



How can employers deal with poor performance?

Probation, disciplinary – which procedure should be implemented to deal with poor performance? It's not always obvious to employers which procedure should be implemented. As an external advisor I always ask employers for copies of the company policies and the employee's contract. This, along with some context on the poor performance, helps guide the advice given.

Probation

If the company has a probation policy, and the employee is still within their probation period, it is more than likely that this procedure will apply unless it is suspected that the poor performance is related to misconduct or an ongoing health issue, in which case the disciplinary or sickness absence procedure may be more appropriate.

Capability

Whether an employer should deal with an employee's poor performance through its disciplinary or capability

procedure will depend on the nature of the poor performance and whether they have a separate disciplinary and capability procedure. All employers should have a disciplinary procedure, or follow the code of practice, but not all will have a capability procedure.

If the employee's poor performance is capability related, i.e. they do not have control over their failure to meet the employer's standards of performance, it will be appropriate for the employer to follow a capability procedure for performance improvement.

Disciplinary

If it is conduct related, i.e. the employee has some control over their actions, it is appropriate for the employer to follow its disciplinary procedure. The employer will need to carry out an investigation to establish the facts. **In all cases, the key is to investigate the circumstances and to follow the principles of the Acas code of practice.**

This month I focus on performance. It's not always obvious to employers which procedure to implement when dealing with poor performance. I hope to provide some useful tips and advice in this June newsletter. I also look at the ongoing debate around home and hybrid working and what's driving a return to the office.



You can also request an initial free 30-minute consultation to see if I can help you.

Please contact me using any of the methods listed below. I would love to hear from you!

hr2go Consultancy is here to support you with any of your HR issues or concerns

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Home and hybrid working...

There continues to be debate over the pros and cons of home and hybrid working or a return to the office either more often or permanently.

HR professionals are seeing a number of employer's seeking to end or reduce flexible, hybrid ways of working and mandate more people back to the workplace more often and Manchester United hit the headlines in May with its push to get all staff back into the office.

Hybrid or blended working

Hybrid working may not be suitable for all organisations but there is a requirement to ensure your company is future-fit and can attract and retain employees. Employers need to assess its suitability by looking at the practical implications and whether it fits with the organisation's culture.

It's always recommended to get staff opinions on their preferred working patterns and any benefits or challenges so consult with your workforce before implementing any hybrid working model.

Senior leadership within the organisation need to buy-in to whatever hybrid working model is proposed for it to be successful. Senior leaders will need evidence of the pros and cons like the importance of retention and recruitment and potential cost-savings like a reduction in office space.

In my experience there is no one-size-fits-all approach or hybrid working model, it may be trial and error! What is going to work best will depend on the nature of the business and its needs as an employer. Restrictions may be needed where for example, roles involve confidential or personal data or are customer or client facing roles. Employers also need to be aware of the risks of working remotely abroad.

... or a return to the office?

Consider implementing a trial period to identify any unforeseen issues. Employees will need this clearly communicated to them. If any changes are made on a permanent basis, employers will need to assess whether agreement is required to change employee's contracts of employment.

As you will be aware from my previous newsletters, I am very much in favour of flexible working and there is often unmet demand among employees for practices such as flexi-time, term-time working, compressed hours and job-sharing arrangements.

So, what's driving a return to the office?

After the pandemic some employers started to instruct employees back into the office full-time. The majority that had seen the benefit of hybrid working in their workforce or the cost-saving with reduced office space, kept it in place. The issue was that hybrid working was never implemented; it was mandatory for most employers.

There was no 'rolling-out' period and HR and line managers didn't necessarily have the skills to support and manage a workforce that was not all working in the same place. Some organisations have succeeded in doing this and continue to thrive with an agile workforce. Others have struggled and only now are seeing the implications on the organisation.

Employers need to continue to provide ongoing training to line managers and ensure that its strategies and policies are suitable for a hybrid workforce. This could include reviewing your approach to:

- performance management;
- employee engagement;
- wellbeing;
- communication; and
- learning and development.

If you need further guidance or support on these areas, feel free to get in touch!

Your top HR questions answered!

Must an employer wait until the end of the probationary period before dismissing an unsatisfactory probationer?

An employer does not need to wait until the end of a probationary period before dismissing an unsatisfactory employee - the employee can be dismissed during the probationary period.

It is common for employers to stipulate a probationary period for new employees, particularly those at junior or mid-level, for example for a period of three or six months. However, a probationary period has virtually no effect on the employer-employee relationship. The purpose of the probationary period is simply to enable the employer to monitor and appraise the probationer in the initial stages of their employment to ensure that the required standards of performance and conduct are being reached.

If the probationer turns out to be unsatisfactory during the probationary period, the employer can take the necessary steps to dismiss them without waiting for the probationary period to come to an end. The employer should ensure that it acts fairly and follows any applicable contractual disciplinary procedure prior to the dismissal. It must give the required period of contractual or statutory notice, whichever is the greater.

If an employee resigns after disciplinary proceedings have started should the employer continue the procedure?

If the employee resigns with immediate effect, their employment will terminate. There is little point in continuing a disciplinary procedure in respect of an employee who is no longer employed, as no disciplinary sanction can be imposed against a former employee. However, the disciplinary information collated should still be retained for a period of up to one year after the employee's resignation, because it may be needed as evidence should the employee subsequently try to claim constructive dismissal or unlawful discrimination in relation to the conduct of the disciplinary proceedings.

If the employee resigns with notice, as a general rule the disciplinary procedure should be progressed to its conclusion during the employee's notice period. The employee is still employed during this period and there is no reason why they should avoid a possible disciplinary sanction just because they have chosen to resign. If the disciplinary procedure concludes with a recommendation for the employee's summary dismissal on the grounds of gross misconduct, if this is affected during the employee's notice period it will supersede the resignation and the employee will be deemed to have been dismissed for conduct reasons.

What is gross misconduct?

Gross misconduct is a single act of misconduct that is serious enough on its own to justify the employee's dismissal without notice. As there is no statutory definition of what constitutes gross misconduct, it is up to each employer to define what types of conduct will be regarded as gross misconduct. It will be important for employers to do this clearly so that employees and their managers properly understand the types of conduct that will lead to dismissal. Before dismissing an employee for gross misconduct, the employer will still need to investigate the allegation and give the employee the opportunity to respond.

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