



The importance of managing employee performance before problems arise

Written by Neena Patel, associate at Fox, Solicitors

Tuesday, 24 July 2012

Dismissal, tribunals, capability and second chances - why a proper performance management process is essential.

The abolition of the default retirement age in April 2011 and the recent decision of the Supreme Court in *Seldon v Clarkson Wright and Jakes* have focused attention on the issue of performance management.

These recent developments highlight the increasing importance of having proper performance management processes in place.

Tackling performance issues

Under UK employment law, “capability” is a potentially fair reason for dismissal. However, in order to avoid expensive unfair dismissal claims, employers still need to follow the correct procedure, demonstrate that capability was the actual reason for the dismissal, and show that they acted reasonably in dismissing the employee on that basis.

In addressing these issues, employers need to be able to point to objective evidence which reinforces their assertions about an employee’s lack of capability. An important element of this will be the extent to which the employer clearly communicated the requirements of the role to the employee. For example, a tribunal will want to be satisfied that relevant performance targets were brought to the employee’s attention and that the employee was made aware of the consequences of not meeting those targets.

The tribunal will ask if appropriate support and training were offered to the employee. The tribunal will also consider whether or not the employee was given a reasonable opportunity to improve once informed of the problem. A single act of poor performance will very rarely constitute a fair reason for dismissal.

Where an employee suffers from a disability, there may also be a legal duty to make reasonable adjustments in respect of that employee. This may mean giving the employee longer to perform tasks, or even reducing general performance targets to levels which are suitable for that employee. An employer’s failure to make reasonable adjustments could result in disability discrimination claims.

It is a basic principle of fairness that a dismissal for poor performance should not take place without a proper process being followed. Whilst the ACAS code of practice on disciplinary and grievance procedures is not legally binding, tribunals are obliged to consider the Code when deciding whether a fair process has been followed. A tribunal can increase any compensatory award by up to 25 per cent if a fair process has not been followed. Employers may prefer to address performance issues under their own capability procedure. That is fine, so long as the procedure complies with the basic principles set out in the Code. To minimise the risk of claims, employers should keep a paper trail of the process followed and the reasons behind the dismissal.

Older employees

Until April 2011, employers were able to rely on the default retirement age of 65 (“DRA”) to avoid performance managing older members of their work force. The DRA allowed employers to dismiss staff over the age of 65 without having to raise performance issues.

Following the abolition of the DRA, effective performance management of senior employees is becoming increasingly important. Whilst employers can still in theory choose to impose their own mandatory retirement age, they will now have to carefully justify that particular age as being a “proportionate means of achieving a legitimate aim”.

The decision in *Seldon* suggests that 65 is no longer a “safe age” to retire an employee. With all the uncertainty surrounding what retirement age a court may consider “proportionate”, the only safe advice is for employers to avoid having a mandatory retirement age altogether. Proper performance management is more important than ever in this context. Employers should be mindful of taking an even-handed approach towards handling performance issues for all of their employees, old and young alike. Without appropriate procedures, employers leave themselves open to claims for age discrimination.

Performance managing before problems arise

Best practice is to manage performance issues head on before a problem arises. Doing so will help to increase morale and productivity. Employees will feel more engaged in the business and know what is expected of them. Regular feedback through formal appraisals and informal discussions should mean that performance issues are thrashed out and unlikely to come as a surprise. Employees are more likely to perceive that they have been treated fairly and therefore less likely to bring a claim.

A probationary period is an ideal time to assess an employee’s suitability for a particular role and to pick-up quickly on performance issues with limited risk of a claim. During the probationary period employers can usually terminate an employee’s contract on very short notice and the employee will not have acquired the qualifying length of service to bring an unfair dismissal claim. Although typically used for new recruits, probationary periods can also be introduced to assess the suitability of an existing employee who is promoted to a new role. Employers should diarise the end of a probationary period to ensure that an employee’s suitability for a role is determined well in advance.

Employers’ expectations can often be efficiently communicated by reference to performance targets; preferably discussed at the outset of the employment. Performance targets are likely

to change in accordance with the evolution of the business or an employee's role and should therefore be kept under review and regularly discussed with the employee.

Line managers often see appraisals as a pointless and time-consuming exercise, especially when profits are low and bonuses are small. In fact, regular appraisals can be an invaluable forum for giving both positive and negative feedback. Managers should receive training on how to conduct appraisal meetings properly so that they are well equipped to have meaningful and constructive discussions with employees who are not meeting expectations. Appraisals should also have a forward-looking element which focuses on improvement rather than simply dwelling on past performance.

Written and verbal communications during the performance management process should be an accurate record and consistent with other decisions made in relation to an employee. We see employees using their flawless employment records to undermine their employer's arguments relating to underperformance. An employer would get into difficulty trying to justify dismissing an employee on capability grounds if it had recently awarded that employee a top rating in their appraisal or a performance-related pay rise. The Data Protection Act 1998 allows employees to request copies of certain types of information held about them at any time which is another reason for consistency in performance records.

Settlement negotiations

Employers sometimes wish to avoid the performance management process altogether and enter into a negotiated settlement with the employee concerned in order to implement the employee's dismissal. This approach can be a much quicker and more amicable way of dismissing an employee. The end result is usually both parties entering into a compromise agreement in which the employee agrees to waive all claims against their employer. However, using a compromise agreement as an alternative to a capability process has risks. Under current legislation, settlement discussions which lead to a compromise agreement are disclosable in tribunal proceedings, unless they take place as part of a bona fide attempt to settle an existing dispute (in which case they are referred to as being "without prejudice"). The best approach is to combine some form of a capability procedure alongside concurrent but separate "without prejudice" settlement negotiations.

The government has recently published draft legislation which would prevent employment tribunals from taking into account in unfair dismissal proceedings any settlement discussions (and not just those on a without prejudice basis). The proposals, in their current form, will be of limited value to employers because tribunals would still be able to take such settlement discussions into account in discrimination and whistleblowing claims. Employees could therefore easily get around the protected settlement offer by alleging discrimination.

The future

Findings published by the Office of National Statistics in October 2011 show that between 2008 and 2010 the average man aged 65 in the UK could expect to live a further 18 years and the average women another 20.6 years. With life expectancy on the increase, the government now proposes that the state pension age will be increased to 67 between 2026 and 2028, which is much sooner than anticipated. With future generations of employees likely to retire later in life, the importance of good performance management processes can only increase.

Neena Patel specialises in Employment Law and is an associate at Fox, Solicitors based in the City of London: www.foxlawyers.com

Neena Patel joined Fox in June 2010 and specialises in employment and partnership law. She advises companies, LLPs, professional partnerships, senior executives and partners on a variety of issues including commercially sensitive senior level appointments and departures. Her experience includes drafting and advising on various types of employment and partnership documentation including service agreements, staff policies and procedures, compromise agreements, retirement deeds and LLP and partnership agreements. Neena also has experience in advising on redundancy exercises, sex and disability discrimination litigation in the employment tribunal and providing strategic and tactical advice in team move scenarios and partnership disputes, including advice on issues such as restrictive covenants and fiduciary obligations.

Neena is a member of the Employment Lawyers' Association and regularly attends seminars and training events.

Fox are a boutique law firm based in the City of London, specialising in contentious employment and partnership issues swiftly and effectively.