

THE END OF THE LINE



Make sure you follow the right processes when you address the underperformance of a team member. Jane Hannon explains how

Employment lawyers and HR professionals are frequently faced with calls for help from exasperated line managers saying that one of their team is simply not up to the job and that they want to 'get them out' as soon as possible. While there may be genuine performance issues in these cases, employment law protection in various forms across Europe means that it is frequently not possible to dismiss the employee without the risk of litigation unless a formal performance management process has first been followed.

Performance reviews

While it is very easy to give a good review, it can be difficult to tell an employee that there are shortcomings in their performance. If an employee is not performing their role to the required standard, then this needs to be flagged in their performance review. On countless occasions, managers will speak to their HR team or employment lawyers and say that an employee has been a

poor performer for years yet, when their performance review documentation is produced, it turns out that they have had satisfactory or even good ratings over recent years and received bonus payments. It can be very difficult to set off down a performance management process with the employee in this situation, unless there has been a sudden decline in performance.

Many employers have formal performance management processes in place. If these exist, then it is vital that the business adheres to its own policy. In the absence of a formal policy, then a recommended approach would be as follows.

Informal stage. In the UK and Germany, the direct line manager should usually address performance issues on an informal basis in the first instance. Bring the issues to the employee's attention, ask them for their views, identify the cause of the issues (if possible) and explain what is required of the employee, and over what period, checking that they understand. It

may be that a training or a coaching need is identified at this stage, so consider what impact the training or coaching is likely to have on the employee's performance. Once the issue has been addressed informally, ensure that there is a follow-up discussion to advise whether the required improvement has been achieved, or whether there is still more to be done.

In Spain, however, it could be risky to start with an informal process since the employee could raise a grievance in anticipation of the formal performance management process being commenced. They could then argue that the subsequent dismissal is linked to the grievance and is, therefore, null and void.

Formal stage. In the UK, the point at which an informal process comes to an end and becomes a formal process will depend on the circumstances of the particular case. There is no fixed number of informal meetings that need to have taken place before moving to the formal process. But it would be unusual to go straight into the formal process

without issues being first raised with the employee on an informal basis.

The employer will need to carry out at least three review meetings with the employee over a period of time before reaching the decision to dismiss. Again, the period of time between the meetings will depend on the nature of the poor performance, the nature of the business and the employee's role. For example, for a cashier in a retail bank a period of one month between meetings may be appropriate, whereas for a more senior strategic manager with much broader objectives, a longer period may be fairer.

Each meeting with the employee should follow a similar pattern:

- ◆ Identify the performance issue.
- ◆ Consider representations from the employee and any mitigating circumstances.
- ◆ Set out the standards that are required – the more tangible these are, the better.
- ◆ Explain how the performance improvement is going to be measured and over what period.
- ◆ Agree whether any training is required to support the employee to achieve these objectives.
- ◆ Confirm to the employee what will happen if the required improvement is not delivered.
- ◆ Ensure that these meetings are documented and that a performance improvement plan is agreed with the employee against which their progress can be measured.

At the end of the first review period, if the employee's performance has improved to the required standard, then meet with the employee and tell them that is the case, but advise that their performance will still be subject to scrutiny to ensure that performance does not slip again.

If performance has not improved to the required standard, issue a formal warning to the employee and go through the same process as at the first meeting, setting new objectives. Continue going through the same process.

Although formal review meetings will be booked in, it is also a good idea to have weekly check-ups with the employee rather than saving all feedback until the end of the review period.

Local law determines the exact format of the ultimate dismissal process. In the UK, it is important to comply with the ACAS Code of Practice, give the employee the right to be accompanied by a union representative or a work

colleague and allow them a right of appeal against their dismissal. In Spain, it is crucial to draft a very detailed dismissal letter that clearly sets out all the grounds for dismissal and the employer must be able to support these with evidence. Spanish courts are very protective towards employees in poor performance cases and if the employee challenges their dismissal, the employer will need to provide a comparison of the employee's performance with the performance of an equivalent employee, or a comparison with his/her own previous performance as well as evidence that the decrease in performance is a voluntary decision of the employee.

In Germany, it can be difficult to demonstrate that an employee's

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performance is, in fact, poor. Under German law, employees have a duty to perform their job to the 'average kind and quality', taking into consideration their individual abilities. It is only possible to terminate employment fairly if the employee's performance is significantly lower, ie by at least 30%, than comparable employees. So, prior to dismissal, the employer needs to assess the employee's performance against a group of comparable employees. The employer may also have to respect co-determination rights with the works council.

Protected conversations

In the UK, it is possible to have a 'protected conversation' with the employee at any point during the performance management process. The purpose of a protected conversation is to enable the employer to lay their cards on the table with the employee on an 'off-the-record' basis where the employer wants to give the employee a choice – ie 'We are going down a performance management process with you and one of the outcomes is that you may be dismissed and we can either go down that route or you can leave now with a severance payment, subject to signing a settlement agreement in which you waive all employment claims'. Many employers avoid doing this as a point of principle because they do not

want to reward poor performance but, in some cases, it can be cheaper for the business to simply part company with the employee for a relatively small sum rather than spend management time going through the performance management process, particularly where it is obvious to the employer that the employee is never going to achieve the required standard.

Clearly the employee has salary costs throughout the performance period and if they are not doing their job properly, this could have a much larger impact on the bottom line. There are fairly complex rules about protected conversations. Remember that they do not give employers *carte blanche* to threaten an employee and the veil of the

protected conversation will not cover any discriminatory behaviour.

In Spain, it is less common to have a 'protected conversation'. So there is a risk that employees will argue that the termination of their employment is null and void because they have been forced to sign the waiver of claims.

Managing poor performance undoubtedly takes time and energy out of a line manager's day and it can be a frustrating process, particularly where the employee shows no sign of improvement. But if performance issues can be identified and addressed early on, before they start to have a major impact on the business, this is likely to involve significantly less management time and financial cost than waiting until the situation becomes unsustainable. In these circumstances, the business may end up reaching a commercial settlement with the employee that has clear employee relations and precedent issues or risk facing litigation if it dismisses the employee. ♡



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