

Unfair dismissal - performance capability

Lack of capability, or poor performance, can be a fair reason for dismissal and is assessed against the employee's ability to carry out their role.

Poor performance can take different forms, but common examples include:

- Lack of productivity
- Consistently not achieving reasonably set targets/objectives
- Poor standard of work
- Inability to cope with a reasonable volume of work
- Attitude towards work

If you have 2 years' service and have been dismissed for poor performance and you're unsure whether your dismissal was fair, there are several factors to consider:



1. Did your employer genuinely believe you were incapable of doing your job and were there reasonable grounds for your employer to believe this?

Your employer should investigate and provide evidence of any alleged performance issues. Some employers have performance management procedures in place. Evidence could also include formal appraisals, complaints by customers or clients, and a statement from your line manager.



2. Did your employer carry out a reasonable investigation into your performance?

A tribunal will consider whether your employer looked at why you were performing poorly. Sometimes, poor performance can be due to stress or ill health. In those circumstances, your employer should support you, and in some cases your employer should make reasonable adjustments, or you may be able to make a claim for discrimination.



3. Were you told by your employer about your under-performance?

Your employer needs to show that you knew what was required in respect of your performance, and that you fell short of those requirements. You should have been told by your employer that your performance needed to improve and warned that you could be dismissed if your performance did not improve.



4. Were you given a reasonable chance to improve?

You should have been given a reasonable opportunity to improve by your employer. How long you should have been given to improve, and how many warnings you should have been allowed before dismissal, can depend on the following:

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| ✓ the nature of your job | ✓ whether the employer offered training | ✓ whether you co-operated with the process and made any improvements |
| ✓ your length of service | ✓ whether you were given measurable targets | ✓ whether there are underlying reasons for your under-performance |
| ✓ whether there have been any recent changes to your workplace or job role | ✓ whether support was put in place to help achieve the targets | |



5. Were you offered suitable alternative employment?

Your employer should have considered whether there was suitable alternative employment that could have been offered. For example, if you had recently been promoted and were struggling with your new role, your employer should have potentially considered the possibility of offering you your previous job back or putting in place support and training to allow you to develop.



When considering whether the decision to dismiss you for poor performance was fair, a tribunal will consider whether:

1. your employer followed a fair procedure
2. your employer followed the ACAS Code and/or their own procedure (a failure to do so may result in a finding that your dismissal was unfair)
3. the dismissal fell within the band of reasonable responses open to your employer, based on the facts and circumstances of the case

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