Problem performers & perfect performance improvement plans

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To the frustration of many employers, the chances of being deemed to have fairly dismissed an employee on the grounds of competence or performance appear slim. But effective management of performance problems should hold no fear for employers, writes Gerry McMahon.

Back in 1996 IBEC warned its members that dismissal on the grounds of competence 'is a difficult area' that 'usually involves protracted observation and possible fluctuations'. Research undertaken subsequently at the Technological University of Dublin confirmed the employer body's concerns, when a review of 400 unfair dismissal claims over the 2008-14 period, found that performance issues featured in just over 5% of cases.

In an attempt to overcome this problematic process, the use of Performance Improvement Plans (PIPs) is now both increasingly common and effective.

A lack of procedural rigour featured in the Google (Ireland) case

THE LAW & PIPS

This PIP process has featured recently in a number of unfair dismissal claims coming before third parties. For example, in 2018 both the Labour Court and the WRC upheld Boots Retail Ireland's decision to dismiss a supervising pharmacist after he failed the PIP that he was put on (ADJ-00005177 and UDD187).

The WRC Adjudicator (AO) noted that the employer provided the complainant with ongoing mentoring and support throughout the PIP process and had even extended the plan's duration at his request. She also noted that the employer's procedures 'were clear and detailed and were available at all times to the complainant', and that the pharmacist had been informed as to his performance shortcomings, what was expected of him and the consequences of not achieving the targets agreed in the PIP.

Passing judgment on the same case (on appeal), the Labour Court concluded that there was 'no evidence from which it could conclude that a management agenda was at play' or that 'the decision to dismiss the Complainant was pre-determined', whilst both the PIP and disciplinary processes were 'were applied in accordance with the Complainant's rights to fair procedures'.

Likewise, at around the same time, despite the claimant accountant's lack of co-operation with an allegedly 'rigged' PIP, the WRC found that the employer's dismissal of an accountant

was fair, as their approach included the use of a PIP in a process that was deemed both reasonable and in line with procedures and natural justice *(ADJ-00000155).*

Similar themes featured in the dismissal case involving a long-serving operations manager, who argued that the PIP was poorly administered. In this case the WRC found that the procedures used by the respondent employer leading to the complainant's dismissal were fair, whilst the rules of natural justice were adhered to. The Commission's AO also found that the complainant "was always made aware of his rights and the procedures used followed the respondent's laid down policy" *(ADJ-00013504).*

THE HERTZ CASE

One of the first and most high-profile cases pertaining to PIPs to feature before the courts involved the car rental firm Hertz. The employer argued that the claimant was given every opportunity to improve his performance and was well aware of the consequences of failing to improve. Hertz explained that they had begun a 'capability process' (or PIP) with the claimant, that is 'aimed at employees who are not performing sufficiently well in their role and at affording them an opportunity to improve before disciplinary action is taken'.

The claimant argued that the whole process was a 'well-orchestrated exit strategy' designed to 'get him out of his job' and the Employment Appeals Tribunal even acknowledged that he 'was not written to to indicate that dismissal was a possible sanction for failure to successfully complete the capability process and that in advance of certain meetings he was not necessarily told what would be discussed therein'.

Despite these procedural shortcomings, the Tribunal concluded that it "does not believe that this, of itself, renders the dismissal unfair .. (as) .. the claimant was aware that he could be dismissed for failing to complete the process successfully and in fact, he agreed with this in evidence'. Accordingly, the Tribunal held that 'the ultimate decision to dismiss was reasonable' and the unfair dismissal claim failed *(Kotleba v Hertz Europe Service Centre Ltd – UD1019/2012).*

Hence, it is clear that case precedent holds that where the employer can show that they implemented a PIP and (as noted by the Employment Appeals Tribunal in the Connaught Electronics case) 'behaved reasonably at all times and did its utmost to support the claimant … affording him every opportunity to adapt to the particular requirements of the respondent's business' and adhered to fair procedures in the process, the judgment is likely to support the employer's decision *(UD 1475/2014).*

Notably, in the same year, the same source upheld a poor performance dismissal as it was 'clear to the Tribunal that … the claimant was given an opportunity to improve and set out his difficulties. He was given a number of training opportunities, some of which he did not avail of, therefore it is difficult to see how he can sustain an argument that he was not adequately trained' (UD1268/2014).

COACHING

It is clear that the legal status and effective application or merit of PIPs relies heavily on good coaching techniques. Effective coaching for improved performance frequently focuses upon the employee whose performance – or some aspect thereof - has fallen below the minimum acceptable standard for the role.

In such circumstances, the standard prescription for the successful resolution of the underperformance problem is to address it at the earliest opportunity, identify and agree the problem with the employee and then decide and agree upon the action(s) required, before resourcing and monitoring these action(s) in an appropriate manner. Whilst all cases are individually assessed, a frequent outcome in such scenarios is some form of PIP, commonly scheduled to take effect over a 3-month period.

NO COMMITMENT & IMPERFECT PIPS

To succeed with this process, however, it's important for the employer to be able to show that they really committed to the PIP, otherwise – like in the 2009 Boston Scientific case – it may be held that they produced 'no evidence … to show that training was made available to the claimant to address his shortcomings' *(Mullaney v Boston Scientific – UD 1924/2009).*

A somewhat similar failing in the process featured some years later, when a judgement against the Irish Wheelchair Association found that it should have 'engaged more constructively with the claimant around the implementation of the performance improvement process' *(Whelan v IWA - UD 436/2014).*

This failure to properly engage with the PIP process also featured at consultancy company Ernst and Young, who eventually issued their IT expert with a written warning due to his 'continuing poor performance and extremely low level of chargeable hours'. However, at the hearing the claimant questioned the validity of the firm's 'capability policy' (or PIP) when sanctioning him, as 'he did not receive any support from HR and no avenues came his way for improvement'.

Explaining its €60,000 award, the Tribunal noted that whilst the company's correspondence 'contained information on a right to appeal that decision, there was no mention, or warning that this continuing situation could lead to dismissal' *(Michael O Farrell v Ernst & Young Chartered Accountants – UD 984/2009).*

'FRESH FACE' MISSING

Procedural flaws also featured in a recent case before the WRC involving a senior engineer who was placed on a series of consecutive PIP-type plans. Concluding her assessment, the AO detailed these flaws, focusing on the fact that it was 'regrettable' that 'a fresh face could not be found' when the executive presiding over the process was involved, given that he 'had had a previous role in an earlier one of the processes to which the Complainant had been subjected' *(ADJ-00014628).*

This principle of natural justice (in respect of who conducts the PIP meetings vis-à-vis the disciplinary interviews) also featured in an unfair dismissal allegation at a drug rehabilitation

service provider in 2019. The facts of this case led the AO to conclude that the CEO should have stepped back from supervising the complainant and 'ought to have known that diffusing the situation by having someone else manage her, would have been preferable to her being the person constantly trying to exert control' *(ADJ-00017882).*

Notably, the employer's case was further weakened by a 'lack of support .. (and) communication' as, despite being put on a PIP, the employee (whilst on sick leave) wasn't aware that her job was at risk *(ADJ-00017882).*

MED PRODUCT MANUFACTURER

This same principle featured again at the WRC in 2020, in a case involving a long-serving quality inspector with a medical equipment manufacturer. When asked whether any other person other than the line manager – against whom the complainant had lodged a formal grievance - could hold the PIP meetings, the plant manager explained that given the specialised nature of the role, the line manager was the only appropriate person to chair these meetings.

Given the complainant's formal grievance, the AO concluded that it was 'entirely reasonable' for the complainant to refuse to engage with the PIP. At her end of year review meeting on February 1, 2019, her line manager explained that she had not met the company's standards in relation to productivity and as a consequence she was being placed on a PIP. The complainant let it be known that she was unhappy about this and would appeal the end of year assessment.

The plant manager then proceeded to dismiss her, as she had refused to engage with the PIP. However, the AO concluded that despite being informed about concerns/complaints during her performance review, this was done 'without being provided with the full details of same'. Furthermore, the employer's case was weakened by the fact that when the complainant lodged her grievance, the respondent 'did not pursue this with any vigour and the grievance remained unresolved by the termination of her employment' *(ADJ-00021947).*

GOOGLE CASE

A lack of procedural rigour also featured in a case involving internet-related services company, Google (Ireland) Ltd, when they fired a support manager for 'persistent underperformance'. The claimant alleged that having been put on a PIP-type plan her manager was 'determined to ensure that she would not succeed'. When awarding her €110,000 for her unfair dismissal, the Tribunal noted that 'it was claimed by the respondent that it is a fair dismissal … linked to competency … the Tribunal does not believe this … Furthermore, the Tribunal is not satisfied that fair procedures were used and therefore it is procedurally unfair' *(UD2147/2011).*

Other shortcomings, like the absence of a 'paper trail' when addressing performance problems and applying an informal PIP-type process, can also contribute to the employer's case being undermined. For example, in 2019 the WRC awarded €25,500 to a St. Colmcille's (Kells) Credit Union loan manager, having found that there was 'no record of any formal

communication with the complainant that actually put him on notice of the specific concerns', whilst a time frame for improvement had not been provided or agreed.

The AO acknowledged that whilst it may well be that discussions took place, the respondent 'failed to demonstrate the actual procedures it applied, the sequence it followed in advising the complainant of its concerns, and the impact that such performance would have on the complainant's employment' *(ADJ-00013116).* Notably, this award was halved by the Labour Court, as it adjudged that the complainant had contributed to the dismissal and failed to provide (job application) evidence of having tried to mitigate his financial loss *(UDD1952).*

CONCLUSIONS

It is clear that where the employer can show that they implemented a PIP, behaved reasonably at all times in adhering to fair procedures and afforded appropriate opportunities for improved performance, third party judgments are likely to support their case.

However, given the all-important link between successful PIPs and effective coaching, research confirms that the single biggest predictor of ineffective coaching is difficulties with the coach! That is, coaches or managers are often neither interested in nor capable and confident about the practice.

While each case assessment will rest upon its own facts, from the employer's perspective it is apparent that proper procedure alongside consideration as to what a 'fair and reasonable employer' would do in the circumstances, will help hugely in enabling exculpatory third-party determinations.

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