



**Welcome** to the latest edition of IntERact. In this quarterly newsletter we are focusing on Capability Performance issues, a recent case of interest and a topical (in light of a heatwave) summary.

## Managing Poor Performance

### What is capability?

"Capability" refers to employee's skills, ability, aptitude and knowledge in relation to the job that they are employed to do. Lack of capability results in unsatisfactory job performance. Lack of capability is generally not the employee's fault. Managers should examine circumstances and support underperforming employees to help them meet the required standard rather than immediately resort to disciplinary action.

### Is it capability or conduct?

An employee demonstrates a lack of capability where they are unable to perform the job to the standard required by the employer, despite best efforts. The employers agreed and clear standard is the relevant factor - not the manager's personal opinion of the employee. However if an employee fails to meet the required standard due to carelessness, negligence or idleness, this does not constitute incapability, but is generally regarded as misconduct.

- *capability is usually outside employee's direct control*
- *conduct is within employee's control.*

It can be difficult to establish if poor performance is due to incapability or lack of effort/negligence as sometimes there is an element of both. Managers should choose to performance manage employees, rather than applying disciplinary proceedings at the start.

### Cause of unsatisfactory performance

There are many causes of poor performance other than lack of effort. These may include:

*inadequate/insufficient training; poor/out of date systems of work or policies or procedures; faulty tools and equipment; poor or inadequate supervision and/or support; lack of understanding on duties, priorities or goals; unclear instructions; work overload, stress and fatigue; unrealistic targets/deadlines; poor working relationships/bullying or harassment; physical or mental ill health or personal problems*

Most are within a manager's influence and effective removal or reduction of the cause of the problem means performance is likely to improve.

### Keep records of discussions/concerns

Records should be kept of meetings about performance, whether formal or informal, as well as any outcomes including agreed targets/action plans.

### Dismissal for unsatisfactory performance

Whether dismissal applies and how will depend on Company policies and procedures for dealing with performance and/or the disciplinary procedure. If, after formal warnings and required support being provided, performance remains clearly unsatisfactory the employer may be able to dismiss. However dismissal for unsatisfactory performance will be unfair if the manager has not taken appropriate steps to give the employee an opportunity, and sufficient time, to improve to the standard required.

## Managing poor performance

1	Meet with employee and clearly state the problem
2	Identify root cause of the problem and consider mitigating factors
3	Give specific examples and seek employee's agreement for improvement
4	Confirm what is expected and agree specific actions. Confirm in writing
5	Agree a timescale for the improvement to be achieved
6	Arrange training where appropriate
7	Schedule follow up meetings to review progress. Communicate with employee
8	Keep a record of meetings and what has been agreed. Decide any further actions.

## Peries v Wirefast

### **Background**

Peries was selected for redundancy. He brought a claim stating that Wirefast failed to comply with the redundancy policy. Under the policy, he was entitled to redeployment pay and the services of a professional outplacement adviser. The policy included the statement: 'this is not part of your contract'. The tribunal concluded the policy did not give rise to contractual obligations and rejected claims. The employee appealed.

### **Decision**

The Employment Appeal Tribunal allowed the appeal as it is possible for policy, over time, to give rise to contractual rights, even though originally expressed as non-contractual. Saying a document is for information only and does not form part of contract does not preclude it from becoming as a result of custom and practice a contractual entitlement. The EAT sent the case back to tribunal to consider facts and decide whether the redundancy benefit had become a contractual entitlement.

### **Comment**

This is a reminder not to be lulled into a false sense of security by 'non-contractual' label. A benefit originally described as non-contractual will be relevant however its status may have been altered through custom and practice. As this case shows, labels are not conclusive

Sources - A variety of resources are researched and utilised in constructing the newsletter including; Acas, BERR, CIPD and other internal and external HR and legal resources as necessary.

## Feeling hot! - Temperature in the workplace

Employers are obliged to maintain a reasonable temperature in the workplace, although there is no maximum legal temperature. Employees may have different views about what amounts to a reasonable temperature and workplace temperature that is tolerated by some employees may be the source of complaints by others.

In the event that an employee complains that the workplace is too hot the employer should consider whether or not their complaint is well founded. For example, the employee's workstation may be sited in an area that is particularly warm, or their job may be more physically demanding than nearby colleagues. Alternatively, the employee may have a medical condition that means that they are more affected by heat. If investigation into the employee's complaint shows that it is well founded, steps should be taken to try to alleviate the problem, such as providing a fan.

Where a number of employees complain about the temperature this is indicative that the temperature problem is wider and more serious. The employer should look into the matter further and attempt to address the problem. There are a number of factors to consider.

- Where there is no air conditioning system are employees able to open windows?
- If air conditioning is used is there a window open that is disrupting the system?
- Is the air conditioning system working properly?
- Should the thermostat temperature be altered?
- Do blinds, if fitted, work?
- Is there a plentiful supply of cold drinks and the opportunity to take breaks to drink?
- Can the dress code or uniform be relaxed and/or adapted to warmer weather?

Where complaints by other employees are limited and there appears no sound reason for an individual employee's complaint, and the employer has taken reasonable steps to try to alleviate the complaining employee's problems but they are still threatening to go home, the employer should advise the employee that it will withhold pay for the hours not worked and treat the absence as unauthorised and subject to disciplinary action.

However, employers should be aware that employees are protected against dismissal and detrimental treatment where, in circumstances of danger that they reasonably believe to be serious and imminent, they take steps to protect themselves, or leave or propose to leave the workplace. If an employer that takes disciplinary action against an employee who goes home, citing workplace temperature as the reason, the employer may have to defend its actions in an employment tribunal. Whether or not the employer can successfully defend the claim will depend on the circumstances of the case.

## Useful Data

<b>Statutory Maternity Pay</b>	effective April 2009	£123.06 per week
<b>Statutory Sick Pay</b>	effective April 2009	£79.15 per week
<b>Minimum Wage</b>		
<b>workers 22 years and older</b>	effective October 2008	£5.73 per hour
<b>workers 18 to 21 years</b>	effective October 2008	£4.77 per hour
<b>workers 16 to 17 years</b>	effective October 2008	£3.53 per hour
Recent survey data of general interest		
<b>Average Absence Cost</b>	CIPD survey 2008	£666 per employee per year
<b>Average Level of Absence</b>	CIPD survey 2008	8 days per employee per year
<b>Employee Turnover Rate</b>	CIPD Survey 2008	17.3%
<b>Average Recruitment Cost</b>	CIPD Survey 2008	£4,667 per vacancy filled

If you have any questions or comments relating to this newsletter then please contact us on **0845 270 1148** or email

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*The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking, or refraining from taking, any action.*

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