is possible, not to tick a box before dismissal.
- If improvement is not possible consider settlement rather than performance management. But remember “without prejudice” conversations may turn out not to be without prejudice (the Mezzotero problem).
Alternatives to performance management processes

- Compromise agreement
- Restructure
- Encourage employee to leave
- Change role/objectives
- Team building workshop / activity
- Change manager
- Performance incentives
- Informal discussion about performance
- Others?
Questions

Adrian Crawford
Partner
Kingsley Napley LLP
acrawford@kingsleynapley.co.uk

Amy Griffiths
Solicitor
Kingsley Napley LLP
agriffiths@kingsleynapley.co.uk