

Proposed changes to performance management and capability arrangements for teachers

Response from Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions, including the teachers and lecturers' unions and advises on the full range of employment rights issues through its specialist employment rights department.

The questions

1. Do you agree that regulations should require schools and LAs to establish a written policy that sets out their approach to managing teacher and head teacher performance?

Yes

2. Do you agree that regulations should require that there is an annual appraisal cycle which supports decisions on pay, including recommendations on pay progression where relevant?

Yes

3. Do you agree that regulations should require that each teacher and head teacher's development needs are identified and there is clarity about how they will be addressed?

Yes

4. Do you agree that regulations should require that the objectives agreed with each teacher and head teacher should be such that, if they are achieved, they will contribute to school improvement and to improving the progress of pupils?

Yes

5. Do you agree that regulations should require that teachers and head teachers should receive a written assessment of their performance: against their objectives for the relevant period; the relevant standards expected of teachers; and having regard to their role in the school?

Yes

6. Do you agree that regulations should require that the governing body receives support and challenge from an external adviser when appraising the performance of the head teacher?

We agree that the governing body should receive support and challenge from an independent advisor when appraising the performance of the head teacher. The Government's decision to end the requirement for schools to have a School Improvement Partner will remove the provision of high quality advice, guidance and support for headteachers' performance management.

In our opinion it is not appropriate for governing bodies to appoint an external adviser without guidance, including legal guidance, from the local authority. The governing body's duty to seek guidance from the LA should be reflected in the regulations.

7. Do you agree that regulations should require schools to make teachers' two most recent written appraisal reports available on request to any other schools to which the teachers concerned apply for work?

No.

Teachers may have good reasons for not agreeing with the content of appraisal reports but would not have the opportunity to explain those reasons under this proposal. Appraisal reports may be influenced by a number of factors which were unique to time in which they were done. Appraisals are confidential personnel documents and should not be shared with any potential employer without agreement with the individual teacher.

We are also concerned about the potential for such a procedure to be abused by managers to bully teachers who may be looking to move to another school for any number of reasons.

8. What barriers do schools face in tackling under-performance, including any created by aspects of current employment law?

We are concerned that the consultation is being driven by largely anecdotal accounts about schools facing barriers in tackling underperformance. The DfE offers no evidence of any barriers.

The current statutory model capability procedure for teachers, DfEE 0125/2000, is based on the Outline Capability Procedure drawn up in 1997 by a national working group of teacher, employer, governor and church representatives and was chaired by ACAS.

Therefore, employer's representatives were actively involved in drawing up the current procedure.

The current procedure represents a fair balance between the need for employers to tackle under performance and the rights of teachers to be treated fairly and, in particular, to be given a reasonable opportunity to address any performance concerns.

9. Please comment on the role played by local authorities in helping schools to manage poor performance and handling staff dismissals. Is this different for those schools who employ their staff directly and for those who do not, and are there advantages for schools in directly employing their staff?

Local authorities play an important role in helping schools to ensure that they meet their legal obligation to ensure that teachers are treated fairly and in accordance with the law.

A local authority HR advisor can guide schools in making appropriate decisions when dealing with performance issues. Head teachers and school governors may have little knowledge of employment law. If they do not receive independent advice, then they are at risk of dismissing teachers unfairly or even of committing acts of unlawful discrimination.

For example, employers have a legal duty (under section 20 of the Equality Act 2010) to make reasonable adjustments to any provision criterion or practice which puts a disabled person at a disadvantage in comparison to persons who are not disabled.

A school which did not have the benefit of local authority advice could overlook this legal duty to a disabled teacher undergoing performance management and, therefore, commit an act of unlawful discrimination.

10. Please comment on the extent to which it would make sense for schools to make changes to their performance management arrangements and/or their capability procedures in advance of September 2012.

We do not agree that there is any need for schools to make changes to their performance management or capability procedures.

We would be particularly concerned about schools implementing the draft model policy for appraising and managing teacher performance in its current form, for the reasons set out below.

11. Please use this space to comment on the new model policy on appraising and managing teacher performance.

The new model policy appears to be a knee-jerk reaction to anecdotal concerns about difficulties with managing teacher performance.

We are particularly concerned that:

1. The policy sets out the arrangements that will apply when teachers fall below the levels of competence or conduct that are expected of them. We do not agree that it is appropriate to have a single policy to deal with both competence and conduct issues because these issues need to be addressed in different ways.

Teachers who are not performing to the required level should not be stigmatised as wrong doers and be required to attend disciplinary meetings.

The terminology in the policy is likely to make the process more adversarial for both employee and employer, will reduce the possibility of the procedure achieving

improvements in performance and will increase the risk of the employment relationship breaking down. It does not enable school leaders to help an underperforming teacher to make different career choices if that is appropriate.

Although the ACAS code applies to both misconduct and poor performance, it also says that, if employers have a separate capability procedure they may prefer to address performance issues under this procedure.

2. There is to be no limit on lesson observation. The process of lesson observation, as well as being stressful for the teacher, is a driver of workload, in that the teacher feels obliged to over-prepare for the lesson so as to meet all the assessment criteria. Following the lesson observation, further objectives may be set, placing additional workload burdens on the teacher. The removal of the limit will have a significant negative impact on teachers' workloads and takes away an important preventative measure against the abuse of lesson observation by a manager, as a means to bully an individual teacher.
3. Head teachers and other leaders may "drop in" in order to evaluate the standards of teaching and learning and to check that high standards of professional performance are established and maintained. This gives rise to the same concerns about workload and bullying which we have outlined at point 2 above.
4. At any point during the appraisal cycle, evidence may emerge (either through the appraisal arrangements or otherwise) about any aspects of the appraisee's performance or conduct which give rise to concern. In the most severe cases where the concerns over conduct or performance are such as to question the appraisee's overall satisfactory execution of his/her duties, the school will move straight to a disciplinary meeting.

This is effectively placing teachers into a continuous capability procedure where they could be called into a formal disciplinary meeting to discuss their performance at any time. This will create a working environment where teachers are forced to be defensive, to protect their jobs.

Teachers will have to protect their position by making clear in writing their reservations about any performance objectives set which may be challenging and they will have to formally respond to any feedback about their performance, setting out areas of disagreement.

A teacher in such a position may well feel reluctant to admit to any shortcomings or to seek appropriate mentoring or training, for fear that this could lead to a formal disciplinary meeting. Therefore these changes will hinder not help the process of performance management and improvement.

Again, we are also concerned about the potential for the procedure to be abused by a manager, to bully a teacher.

5. Five working days is insufficient notice for a disciplinary hearing. The teacher will need time to gather evidence to support their position and, where the teacher is a union member, to meet with and take advice from their union representative. We suggest that a period of 10 working days is more realistic.
6. We are very concerned about the absence of an explanation of the teacher's right, under section 10 of the Employment Relations Act 1999, to be accompanied.

Without this there is a risk that the teacher will be denied this right, particularly if the school

is not receiving advice from the local authority. Denial of this right is likely to make any subsequent dismissal unfair.

7. The policy includes that a final written warning will be appropriate in cases of “particularly serious concern”. There is no guidance on what amounts to a particularly serious concern. For example, the ACAS Code says that a final written warning might be appropriate where the employee’s actions have had or are liable to have a serious or harmful impact on the organisation. In our view similar guidance should be provided in the policy.
8. A decision or recommendation that the member of staff should be dismissed or required not to work at the school is one possible outcome of the first disciplinary meeting. This is quite clearly inappropriate. It is unfair and unlawful to dismiss an employee on grounds of capability without giving them a formal warning and a reasonable opportunity to improve. Paragraph 19 of the ACAS code says that if an employee’s first misconduct or unsatisfactory performance is sufficiently serious it might be appropriate to move to a final written warning but, quite properly, makes no provision whatsoever for dismissal at the first formal meeting in a capability case.
9. The assessment and monitoring stage will be for a minimum of four weeks. This period is simply too short to allow the teacher a reasonable opportunity to improve. Case law authority supports an assessment period measured in months, not weeks. In **Evans v George Galloway and Co Ltd 1974 IRLR 167**, a man with six years service was thought to deserve six months rather than five weeks. In **Winterhalter Gastronom Ltd v Webb 1973 ICR 245**, NIRC, three months was thought suitable for a sales director with two months service. In **Clark V Johnson EAT 484/78**, the EAT extended a long-serving butcher’s improvement period from one to nine months. In our view the current assessment stage of 20 weeks is reasonable.
10. The further disciplinary meeting will, if acceptable progress has not been made, lead to a final written warning or, in “severe cases”, to dismissal. Again, there is no definition of severe cases and this is a serious omission which may put schools in breach of employment laws.
11. A teacher may be dismissed with or without notice, as appropriate. It is very clearly inappropriate and unlawful to summarily dismiss a teacher on grounds of capability. An inability to perform to the required standard is not a fundamental breach of contract. Paragraph 22 of the ACAS code makes it clear that dismissal without notice is only appropriate in cases of gross misconduct.
12. The appeal will be dealt with, wherever possible, by a manager who has not previously been involved with the case. If the appeal is to be a genuine review of the decision to dismiss then it should be dealt with by the governing body or, at the very least, by a manager who is more senior than the person who made the decision to dismiss or recommend dismissal.

12. Please use this space for comments on any other aspects of the proposals, including their likely impact, or to make any suggestions for other changes that might help tackle the issue of underperformance.

As stated above, our view is that the current procedures are appropriate for dealing with underperformance.

Performance is more likely to improve in an environment where teachers feel able to be open about any shortcomings and to request appropriate monitoring and training.

We are greatly concerned that the new draft policy will lead to a climate of fear and defensiveness in schools, which will impede performance improvement. Surveys carried out by the NASUWT indicate that unreasonable workload is the primary concern for teachers across the UK. This policy will lead to higher workloads, increased stress and reduced job security and consequently may lead to good teachers leaving the profession and a negative impact on school performance.

In addition, the policy will lead to schools facing a significantly increased number of employment tribunal claims from teachers who have been denied their right to be accompanied and have been unfairly dismissed and even unlawfully discriminated against.

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