



# POOR PERFORMANCE

*the easy complete guide for employers*

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# POOR PERFORMANCE

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## GENERAL

Dismissing an employee for incompetence can be difficult because you should verify every employee's competence before you employ them. (You can either check out an employee during the recruitment process or employ them on trial [yes it's legal] – see our book *Employ The Best Staff- Every Time*).

## PROCESS

This does not mean that you cannot fire an incompetent employee – but you have to be very systematic and open about it. You must be able to show that the employee has been:

- warned about the areas in which the performance is below standard,
- offered whatever assistance or training may be necessary,
- given a reasonable time to improve and,
- advised of the possibility of dismissal in the event of no improvement.

Where an employee has been employed in a certain position for a number of years, it may be more difficult to dismiss for incompetence, because the company has accepted the poor performance for so long. It can be done, though, but we suggest that you phone AdviceWise People before you embark on this route.

What it does mean is a series of meetings with the employee and his representative, all of which should be documented. During each of these meetings you should –

- Explain exactly what the employee should do differently.
- Allow the employee to ask questions until you are satisfied that they understand what they are doing wrong, and how you expect them to do it.
- Get agreement on how long it should take to improve, and set a date and time for testing.
- Make sure the employee understands that they are expected to meet the specified performance standard.
- If further training is required, arrange it.

If the employee's performance still falls short of your standards, you may start the disciplinary process - follow the procedure described for less serious misconduct, and give a written warning.

If that is ineffective, a further disciplinary meeting and a final written warning could follow, until the employee is dismissed after a third disciplinary meeting. Circumstances may vary, so please phone Advicewise People for specific advice.

Before dismissing for poor performance, review the following from chapter 2 –

### **A fair and reasonably employer would...**

You must be able to justify dismissal or any other action that disadvantages an employee. There are two issues – WHAT to look at and HOW to look at it.

WHAT to look at. You should look at all of the circumstances, including (but there may be more factors)–

- The conduct of the employee
- The conduct of the employer
- The employment history
- The nature of the industry and its customs and practices
- The terms of the contract (express, incorporated and implied)
- The terms of any other relevant agreements
- The circumstances of the dismissal.

HOW to look at it. Then you must view the matter as a fair and reasonable employer would do. There is no standard for such an employer – it is a hypothetical idea.

The matter is made more difficult by section 103 of the Employment Relations Act, which the Court said “redressed the imbalance of power” between employer and employee and “shifted it out of the hands of the employer”. The relevant part of section 103 reads as follows –

*“... the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, where what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”*

Clearly, process is paramount.

In so far as the decision itself is concerned, the Court has given the following guidance –

*“...if an employee is unequivocally caught red-handed stealing large amounts of money, a fair and reasonable employer both could and would dismiss with justification. However, if an employee has made a negligent accounting error, the employer could dismiss but whether a fair and reasonable employer would dismiss is a matter for evaluation against all the relevant circumstances.”*

All the circumstances of the case includes not just the employer’s reaction to the misconduct with it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer.

## KEY POINTS

### POOR PERFORMANCE

- Warn EXACTLY which part of performance is below standard
- Offer assistance or training
- Give reasonable time to improve
- If coaching fails, start disciplinary process and formal warnings
- For entrenched poor performance, get professional advice