The Agenda podcast by Lewis Silkin

The future of performance processes and probationary periods

Sarah McWhinney: Hello everyone, and welcome to the latest podcast from the Employment team at Lewis Silkin, and it's our first one of 2025, which is very exciting! Thank you all so much for joining us today. I'm Sarah, and joining me today is my wonderful colleague, James. Hello, James!

James Walters: Hi, Sarah. And to all our listeners, I hope you've all had a good start to 2025. We're kicking off the year by looking at performance management, particularly for new joiners. So not the jolliest of subjects, but I think employers often start the new year energized to deal with things that have been allowed to slide in the lead up to Christmas, whether that's redundancies, disciplinaries or performance issues. And that's often from a place of kindness, isn't it, given the time of year? After all, nobody wants to be sacking people just before the holidays. But as we'll come on to talk about, not having a firm handle on performance issues early on, regardless of the time of year, will become even more important when changes in the Employment Rights Bill come into force, and we're expecting that to happen in 2026.

Sarah McWhinney: That's right, James. So today we're going to be talking about some of the common mistakes we see in practice in relation to performance management, as well as some of those upcoming changes from the Employment Rights Bill, which will potentially impact how employers will need to manage probationary periods in the future. And to get us started, James, I thought it might be helpful to kick off with a bit about managing performance and why it's so important to get it right.

James Walters: Yeah, I guess one of the big questions is what should a performance process actually look like? As with so many things to do with employing people, there's no one size fits all answer because clearly all people are different. But there are definitely things that all employers should be mindful of in every situation. I think there's also sometimes confusion because poor performance is used by different people to mean different things. It can be a shorthand for failing to hit targets or lack of productivity or not having technical skills or just, I suppose, good old fashioned negligence.

For me though, the starting point is to make sure that expectations are clearly set and actually communicated to people at the start of their employment.

Sarah McWhinney: And to help with that, I think it's really important just to have a clear job description that clearly sets out the scope and remit of an employee's responsibilities, which I think sounds really obvious, but is actually overlooked in a surprising number of situations in my view. Pretty much all employers that I talk to will also have policies and procedures in place, but we don't always see those put into practice, which is something we'll come on to.

And as you mentioned earlier, it's often because managers are just being too kind and don't want to ruffle feathers by implementing the policies on the ground. And on that, I think one key aspect of performance management that can be overlooked are regular candid check-ins from the start of employment. I think there's a common misconception that those have to be formal, but I don't think that's the case. And I appreciate that many people do find it hard to give honest feedback, but it's just not possible to manage performance effectively, if the employee isn't aware that they're not meeting the required standard. And I see loads of people get into difficulties because they just don't communicate that properly, which really isn't fair to the employee. I think it's also crucial to have documented evidence of an employee's underperformance and the relevant feedback, just in case you need that further down the line.

James Walters: So, OK, let's look at what does that process actually look like in terms of the ideal or best practice? And the key thing to keep in mind is that concept of reasonableness. If you come across as acting irrationally, or if you're overly heavy-handed in dealing with the process, you'll be on the back foot if

everything goes wrong and you end up in the employment tribunal having to justify why you dealt with it in that way.

So the starting point in most cases is to follow any process roadmap set out in a disciplinary or performance management policy. I suppose that's unless you have wriggle room to deviate from that where the person you're dealing with has under two years' service, but we'll obviously talk about that in a minute. You also need to be mindful of the ACAS code, which the employment tribunal will take into account when considering a fair process and whether or not that process has actually been followed.

Sarah McWhinney: And as I said earlier, I really don't think that needs to be formally initially. In fact, I think it's often best to try to address those issues informally first and doing that sooner rather than later. So I think employers should be holding regular meetings with employees to discuss performance concerns honestly and communicating those issues and offering support to try and resolve them. And then if none of that works, then you've got the more formal option of a performance improvement plan.

James Walters: That's right. And at the point of wheeling out that formal process, it's going to be much easier to deal with if the fact there are performance concerns doesn't come as a complete surprise to the employee. And surprise in that situation may make the employee suspicious or believe that the process or analysis of their performance is unfair or untrue or just biased. All of that opens the door to grievances and things like sickness absence, and I suppose a general inability to actually manage the employee's performance, which is what you just want to avoid at all costs.

Sarah McWhinney: Absolutely. I think that leads us nicely on to you talking about some of the pitfalls that we actually see in practice.

James Walters: Yeah, OK, so where to begin? One thing I see a lot is managers being reluctant to have difficult conversations, which usually means that no conversations happened at all. I see it most often in situations where there's lots going on and so the employee's performance is one of several things to be considered. For example, the employee may be neurodiverse or have a medical condition that needs to be taken into account or may have a complex home life or caring arrangements that impact on their work.

I suppose, as I said before, people are all different, so trying to deal with every performance issue as though everyone's the same just doesn't work. It usually ends in chaos.

I've picked up the pieces so many times for clients who have handled things in that way. And in almost every case, things would have been different if at the outset, they'd started by thinking about how the process fits around the person rather than simply imposing the process on them.

Sarah McWhinney: I think that is absolutely right. And I should say, I'm very sympathetic to managers. I can completely see why it's difficult and why they would be reluctant to discuss performance issues in those circumstances. And I think the same situation often arises where an employee has raised a grievance about something and an employer is then concerned that addressing a performance issue might look like victimisation. And although that does obviously need careful handling, I don't think that should stop employers from addressing genuine performance concerns.

I don't know about you, but another issue that I often see is situations where managers are actually doing all the right things - so they are having those candid discussions with employees about performance concerns, but they haven't gone that last extra mile and documented it properly. So actually there's no concrete evidence to rely on when they come to address a performance issue more formally. And I think as we've probably both seen, that can create real problems if the issue then becomes a dispute because it leaves managers in a position where it's their word against the employees about what's been said.

James Walters: Yeah, and I find that's also a problem with probationary periods. I don't know if you've seen this in practice too, but we often see situations where there's a known performance issue during the probationary period, but the employee's been passed anyway because there just isn't enough evidence

showing what the issues are or how or even if they've been communicated to the employee. Obviously the probationary period exists specifically to allow employers to exit underperforming employees. I think that's normally because they're not the hire everybody thought they'd be. And it allows employers to do that in a straightforward way as possible, but often that straightforward exit opportunity is missed purely because the process just hasn't been robust enough in the first place.

Sarah McWhinney: That is a situation I've seen many, many times and I'm sure many of our colleagues have as well. And I think seeing as we're talking about probationary periods, I wonder if now is a good time to come on to talk about the Employment Rights Bill, which I think most of our listeners will be aware of. And I think most of them will also be aware that the Employment Rights Bill is going to give all employees day one unfair dismissal rights, which I know has been in the press because I think it's the aspect of the bill that's actually caused the most concern to employers.

Just to recap, at the moment employees need to work for two years before they have the right not to be unfairly dismissed. So a lot of employers will feel comfortable following a more relaxed process before the employee hits that two year mark, as long as there aren't any wider risk factors which don't require that two year qualifying period. So often when advising on performance issues, we'll start by asking, well, have they been employed for two years or more? But that is obviously not a question that I'm going to be asking from 2026 onwards.

James Walters: Yeah, that's so true. But the Day One Right doesn't actually give employees cast iron protection against unfair dismissal, as employers won't need to follow a full performance process from Day One. There's a helpful carve out from the Day One Right where employers will be allowed to use a more light touch procedure for some dismissals during an initial period of employment. And for lovers of acronyms out there, I'm sure we're going to be seeing the IPE referred to quite a lot moving forward, which will be the initial period of employment.

This is an area we'll be keeping a close eye on because we're waiting to find out how long that initial period of employment or IPE will be.

Sarah McWhinney: Yeah that's right. And we don't know yet how long that initial period of employment is going to be, do we? I know the government has expressed a preference for it to be nine months, but we're still waiting for confirmation. So I think the new question we'll be asking clients is, has the employee been employed beyond that initial period of employment to see whether or not it might be an option for them just to apply that light touch procedure?

James Walters: Yes, I think that's right, and then doing some quick maths to check if we're within it. It's worth mentioning that the termination date can be three months later than the end of that initial period of employment. So provided notice has actually been given within that initial period, you've then got three months from that date.

So employers will, from next year, need a laser focus on performance early on during employment, as well as thinking hard about whether their recruitment processes are really up to scratch. Now this light touch procedure won't apply to all dismissals, but we're expecting it to apply definitely to capability dismissals or other reasons relating to the employee such as a breakdown in trust between the parties.

Sarah McWhinney: Yeah, that's right. And I think the reason for dismissal is going to be even more important than it is now, because, for example, redundancy dismissals won't fall into the scope of that new light touch procedure. So employers will need to follow a full process for any redundancy dismissals irrespective of the length of service, which is quite a change really from what we currently see in practice. So we're expecting our clients will need to check in with managers in more detail about exactly what's happening with a potential redundancy situation. And particularly if a role is going to be backfilled if an employee is dismissed.

James Walters: Yeah, that's such a good point, Sarah. If a role isn't backfilled, it will give the employee much stronger grounds to say it was actually a redundancy and so a fair process wasn't followed.

Sarah McWhinney: Yeah I completely agree and of course there's still a lot of uncertainty over what the new light touch process will look like because we don't actually yet have any information on it do we? And I think in terms of performance management what we do know is that the government has hinted that this could involve a meeting with the employee to explain concerns where they will have the right to be accompanied by a trade union rep or a work colleague, but we don't really have any further insight other than that at the moment.

And I know there has been some concern that this could effectively signal the return of a statutory disciplinary dismissal procedure, which we used to have in the Employment Rights Act 2002, but I think it was repealed in 2008 everywhere except for Northern Ireland, where it's still in force. And that required quite a rigid process where employers had to provide a written statement of why they were contemplating disciplinary action, followed by a meeting at which both sides could explain their case, and it was only then that the employer could take their decision. And in practice, I think most employers currently will still set out their disciplinary case in the disciplinary invitation letter, and then they will hold a meeting, and they do have to comply with the ACAS code, so query how different it actually looks. But I think everybody welcomed the greater flexibility that we've had since 2008, which allows employers to conduct their disciplinary processes as they see fit, provided that they're complying with that overarching requirement we've been discussing that they act reasonably.

James Walters: Yes, I remember most of us employment lawyers did a little dance of joy when the statutory procedure was binned as a bad idea all around back in the day. And I think it's going to be interesting to see how this pans out. I mean, some of the key details are going to be subject to consultation, which will, of course, include what the initial period will be, but also what the compensation might be for an employee who's found to be unfairly dismissed in that initial period.

Sarah McWhinney: Yeah, and just going back to that initial period, I found the suggestion that the initial period of employment could be nine months really interesting. And as you mentioned, employees can be dismissed up to three months after the end of that initial period of employment, provided that notice has actually been given within it. So some commentators have said that this basically represents the old labour regime, where the qualifying period for unfair dismissal was just a year.

You might have seen that the Lib Dems think that the initial period of employment should be a bit more flexible. So they've proposed an amendment that it should be not less than three, but not more than nine months. Ultimately, of course, it's going to be a question for the government and we'll need to see what comes out of the consultation and what initial period of employment is set by statute.

I think one area of difficulty is going to be that it is a different concept to that of a contractual probationary period, which is something that we're already getting quite a lot of questions on. In my experience, probationary periods are usually between three months and six months with longer for more senior roles. And there's often a right for an employer to extend that probationary period if they want to. I do wonder if we're going to see employers doing away with contractual probationary periods and just aligning them to whatever length that initial period of employment is going to be, since I think it could be quite confusing to have two different processes to assess performance. But I think employers are going to need to bear in mind that if they align the contractual probationary period with the initial period of employment, so let's say both are nine months, that could leave employers with no wriggle room to dismiss using that light touch procedure because by the time you get to the end of the probationary period, that initial period of employment where you're allowed to use that procedure has also expired at the same time.

James Walters: Yes, and there are questions about whether that initial period will be long enough. For example, we ran a poll at a recent client webinar about the bill and 40% of the attendees there thought that they needed 12 months to fairly assess new recruits.

I also wonder if we'll see more sex and disability related discrimination claims from employees who are absent or on sick leave, as if employers are going to jump to dismiss employees sooner than they might otherwise have done, to benefit from the light touch procedure, there's definitely more scope for that kind of challenge and it's more likely the employer will have insufficient evidence to challenge that.

Sarah McWhinney: I agree with that and I also think it's really interesting that legislation that's actually been designed to protect employees could in reality practically result in more employees losing their jobs earlier on because employers want to benefit from that process, or certain people not getting jobs at all if employers are more reluctant to take a chance on them, if they're not sure that they fit the mould or have the right experience. I do think that could have knock-on effects on social issues like social mobility.

I've also had some discussions about whether a contractual probationary period will be needed at all post 2026. Although probationary periods obviously aren't just about performance or disciplinary issues, but also serve other purposes. I think most notably things like allowing a shorter notice period and allowing different entitlements to benefits, that kind of thing.

James Walters: Yeah, and that means that even though we're looking at next year for these changes to come into force, there are some good practical things that employers can be doing to get ready. Top of the list is taking the time available now to review current processes around probationary periods and modify those if you need to. Things that can be done, including ensuring that timelines can be easily tracked and acted on, getting managers comfortable with performance management and ensuring that assessment of new recruits does actually happen and having some structure around that process, even if that doesn't coincide with appraisal time, which is the normal failing that people just say, well, we'll wait till we'll do the appraisal, which was after the probationary period ends.

Sarah McWhinney: Yeah, agreed. And just to add to that, I also think there would be no harm in reviewing recruitment procedures more generally, just to make sure that those are as robust as possible.

On that note, I'm afraid our time is nearly up and so we're going to have to leave it there for today, but we hope you found that useful. Thank you to you all for joining us and thanks to you, James, for the chat.

James Walters: Well, that went quickly! Thanks, Sarah. It was a pleasure to chat to you and thanks very much to all of our listeners for joining us. I think there's lots to digest on this topic and hopefully we've given you some new things to think about and useful practical tips. We've got some very exciting topics lined up for future episodes in what is set to be yet another busy year in employment law. So bye for now!