

From the Chief Executive



BY E-MAIL

Nick Clarke
Deputy Director, Professional Standards
Department of Health

15 November 2013

Dear Nick

Commission for advice to the Secretary of State – Cavendish Review recommendation 14

1. Thank you for your letter of 16 October 2013 regarding recommendation 14 of the Cavendish Review which stated:

The Secretary of State for Health should commission the Professional Standards Authority for Health and Social Care for advice on how employers can be more effective in managing the dismissal of unsatisfactory staff, the legal framework around this, and the relationship with referrals to professional regulators.
2. You asked the Authority to consider what best practice looks like when it comes to identifying, managing and dismissing unsatisfactory staff; to consider the steps employers might take in order to meet this best practice; and to agree the final product with the Department of Health.
3. Our views on good practice are set out in this letter together with an outline of the products we consider could be developed by organisations with expertise in this area. We have advised on 'good practice' rather than 'best practice' because in our view good practice generally has universal application whereas best practice is tailored to particular circumstances.
4. In your letter you also asked us to consider the following:
 - *At what stage it is appropriate to seek the dismissal of a staff member on performance grounds and what steps it might be appropriate to take first*
 - *The legal requirements around dismissal of unsatisfactory staff, including a judgement on the level of proof/evidence needed to demonstrate that a staff member is unsatisfactory*
 - *In relation to a regulated profession, when and how to refer malpractice to the professional regulator and how to manage the staff member pending the regulator's decision*
 - *How to manage whistleblowers when their performance is unsatisfactory and how this interacts with their rights*
 - *The roles and responsibilities of the persons and parties involved in the above.*

5. To inform further our advice we have held discussions with some key organisations including NHS Employers, Acas, Chartered Institute of Personnel and Development, the Social Partnership Forum, Employment Lawyers Association, Association of Directors of Adult Social Services, and a small group of HR directors from health and social care organisations. We have also reviewed existing sources of advice. Given the short timescale of this commission, our review has not been extensive but it has shown that relevant guidance already exists.
6. Our advice is informed by the principle that safe, high quality care requires all solutions to be designed as part of a whole-system approach to quality assurance and, so far as possible, to be simple to operate. The views and conclusions reached here are those of the Authority.
7. In line with your commissioning letter, our advice:
 - Considers all employees and is not focused solely on healthcare assistants and support workers
 - Makes no distinction between public sector, private sector or third sector employers
 - Does not consider individual members of the public contracting with workers for care in their own homes
 - Concentrates on dismissal for unacceptable performance (capability) rather than conduct, reflecting the context in which this recommendation was made in the Cavendish Review.
8. We set out below our view of the problem, discuss good practice and suggest the solution.

The problem

9. The Cavendish Review found that some stakeholders believed it was difficult to dismiss under performers.¹ We heard conflicting views on prevalence of unacceptable performance from the stakeholders we spoke to. Some believed it was not widespread; others suspected it was particularly in the care sector. We are mindful however that there is considerable concern about the quality of care in both the health and social care sectors and evidence of expected standards not being met in many places. This, coupled with knowledge of on-going pressures on funding, causes us to agree that action is needed to improve performance management. This would allow those who are employed are supported to fulfil their role in delivering good care and appropriate action is taken to identify, manage and if necessary dismiss those who perform unacceptably.
10. We have found that in general the process required by law is thought to be clear, but employers may experience difficulty in applying it either through lack of training, failing to follow the good practice procedures recommended by Acas or lack of access to suitably trained expert advice. The commissioning letter noted there may be particular difficulties that arise from apparently complicating factors such as whistleblowing, or investigations following referrals made to professional regulators.
11. We have not considered in any detail the separate and particular procedures for managing performance of doctors and dentists in the NHS, as outlined in *Maintaining High Professional Standards*.² However, in the context of integrated

care and multidisciplinary teams, we understand the view expressed by stakeholders that it would be simpler if there was a single procedure for managing performance across the whole workforce. We agree.

12. From our literature review, we are struck by the growing body of research examining the correlation between staff who are 'engaged', and patient outcomes, experience and satisfaction. By 'engaged' we mean employees who take pride in their job, are loyal to the organisation, and 'go the extra mile'.³ There remains some variability in the research conclusions, but they do have a compelling logic. Evidence also demonstrates positive links between investment in staff development and factors such as retention and productivity.⁴ When it is done well, performance management is not an administrative burden, but an essential tool that helps employees deliver care well to standards set by their employers for the benefit of patients and service users.
13. We also noted that the costs of failing to performance manage staff were largely invisible, set against the obvious reputational, administrative, legal and emotional costs of defending a claim in an employment tribunal. Having invested in recruiting and training staff to do a job, it is generally more efficient to continue to invest in their ongoing capability and in supporting line managers' ability to performance manage their staff than to permit poor performance to go unchallenged. Employers might view investment in performance differently if the costs were better quantified.
14. When the evidence is taken together it is sufficiently convincing to lead us to recommend that the way in which people management is viewed in the health and social care sector needs to shift away from largely being seen as a vice to one in which it is valued and regarded as a virtue. Our view is that this will not only assist in effecting fair dismissals when such action is appropriate, but will also contribute to achieving the cultural change called for by Francis and Berwick.
15. Stakeholders identified two particular constraints in social care which might be investigated further: current funding levels being too low to incentivise employers to invest in staff training and good performance management; and lack of reinforcement for its adoption by other incentives including contracting or enforcement arrangements.
16. Employers in the care sector also explained that it can be challenging to maintain sufficient staff numbers, which can constrain their ability to tackle unacceptable performance and other capability issues. There are additional challenges presented by remote and isolated working that inhibits supervision, such as in domiciliary care.
17. Some stakeholders thought it would be an uphill struggle to persuade staff in health and social care to manage performance effectively and pointed to their reluctance to blow the whistle even on the most serious of concerns.
18. Stakeholders identified two pre-requisites to effective performance management in health and care: Board leadership; and valuing people management as a skill that is intrinsically linked to good care.

Good practice in identifying, managing, and dismissing for unacceptable performance

19. It is the employer's role to decide when it is appropriate to consider dismissal on performance grounds. Good practice means of course that they must dismiss lawfully or otherwise risk having their decision overturned or being subject to a monetary award, damaging morale, setting a bad example, wasting money and risking an organisation's reputation.
20. There are two main legal principles that employers must keep in mind. First, they must only dismiss an employee for a potentially fair reason. Lack of capability is a potentially fair reason. Second, they must act fairly and reasonably in treating that reason as sufficient reason for dismissal, which in particular means following a fair procedure. What may constitute a fair procedure is set out clearly in the disciplinary section of the Acas Code of Practice⁵ which is recognised by employment tribunals and supported by more detailed guidance.⁶ The key is to apply it methodically.
21. The law states that there are five potentially fair reasons for dismissing an employee, one of which is 'capability'.⁷ Unacceptable performance is an example of lack of capability and can take many forms including:
 - Failing to reach the employer's standards of performance or attendance for the job the employee is employed to do (even if those standards are higher than those the employer previously required or similar employers require)
 - An intransigent, inflexible, uncooperative or difficult manner which adversely affects the quality of other people's work, or relationships with colleagues or service users.
22. Ill health or disability which, despite reasonable adjustments, prevents the employee from performing their job, would also fall under the capability category.
23. A dismissal on capability grounds will generally be fair if:
 - The employer honestly believes that the staff member is incapable of performing some or all of work they are employed to do
 - This belief is based upon reasonable grounds
 - It is genuinely the employer's principal reason for the dismissal
 - The employee has been made aware of the concern and been given an appropriate opportunity to improve
 - The employer has considered appropriate alternatives to dismissal (such as demotion, re-training or re-deployment)
 - Reasonable adjustments have been considered and made where appropriate (this is a statutory requirement if the employee falls within the definition of a 'disabled person')
 - The employer arrives at the above conclusions by following a fair procedure.
24. Good practice on the steps employers should take to identify and manage performance is comprehensively covered in the Acas guide *How to Manage Performance*.⁸ The Acas website contains an online tool that employers can use to check how good their people management procedures are.⁹ Employers and employees can also obtain help and guidance from the Acas helpline.

25. Having reviewed the Acas guidance referred to above we conclude that it adequately describes good practice in identifying and managing performance and, if necessary, dismissing employees on capability grounds. Complexity arises due to human factors and staff can find it difficult to apply the rules. Difficulties with dismissal arise when employers either do not follow the law, or do not follow the correct procedures.¹⁰ Good practice would be to take advice (particularly in difficult cases) but if the employer follows the recommended procedures methodically and in good faith their performance management decisions should not be impacted by the fact that the employee in question is a whistleblower, a trade union representative or falls within any of the groups protected from discrimination whether by the Equality Act 2010 or otherwise. In this context, Tribunals will only rule against employers if they determine that the decision reached or the process used has been tainted by reference to one or more of these factors.
26. Referrals to regulators about fitness to practise concerns should be made in line with guidance available from the regulators. The roles of regulators and employers in addressing unacceptable performance have similarities, but are distinct. Capability to do a specific job and fitness to practise are different issues. Employers consider whether a person can do the job they have employed them to do (for example as described in their job descriptions, their objectives and their employer policies). Regulators consider whether someone is fit to practise their profession at all. We would advise employers to keep these two matters distinct and separate. Stakeholders did not perceive there to be any particular difficulty either in understanding the distinction or in making referrals. From our work with regulators we are aware that some believe employers sometimes do not refer appropriately, but any work to address these issues could be considered separately.

The solution

27. There was considerable agreement amongst stakeholders that the solution to employers managing the dismissal of unacceptable performers more effectively lay upstream, in recruitment, induction, and making an individual feel that their contribution is valued. We concur with this. To achieve this, employers should invest in performance management. This includes:
- Transparent recruitment processes, based on values, including provision of information about the job role, demands, culture and expectations, and being clear throughout recruitment about what is needed, using appropriate selection methods, eg. assessment activities or personality profiling.
 - Induction, setting clear objectives, covering organisational culture and general facilities, policies and procedures, new starter paperwork, health and safety of the workplace, off-site working; and perhaps also ‘buddying’ with experienced team member
 - Regular reviews and development planning, with planned ‘check-points’ eg. daily, weekly, then monthly as the individual begins to integrate
 - Regular performance reviews and appraisals where the individual has the opportunity to outline what is going well, what is not going well, what support they need, and the manager offers feedback on performance
 - Access to training and development support, including opportunities for reflective practice and clinical supervision

- Regular communication about the organisation overall.
28. To operate an effective performance management system, employers need to train and equip all staff to play their full part in the process, whether as board member, senior leader, service manager, first line manager, or employee. This demands investment at all levels of the organisation, wherever anyone has responsibility for other people, to build confidence to identify and deal with issues, and to demonstrate good people management practices.
 29. It is rightly the role of employers to set standards and to ensure that their staff are managed effectively. The NHS Constitution for England¹¹ makes this clear for all NHS staff:

The NHS commits to provide all staff with clear roles and responsibilities and rewarding jobs for teams and individuals that make a difference to patients, their families and carers and communities (pledge);
The NHS commits to provide all staff with personal development, access to appropriate training for their jobs and line management support to succeed.
 30. More generally, Acas good practice on the employers' duty of care states¹²:

Requirements under an employer's duty of care are wide-ranging and may manifest themselves in many different ways, such as:

 - *Clearly defining jobs and undertaking risk assessments*
 - *Ensuring a safe work environment*
 - *Providing adequate training and feedback on performance*
 - *Ensuring that staff do not work excessive hours*
 - *Providing areas for rest and relaxation*
 - *Protecting staff from bullying or harassment, either from colleagues or third parties*
 - *Protecting staff from discrimination*
 - *Providing communication channels for employees to raise concerns*
 - *Consulting employees on issues which concern them.*
 31. It is our view that introducing a performance management culture and providing staff with training would help to normalise conversations about performance and facilitate constructive challenge. In the USA, Baylor Health Care System trains managers in holding difficult conversations and supports all staff to challenge unacceptable performance. In our view, this approach may in the long term improve performance management and also help to redress the balance in favour of people speaking out about poor care, and assist with implementation of a duty of candour should that proceed.
 32. As well as the Acas guidance on managing performance, there is specific guidance for different parts of the health and care sector and particular groups of employees, such as that provided by the National Clinical Assessment Service, NHS Employers, and the National Skills Academy for Social Care, which can help employers to demonstrate good practice.

Recommendations

33. Fundamentally, we consider that there is sufficient guidance and advice available currently to employers to enable them to take steps to improve how effective they are in managing the dismissal of employees whose performance is unacceptable, should this improvement be necessary.
34. Based on our analysis, we advise that if the Department wishes to develop further guidance and support for employers to allow those who are not currently effective to improve, the following options should be considered:
 - Communications to persuade employers of the benefits of investing in performance management and motivating them to adopt it
 - Acas-style training package for employees and employers tailored to health and social care settings
 - Review of advice pathways to ensure a ‘one stop shop’ or alignment and direction to Acas guidance plus any related sector-specific guidance such as NCAS guidance. This could include a bank of case studies to help share good practice and improvement initiatives.
35. Advice should be taken on the best way to reach key audiences and to persuade employers to adopt good practice. We would also recommend wider use of existing employer and provider networks to promote good practice, and shared expertise in people and performance management.
36. Beyond this, it may be valuable to consider how the system provides incentives to employers to invest and promote good practice in performance management. For example, are funding and contracting arrangements a significant impediment or an enabler? Are changes necessary to system regulation to reinforce adoption of good practice eg. through interpretation of standards?
37. The recommendations we make could be implemented swiftly.

Yours sincerely,



Harry Cayton

References

¹ Cavendish C. 2013. *The Cavendish Review – An independent Review into Healthcare Assistants and Support Workers in the NHS and social care setting*, para 8.5.3

² Department of Health. 2003. *Maintaining High Professional Standards* Available at <http://www.nhsemployers.org/EmploymentPolicyAndPractice/disciplinary-procedures/Pages/NewDisciplinaryProcedures-Overview.aspx>

³ Acas. 2010. *How to manage performance*, Available at <http://www.acas.org.uk/index.aspx?articleid=2927> p4.

⁴ For example research by Professor Michael West at Lancaster University; Macleod & Clarke. 2009. *Engaging for Success: enhancing performance through employee engagement*; Foundation Trust Network. 2013. *Realising the benefits of employee engagement*.

⁵ Acas. 2009. *Code of Practice 1 – Disciplinary and grievance procedures*. Available at <http://www.acas.org.uk/index.aspx?articleid=2174>

⁶ Acas. 2011. *Discipline and grievances at work - The ACAS guide*. Available at <http://www.acas.org.uk/index.aspx?articleid=2179>

⁷ Employment Rights Act 1996, section 98

⁸ Acas. 2010. *How to manage performance*. Available at <http://www.acas.org.uk/index.aspx?articleid=2927>

⁹ Acas Model Workplace tool available at <http://www.acas.org.uk/index.aspx?articleid=2806>

¹⁰ A breach of additional requirements in the MHPS procedure incorporated into some NHS doctors and dentists contracts of employment would not necessarily of itself make a dismissal unfair however it may amount to a breach of contract.

¹¹ Department of Health. 2013. *The NHS Constitution*. Available at <http://www.nhs.uk/choiceintheNHS/Rightsandpledges/NHSConstitution/Documents/2013/the-nhs-constitution-for-england-2013.pdf> p13

¹² Acas. *Defining an employer's duty of care*. Available at: <http://www.acas.org.uk/index.aspx?articleid=3751>