



## INCOMPETENT EMPLOYEES

### Introduction

One of the recognised reasons to fairly terminate the services of an employee is his or her incapacity due to poor work performance (incompetence). In this article we examine the requirements for dealing with employees who, after completing their probationary period successfully, fail to meet the required standards of performance.

### Incapacity: dismissing employees for poor work performance

Paraphrased, the Code of Good Practice: Dismissal (items 8(2) & (9)) requires that the fairness of the dismissal of a poor performer must be judged in terms of the following:

- Was there a performance standard in place? (This suggests that **all** jobs need to have standards of performance set for them.)
- Was the standard known to the employee?
- Did the employee fail to meet the standard?
- Did the employer establish the reasons for the under performance?
- In the light of this, has the employee been given appropriate evaluation, instruction, training, guidance or counselling?
- Has the employee been given a reasonable period of time for improvement?
- Were there suitable alternatives to dismissal (e.g. demotion)?
- If not, dismissal will be fair.

### Evaluating the poor performer

Performance is evaluated or assessed by examining the employee's actual performance against the known or agreed job standards. The need to evaluate the employee's performance is a critical step when dealing with poor performance, in that it clarifies the *exact nature* of the problem i.e. what must be achieved and what is actually being achieved. Unless the employee is made aware of the specific performance problem, it would, in most cases, be unreasonable to expect him or her to take steps to resolve it, or to dismiss him or her for something which he or she may be unaware of.

## **Instructing the poor performer**

While it is not clear from the Code what is meant by 'appropriate instruction', it is reasonable to assume that this involves ensuring that the employee is, or has been, told (instructed) what the important *basics* are of how the job should be performed and the various rules, regulations and policies which must be adhered to.

If the employee is performing poorly because of a lack of *basic* information about how the job should be carried out, or the rules and regulations which must be adhered to while at work, then it would be unfair to penalise him or her. Management has a responsibility to ensure that all employees, and especially those performing below standard, are provided with the key information they require to perform their work correctly.

## **Training the poor performer**

The employee needs to be provided with the specific knowledge or skills which he or she needs to be able to perform the work to the required standard.

How much training, if any, and what type should be provided to the poor performer, (i.e. what would be appropriate) will depend on a number of factors. For example, if the employee's job content has been changed, then detailed and comprehensive training may be appropriate to assist him or her to carry out the new or changed tasks. However, if the employee's previous performance has been up to standard and there have been no job changes, then training may not be appropriate in such a case. Cost may also be an issue when deciding whether training is appropriate. For example, on-the-job training may be affordable and appropriate in most circumstances, but sending the employee on an external programme may not be. Lastly, the nature of the job itself may have an effect on whether it is appropriate to provide training, for example at very senior level where it is reasonably expected that the employee already possess the required skills, or where there are important deadlines to meet and training would take longer than the time available.

## **Guiding the poor performer**

This implies showing the employee the right way to do things, on the job coaching, and generally helping him or her avoid the pitfalls of doing things incorrectly. It may also include spending time with the poor performer in order to guide him or her to improve his or her job performance to the required standard.

## **Counselling the poor performer**

This is perhaps the most important requirement of all for dealing fairly with poor performers. Counselling is a process whereby the employee is told that his or her

performance is below standard; the causes of the poor performance are investigated together with the employee; the employee is assisted as may be appropriate to improve to the required level; and, when necessary, the employee is clearly informed that the failure to meet the required standard could result in him or her becoming unsuitable for continued employment.

### **The process**

It is essential to implement a correct counselling process as the Code makes it clear that poor performance should not be handled in the same way as misconduct i.e. poor performance is not viewed as a disciplinary offence and the employee who performs poorly should therefore be dealt with through the counselling process rather than a disciplinary procedure.

This is sound practice, as the employee who is experiencing difficulties in doing the job is (usually) neither behaving badly nor breaking any rules, and should thus be treated in a *supportive* rather than a punitive way.

The following is a suggested process to follow. (Note that a truncated process may be sufficient depending on the circumstances, e.g. the seniority of the employee.)

- A.** Hold a first counselling meeting at which the employee is –
- informed of the specific details of the sub-standard performance and asked to give any reasons as to why it is happening;
  - asked how it can be improved to the required standard and given guidance on how to improve;
  - informed (as appropriate) as to what other assistance by way of training or instruction will be provided to him or her; how and when progress will be monitored; and
  - given a date on which the performance problem area will be reviewed.
- B.** A follow-up counselling meeting should be held at which the performance improvement (if any) is reviewed. If the standard had been achieved, praise the employee and ask them to keep up the improvement. Also indicate that a relapse will result in the process continuing where it left off.
- C.** If the standard has not been reached, discuss further what needs to be done and by when. Inform the employee that unless his or her performance improves to the required level, he or she may become unsuitable for continued employment.
- D.** In the latter case, schedule a third counselling meeting at which the performance is reviewed again. If it is to the required standard, the counselling ends. Inform the employee as in step B.

**E.** If the standard has not been reached, consider whether further time can be allowed for improvement. If so, schedule a further follow-up meeting. If no further time can reasonably be allowed, indicate to the employee that an incapacity hearing will be held and that notice thereof will be given in writing.

**F.** Conduct the incapacity hearing after giving reasonable notice thereof to the employee. The usual rights apply, e.g. the right to be represented by a fellow employee. The line manager responsible for managing the problem should submit evidence to satisfy the requirements of items 8 and 9 of the Code (see above). The chairperson must also judge the matter in the light of those requirements. Before deciding to dismiss, however, the chairperson should consider ways short of dismissal to remedy the problem, e.g. a transfer or demotion to an appropriate position, with or without a lowering in status and benefits. Dismissal must always be the last resort.

**Note** also that there is no limit as to how many or how few counselling meetings must be held; the number will be determined by the need to ensure that the employee has been given every appropriate assistance to improve and reasonable time to do so. Factors such as the employee's seniority, the seriousness of the problem and the effect of the problem on the organisation will play a role.

### **Concluding comment**

The Code clarifies the requirements to effect a fair dismissal for poor performance. However, it also places the onus on management to follow a fair process before doing so and to prove the fact of the under performance, if required to do so. If this is not done, the CCMA may well decide to award reinstatement or costly financial compensation to the employee.

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