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## Our Talk Business angels...



**Mike Norfield** is CEO of Team Telecom Group (TTG), a global telecoms specialist, which researches, develops and manufactures much of its technology in the UK. Mike has over 30 years of multinational experience in the wireless business, having held senior positions throughout his career. Mike has fast-tracked plans for growth and development within TTG, with a focus on maximising the global potential of the company. His knowledge of the telecommunications industry, together with his international business expertise, has seen him become the driving force behind the business' creation, growth and success.  
*Read his thoughts on research and development on page 64*



**Neena Patel** specialises in employment law and is an associate at Fox Solicitors. She advises companies, LLPs, professional partnerships, senior executives and partners on a variety of issues, including commercially sensitive senior level appointments and departures. She also has experience in advising on redundancy exercises, sex and disability discrimination litigation, and providing strategic and tactical advice in team move scenarios. Neena is a member of the Employment Lawyers' Association and regularly attends seminars and training events.  
*Read her article on employee performance on page 92*



**Martin Spiller** is a partner with Jenson Solutions, an angel investor and a lecturer in finance. He qualified as a chartered accountant before joining Deloitte in 2002 as head of the food and beverage sector team, and was involved in disposals, buy-outs and strategic advisory for clients. In 2003, he co-founded a successful consumer goods business before taking a year out to complete a graduate diploma in law and to pursue other interests, including getting his motorbike licence. Martin is also a lecturer for leading professional training providers and a regular contributor to TB.  
*Read his advice on alternative funding streams on page 47*



**Bev Regan** is head of franchising at aspect.co.uk, and has more than 25 years' experience across the franchising sector. A franchisee herself for 18 years, Bev drove her business to be a flagship franchise covering Hertfordshire, Middlesex, North and North-west London. Bev's core skills lie in the creation, development and implementation of processes and tools that can help a company solve business issues. She enjoys working with people to take away the background noise, so that they can focus on the success of the business.  
*Read her top tips on building a franchise network on page 121*



**Neena Patel**, an associate at Fox solicitors and employment law specialist, looks at the importance of managing employee performance before problems arise

# Performance problems

## 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. While 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% 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. While 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". 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

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 are 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' expectations can often be efficiently communicated by reference to performance targets: preferably discussed at the outset of employment. Performance targets are likely to change in accordance with the evolution of the business or an employee's role, so should 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. 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

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**"Proper performance management is more important than ever"**

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**"Best practice is to manage performance issues head on"**

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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, which is another reason for consistency in performance records.

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

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