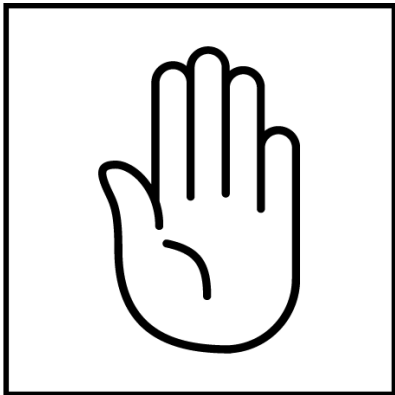


CPD Seminars - 2: Capability: Managing Performance and Ill health



Housekeeping



Capability – Performance Management

- One of 5 potentially fair reasons for dismissal:
 - Conduct
 - Capability
 - Redundancy
 - Contravention of a statutory restriction (illegality)
 - SOSR
- A capability dismissal is one which is related to the employee's "skill, aptitude, health or any other physical or mental quality" (section 98(3)(a), Employment Rights Act 1996). The capability must relate to the work that the employee was employed to do (section 98(2)(a), Employment Rights Act 1996).
- Performance
- Ill health

- Firstly...
 - Difference between annual appraisals and performance related pay decisions (the STPCD makes clear that all pay progression for teachers must be linked with performance management);

and
 - Formal capability / performance management – where an employee isn't performing to the required standard and improvements need to be made.

Managing performance: aims and objectives



Why is managing performance important?

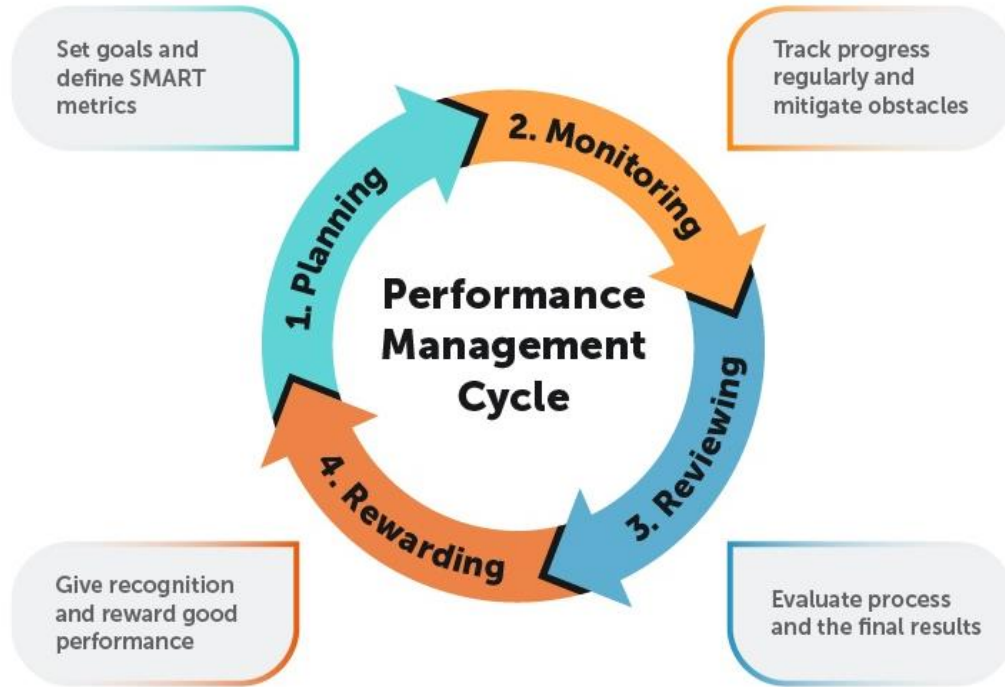
- Clear benefits to the school:
 - Better performance in school
 - Better engagement
 - Consistency of standards
 - Better moral and improved staff retention
- Be clear on what is expected at each stage of employment lifecycle:
 - Recruitment
 - Induction
 - Probationary review (if you have these)
 - Annual Appraisals and performance related pay decisions
 - Formal performance management
 - PIPs (performance improvement plans)

- It should be made clear during a performance management meeting if an objective has not been achieved as a direct result of COVID.
- The objective in question should be reviewed in line with the DfE's expectations, in order to ensure no member of staff is being disadvantaged due to the effects of the coronavirus pandemic.
- Particular care should be taken with objectives that relate to the achievement by pupils of data-based learning outcomes.

Conduct or capability?



Performance management cycle



Continuous performance improvement

- Regular discussions
- Regular monitoring/supervision
- Set clear objectives - SMART
- Career planning
- Consider appropriate training to the role
- Appraisals: no surprises!
 - Don't leave these to the anniversary / performance related pay decision meeting
 - Don't be over nice...

Reasons for poor performance



Don't delay -
investigate and
record discussions

Informal or
formal?

Follow
performance
management
procedure

Think about what
you are trying to
achieve

Setting the required standard

- Required standard will vary from role to role. For example:-
 - Cleaner in school – what is expected of them?
 - What is expected of a teacher (will varies depending on role and what they teach)
- Some requirements of the job are so obvious that the staff members attention does not need to be drawn to them - as observed in the case of Burns v Turboflex Ltd EAT/377/96:

*"a van driver ... does not need to be warned that he should not drink before he drives;
the personnel director of a large company does not need to be told that he should not make racist or sexist comments about or to members of his staff;
a pilot does not need to be warned that he should not crash the plane."*

- Aside from most obvious requirements of the job, it is important for the school to have drawn the employee's attention to the required standard.
- This means targets / objectives and meetings to discuss if they have been met.

Deal with the problem at an early stage

- Where possible deal with the situation early and informally:
 - More likely to get an improvement than to let it fester
 - Going through this step will make any later formal process more likely to be fair
- If the school let the issue drift:
 - Standards become ingrained
 - May have accepted the poor performance – standard takes longer to improve
 - Demotivating for other employees
 - Causes resentment of colleagues and lack of respect for SLT / management

- Performance improvement warnings:
 - Conduct a reasonable investigation
 - Be specific
 - Improvement required and realistic timescales – fact sensitive
 - Review date to consider targets
 - Support or training to be provided (proactively)
 - Staged warning process
 - first warning...
 - final warning...
 - potential termination of employment
 - Right to appeal at each stage

- The decision to dismiss
 - There is no mandatory requirement to consider alternative “lesser” roles – but good practice to do so.
 - There is no general duty to re-open earlier warnings
 - Is it possible to dismiss for a single act of incompetence?
 - Can you jump straight to a final warning (skipping out a first warning) for particularly serious performance issues?
- Settlement agreements.... Protected conversations....

Capability – Sickness absence

- Huge cost to schools
 - Contractual sick pay doesn't help
- Impacts on staff morale and school performance
- Increased absences due to Covid
 - Are staff self-isolating (not vaccinated)? Or are staff sick? May impact on enhanced sickness pay.

Managing sickness absence

- Have a clear policy for managing sickness absence
 - Start with informal process
 - Conduct return to work interviews
 - Categorise leave time correctly- time off for dependants or other leave is not sickness absence
 - Consider use of trigger mechanisms to review attendance if this is an issue
 - Consider change to working patterns or environment, such as flexible working
- Keep in regular contact with staff who are absent
- Apply standards consistently

Short term absence

- Usually takes the form of:
 - Minor one-off absences (e.g. flu, toothache, sprains and strains)
 - Minor absences that occur more regularly (e.g. migraines)
- Employee should explain why they are absent and the nature of the problem
- Self-certificate if they return within seven days
- Statement of fitness for work if absent for seven days or more:
 - Employee is unfit for work
 - Employee may be fit for work
 - Phased return
 - Altered hours
 - Amended duties
 - Workplace adaptations

Repeat short term absence

- Discuss reasons at return to work interview
- Consider if the absence indicates general ill health which requires investigation
- Conduct issue – (any concerning patterns?) manage by following disciplinary procedure
- Issue warnings (improvement notices)
 - What improvements in attendance is expected
 - Consequences of failing to improve
 - Right to appeal

Long term sickness absence

- Keep in regular contact with the individual about their position
 - Be clear about their sick pay
 - Be clear about any workplace changes or promotion opportunities
- Consider whether it is appropriate to just keep in touch and give them the time they need to get better
- Assess if colleagues can manage without a replacement or whether you need to hire somebody on a temporary contract
- May need to follow formal process
 - Requirement for up to date medical information before termination of employment
 - Staged warning process not usually appropriate

- Those who continue to experience the impact/symptoms of Covid-19 after they have recovered from the infection itself (known as long COVID or Post-COVID-19 syndrome)
- According to the NHS most people will make a full recovery within 12 weeks
- Potential to be considered a disability for the purposes of the Equality Act 2010
 - Physical or mental impairment, **and**
 - The impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities
- Acas guidance published in April 2021 regarding managing Long COVID
 - <https://www.acas.org.uk/long-covid>
- Schools need to ensure they follow a fair procedure. It is recommended to follow usual sickness management procedures.
- Current data suggests those most at risk of contracting long COVID are older people, women and ethnic minorities

- Equality Act 2020 imposes a duty on Schools to make reasonable adjustments:
 - Duty arises where a disabled person is put at substantial disadvantage, an example of a reasonable adjustment in a sickness absence scenario may be agreeing to increase trigger points for individuals in relation to disability related absence:
 - consider how much absence would be reasonable for someone with the particular disability and increase the trigger point for formal action to reflect this
 - In general terms, if a reasonable adjustment can be made then a tribunal would expect a School to make it: the onus is on the School, taking into account the overall circumstances
 - Examples of potential adjustments (very wide ranging):
 - Allocating some duties to another employee
 - Considering suitable alternative posts
 - Altering hours of work
 - Assigning a different place of work or home working
 - Acquiring or modifying equipment (e.g. large screen or adapted keyboard)

Questions and answers

Thank you

 Ward Hadaway  @WardHadaway
wardhadaway.com