**Capability versus Conduct**

The ISME HR Team have seen a trend develop on this particular area of HR therefore clarification is important. Furthermore, clarifying the distinction between Capability and Conduct in managing Staff Performance and Disciplinary Issues should be the first step. The appropriate intervention—be it support or discipline— ultimately depends on correctly diagnosing the underlying issue.

**Capability:** Refers to an employee’s **inability** to meet performance expectations, often due to factors like skills gaps, insufficient training, or health concerns.

**Example:** Struggling to meet role requirements despite genuine effort.

**Conduct:** Relates to an employee’s **unwillingness** to comply with job requirements, often evidenced by behavioural issues or failure to adhere to established norms.

**Example:** Refusing to follow workplace protocols or insubordination.

**How to Diagnose the issue?**

**1. Gather Information:**

* + Look at **performance records**, are the records comparable to either colleagues or timelines?
	+ Speak with their Line Manager and ensure to obtain the employee's perspective.
	+ Are there any mitigating factors at play?

**2. Ask Yourself:**

* + Is this about their **ability to perform the role**? (Capability)
	+ Or is it about their **behaviour and compliance**? (Conduct)

**Capability/Performance**

An employee can only be charged with poor performance after they have been made aware of the work standard required and given reasonable and sufficient time to improve.

**The Dutiful Dozen:**

* Check that the standard required of the employee is reasonable and achievable.
* Refer to the employee’s pre-agreed job specification
* Point out to the employee that he or she is falling short of the standard before it becomes a disciplinary issue. A Make Aware Meeting is a great way to get this information exchange on record.
* Create a Performance Improvement Plan (PIP).
* Set out what objectives the employee is not meeting but is required to meet and the deadlines the employee has to meet each objective in the PIP.
* Talk through the PIP with the employee so that they understand it.
* Urge the employee to notify them if they need assistance, training, or more time.
* Ensure the employee’s work situation allows for a focus on improvement.
* Set regular reviews dates during the PIP period.
* Inform the employee that should they not meet the deadlines set out in the PIP,
* then the disciplinary process will be initiated.
* Inform the employee that sanctions resulting from the disciplinary process could include sanctions up to and including dismissal.
* Follow company disciplinary procedures and go through the sanctions of verbal and written warnings before dismissal.
* Proceed to dismissal only as a last resort.

**Conduct**

Regardless of an employee’s length of service they are entitled to a fair process. In cases of misconduct or gross misconduct, it is not the probation process that should be used but rather the disciplinary procedure, and fair procedure and natural justice should apply. The Workplace Relations Commission (WRC) and Labour Court expects Employers to meticulously adhere to fair procedures and natural justice when dismissing an employee for misconduct. It is up to the employer to prove that the dismissal was fair.

**Establishing Fair Procedures:**

* Follow your company Disciplinary process.
* Ensure that the employee is fully aware of the company Disciplinary process. Provide a copy for reference.
* Confine the investigation to establishing the facts and the allegation at hand only.
* Suspend the employee only if necessary – only potentially used in high risk gross misconduct allegations.
* Provide the employee with a written copy of the investigation outcome.
* The individual conducting the hearing must be trained and impartial.
* The decision maker must take time to consider everything before making a decision.
* Check if follow ups to anything said during the hearing are necessary.
* Ensure the decision is balanced and based on all of the facts.
* Take lesser disciplinary sanctions into consideration in line with your own Company policy.
* Inform the employee of the appeal procedure.
* An appeal must be heard by an impartial and independent individual.

As always, if you require any support with HR or Employment Law you can contact the ISME HR Team on 01 6622755 Option 2 or via HR@ISME.ie. Members also have access to a full suite of HR templates regarding Absence management on the ISME HR Hub

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