

A photograph of a Highland cow with long, shaggy, reddish-brown fur and curved horns, standing in a lush green field with tall grass and trees in the background. The cow is looking towards the camera.

PERFORMANCE MANAGEMENT

This guide is for dealing with the more formal aspects of performance management, often referred to as capability management. To achieve a fair process, employers should have a documented procedure setting out how it will deal with issues of poor performance.

Some employers may include poor performance as a form of misconduct, whilst others may have a separate policy.

The purpose of following a procedure should be to address an employer's concerns about an employee's performance and to consider ways how they may work together to help the employees performance improve.

Below is a summary of a typical capability procedure. However, the procedure may depend on the wording of an employer's own written policies, and so the summary below should be taken as a guide only.

Issues concerning performance can be complex. Whilst this information contains general guidance it is not a substitute for dedicated legal advice. Please call the helpline for further information.

Initial assessment or investigation

Unlike conduct and grievance issues, the Acas code does not deal directly with performance management.

However, it is good practice to follow the principles that apply in these situations, in terms of meetings,

consultation, warnings and appeal rights.

Performance issues are often initially dealt with informally between the employee and their line manager as part of day-to-day management. Any informal warnings given at this stage should not form part of the disciplinary record. If, matters do not improve a more formal process may be required. Before the employer decides to follow such a procedure, it should undertake a reasonable assessment or investigation to ascertain whether this is necessary.

A capability procedure will usually involve several meetings between employee and employer at which the employee's performance will be considered, ways to improve that performance are discussed, and agreed performance targets are set and reviewed. It is common practice to have a series of such meetings and if things do not improve an employer may decide more formal action is appropriate.

Invitation to a formal capability meeting

If the employer decides to take formal action, it should write to the employee setting out its concerns regarding performance, the reasons for those concerns and the likely outcome for the employee. If one of the outcomes of the meeting could be a formal warning then the process to be followed should mirror a disciplinary process. The letter should include a copy of any relevant documents that will be used or referred to at the capability meeting.

The letter should specify the date, time, and place of the forthcoming capability meeting. The employee should be given enough notice of the meeting to enable them to prepare for it.

Following the Acas disciplinary code, the employee has a right to bring a companion to any formal meetings, and this can be a colleague or a trade union representative (if applicable). Sometimes an employer will allow an employee to bring a companion who is not a colleague or trade union representative, such as a friend or family member, but employers do not have a legal obligation to do so.

The capability meeting

A capability meeting will usually be conducted by the employee's line manager or a more senior manager and may also be attended by someone as a note taker. The aim of the meeting should be to:

- Clarify the required standards the employer feels the employee has failed to meet and examine the evidence in this respect.
- Allow the employee to ask questions, respond to the evidence put forward, provide any evidence they may have and put their views across.
- Establish the likely reasons for the employee's poor performance.
- Identify what can be done to assist the employee in improving performance, such as additional training or supervision.
- Set agreed targets for improvement and a timescale for review.

The employer should communicate its decision in writing as soon as possible after the meeting.

Warnings

If the employer decides that the employee's performance is unsatisfactory, it may give the employee a written warning or may decide on a period of further monitoring and assessment. If the employee's performance has fallen seriously below standard, the employer may decide to go straight to a final written warning rather than a first written warning (see below).

Any written warning will usually set out:

- The areas in which the employee performance has fallen below required standards.
- Targets for improvement and the timescale in which improvement is required and when a review may take place.
- Any additional measures to assist in improving the employee performance, such as additional training or supervision.

A warning will usually remain active on the employee's personnel file for a set period, usually six months for a first warning and twelve months for a final warning, after which it should be disregarded by the employer.

Review period

How long the review period should be will depend on what is reasonable considering all the circumstances, including the needs of the business and the nature of the targets for improvement set at the capability meeting. However, commonly the review period will be 2 or 3 months.

The employee's performance should be regularly monitored during the review period, normally at weekly or fortnightly intervals. If the employee's line manager is satisfied with the employee's performance at the end of the review period, then ordinarily no further action will be taken. However, if the employer is still not satisfied, a further capability meeting may be held.

The employee should be notified of the meeting, and the possible outcomes of the meeting, in the same way as for the initial capability meeting.

Further capability meetings

At the meeting the employee should have the same rights as at the first capability meeting, including the right to bring a companion. The focus of the meeting will usually be on the extent to which the employee's performance has improved over the review period and, if it has not improved to a satisfactory level, the reasons for this and whether anything further can be done to assist. A further period of review and further objectives may be agreed with the employee at the

meeting, or the employee may be notified of these after the meeting in the outcome letter.

Final warnings

Following a further meeting, if the employer decides that the employee's performance has not improved as required, it may decide to give the employee a final written warning. A final written warning will typically set out:

- The areas in which the employee has continued to not meet required performance standards.
- Targets and timescales for improvement.
- Any measures, such as additional training or supervision, which will be taken to assist the employee in improving their performance.
- The consequences for the employee of failing to improve within the review period, or of further unsatisfactory performance within the period in which the final warning is active.

A final written warning will normally remain active for 12 months. After that time, it may remain on the employee's personnel file but should be disregarded in deciding the outcome of future capability proceedings.

If the employee does not meet the further targets set by the employer within the timeframe specified, it may be necessary to take further action against the employee, including dismissal.

Dismissal on performance grounds

It is potentially lawful to dismiss an employee who is failing to perform and does not seem capable of fulfilling their role. To complete a fair dismissal an employer must either follow their own policy and procedures or complete a process which is fair.

Fair procedure

Whether a dismissal is fair will depend on the reasonableness of the employer's decision in the circumstances and the procedure followed. Any tribunal will want to be satisfied that the employer honestly believed the employee was incapable of performing their job and management discharged its

own responsibilities towards the employee.

A dismissal for poor performance may not be fair unless the following key elements are present:

- A proper investigation into the problem has taken place.
- The employee has been made aware of the problem and been given an opportunity to improve within a realistic timescale.
- The employee has been provided with appropriate support and possibly training.
- The employee's progress is reviewed during the review period.
- The employee is offered a right of appeal against the decision to dismiss.

These can be complex issues and advice should be sought from the helpline.

Appeals

The employee has the right to appeal the decisions and warnings given by the employer under the capability procedure. The employer should set out the appeal procedure and any deadline when writing informing the employee of the outcome of each stage in the capability procedure.

Where possible, the employer should appoint a different manager to the one who made the original decision when appointing an appeals officer.

Medical issues

If the employee suffers with a physical or mental condition which may affect the employee's performance, an employer may consider obtaining medical evidence of the condition. This may help the employer understand any impact the condition may have on the employee's ability to perform their role.

Disability discrimination issues

The issue of disability is always relevant if an employee suffers with a long-term medical condition. If that condition has a substantial effect on the employee's day to day life, the employee may be classified as disabled under the Equality Act 2010.

Under disability discrimination law, the employer may have a duty to make reasonable adjustments to help the employee to overcome difficulties caused by workplace arrangements. This could include changing the employee's duties and/or giving additional training, or adjusting the capability procedure itself, such as holding meetings at the employee's home if the disability makes it difficult to attend a meeting at work.

In avoiding disability discrimination, the employer should also consider whether any adverse action it takes against the employee because of poor performance, such as dismissing the employee, can be objectively justified. This means that the employer needs to be able to show that it has a legitimate aim (such as meeting productivity targets) and that it has acted proportionately in the way it has treated the employee. This includes showing a good reason for rejecting any alternative ways of addressing the problem.

This is a complex area of law, and it is recommended that advice is sought from the helpline.

FAQ's

What should trigger an initial assessment or investigation about performance?

Consider all the relevant facts, has the employee been clearly told what is expected of them? Do they understand what the consequences are from underperforming? Are there any circumstances that are affecting performance, such as health or relationship problems that need to be addressed? Are they given regular and clear training/support? Do they understand they are under performing?

How do I establish which procedure to use? Misconduct or poor performance/capability?

Generally, a matter is classed as misconduct if the employee will not meet the requirements of the role. If they cannot meet the requirements of the role, with full training and support, that will be a performance/ capability matter.

When should the performance management escalate to a formal capability meeting?

The formal review stage begins when capability

issues have not been resolved informally. Normally, a line manager and the employee will meet with them to outline where performance is falling short of expectations, set objectives and arrange a review meeting, or a series of review meetings. Support including mentoring/coaching/training should be discussed as part of this meeting.

Who should have a copy of the notes of formal/informal meetings?

Copies should be provided and retained by both the manager and the employee.

How should I monitor progress during a period of review?

During the initial meeting, there should be a review date, or a series of review dates organised to enable the employee to reach the objectives set. During the review, there should be clear goals and objectives and the employee should be given the opportunity to demonstrate and provide evidence of the progress they are making.

What happens at the end of the formal review process?

The employee will meet with their manager to discuss progress against the objectives. An assessment will be made as to whether either:

- progress has been made which is significant and sustained to exit the formal process
- some progress has been made in which case the review process may be extended
- insufficient progress has been made and the employer may decide to hold a formal capability meeting.

The outcome of the review should be set out in a letter to the employee.

What documentation will be included if a formal capability meeting is needed?

The manager should collate all the documents relating to the employee's case including the capability improvement plans, outcome letters detailing expectations and shortfalls, information relating to support/training/mentoring, any minutes of the meetings between the manager and the employee. A summary of these documents should be

provided. All documents should be shared with the employee prior to any capability meeting.

What should the employer do if the employee raises issues about unfair treatment or even discrimination?

In this situation the employer should investigate the concerns raised as a grievance and try to avoid making any significant decisions in the performance management process until the grievance has been concluded and any appropriate action to remedy any upheld grievances has been implemented.

NOTE: Please be aware there are links contained within this factsheet that may take you to external sites, we are not responsible for their content. This is a general advice and information factsheet only and should not be treated as a definitive guide and does not constitute legal or professional advice. We are not a law firm and information is not intended to create a solicitor client relationship. Law Express does not accept any responsibility for any loss which may arise from relying on information contained in this factsheet. This is not a substitute for legal advice and specific and personal legal advice should be taken on any individual matter. If you need more details or information about the matters referred to in this factsheet please seek formal legal advice. This factsheet is correct at time of going to print. The law set out in this factsheet applies to England and Wales unless otherwise stated.

Copyright © 2025 by Law Express

All rights reserved. This article or any portion thereof may not be reproduced or used in any manner whatsoever without the express written permission of the publisher.