



LITTLETON

# PERFORMANCE AUTUMN 2020

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## The Question

### PERFORMANCE

**Is there a creative way of going beyond a performance plan, when faced by employees who aren't quite good enough; they aren't bad, but others don't value them, and you know you can hire better?**

## Analyse the Question

2 elements:

(1) What does the law require of an employer when faced with an underperforming employee?

(2) Is there a creative response to (1)?



## 1. LEGAL REQUIREMENTS



# S98 Employment Rights Act 1996 (“ERA”)

**(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**

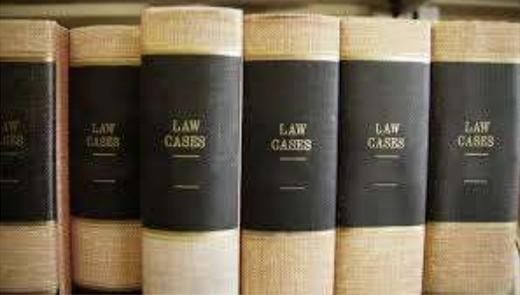
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is...a reason falling within subsection (2)...**

**(2) (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**

**(3) (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and**

**(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
- (b) shall be determined in accordance with equity and the substantial merits of the case**



## Case Law Requirements

- (1) Employer's honest belief as to incompetence is all that is required: ***Taylor-v-Alidair*** [1978] ICR 445
- (2) Generally objective evidence should be provided but in cases such as 'quality of management' opinion may suffice ***Cook-v-Thomas Linnell*** [1977] ICR 770
- (3) Customer of staff complaints may be evidence of incapability: ***Hopper-v-Feedex*** [1974] ICR 99

## Case Law Cont

(4) Follow ACAS Code which applies to “*misconduct or poor performance...*” (Paragraph 1)

(5) Apply general approach of fair play to the process: ***Littlewoods-v-Egenti*** [1976] ICR 516

(6) What that means is addressed in ***James -v-Waltham Cross*** [1973] ICR 398



## James



*An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance.*



## Case Law (Cont 2)



(7) A prior warning may not be needed in cases of gross incompetence or if the consequences of incompetence are serious (e.g. *Taylor* where pilot damaged plane on landing) or refusal to change (*Retarded Children's Aid-v-Day* [1978] ICR 298)

(8) A warning may not be needed as regards a senior employee who knows what is expected of them: *Winterhalter-v-Webb* [1973] ICR 245.

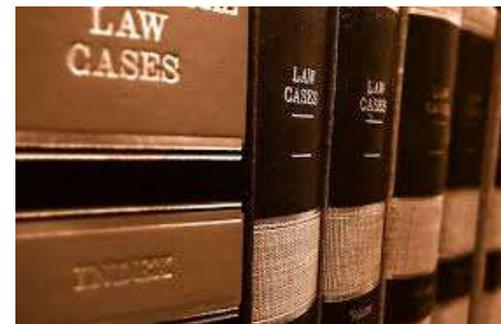
(9) Must generally allow a reasonable opportunity to improve:  
*Winterhalter*

## Case Law (Cont 3)

(10) The training and support provided by management are relevant: ***White-v-London Transport*** [1981] ICR 261.

(11) Duty to consider/offer alternative employment? Potentially if the employee has been promoted ***Draper-v-Kraft*** [1973] IRLR 328.

(12) General requirement? No see: ***Henderson -v-Masson Scott*** [1974] IRLR 98



## *Henderson*

“

*If a company can offer alternative employment to an employee, that may, in a borderline case, render a dismissal unfair which would otherwise be fair.*

(My emphasis)

”

# What are the legal risks?

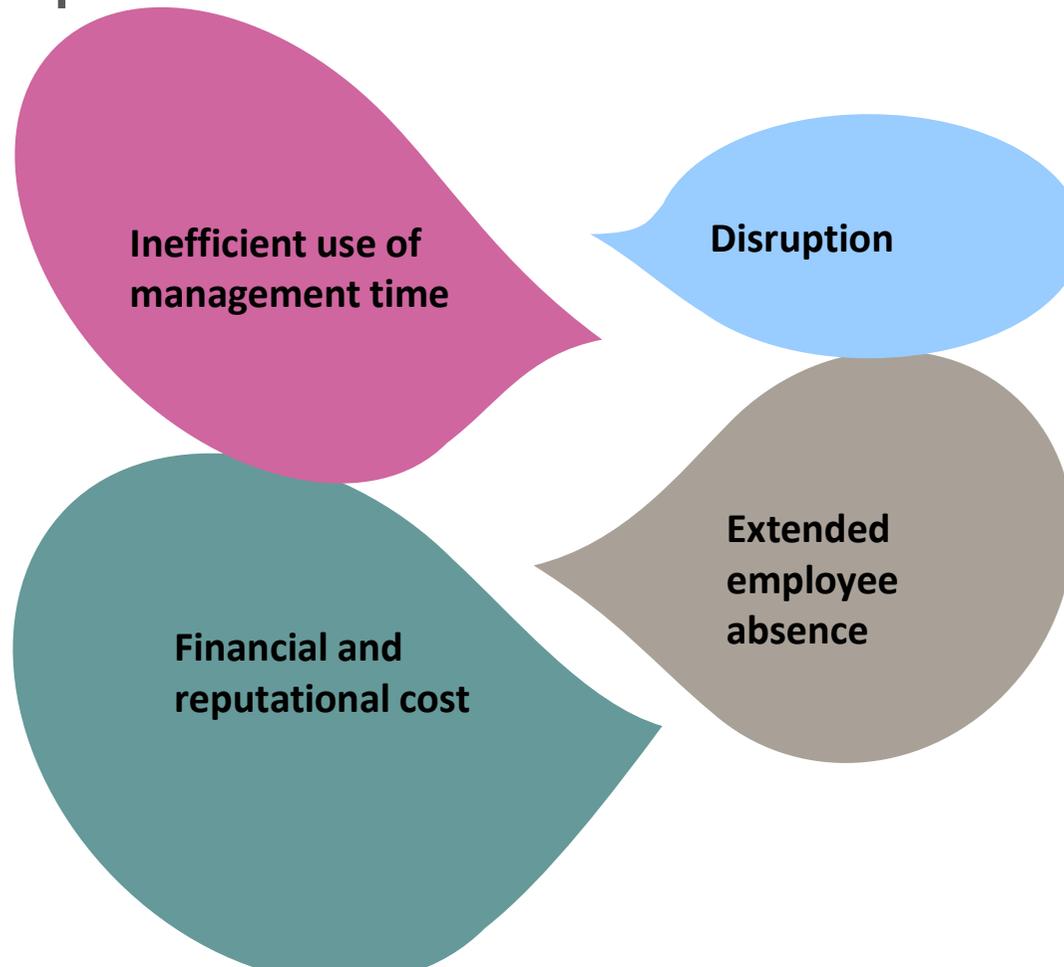
Breach of contract / (constructive) unfair dismissal

Discrimination claims

Staff Absence

Protection from Harassment Act 1997

# What are the practical risks?



## 2. CREATIVE RESPONSES



## **(Differing) Suggested Courses**

<https://inside.6q.io/15-effective-ways-to-deal-with-an-underperforming-employee/>

<https://allthingstalent.org/2019/10/21/10-ways-deal-with-underperforming-employees/>

<https://opexmanagers.com/2020/05/25/how-to-get-rid-of-an-employee-who-is-not-performing/>

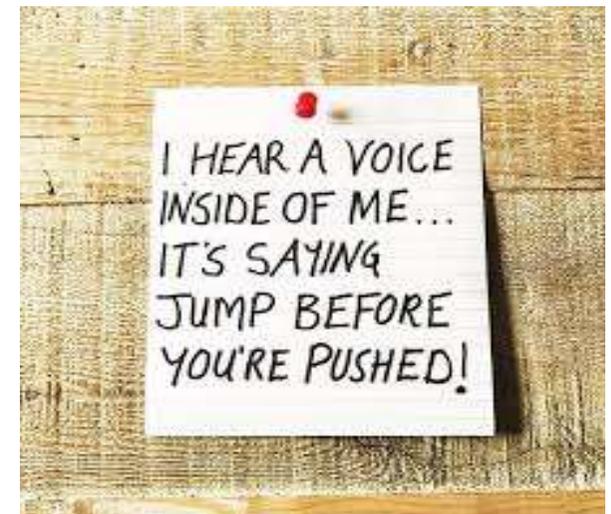
# Options

- (1) Easing Out
- (2) Redundancy
- (3) Protected Conversations
- (4) 'Head – Shunt'



## (1) EASING OUT

- May succeed if the employee senses a 'hostile environment' and jumps before they are pushed.
- The risk is claims of constructive dismissal
- See Browne-Wilkinson J in ***Woods-v-W.M. Car Services*** [1981] ICR 666



## Woods



*...employers who wish to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of “squeezing out” an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal...It is for this reason that we regard the implied term we have referred to as being of such importance.*



## (2) REDUNDANCY

- Not true reason for dismissal
- Required to pay redundancy payment
- Risk of Unfair Dismissal claim



## (3) PROTECTED CONVERSATION

- Often successful (anecdotally)
- ‘Flimsy’ privilege
- Required to pay settlement sum



A GUIDE TO PROTECTED  
CONVERSATIONS

**TBOs**  
E-a-m-m-u-n-i-t-y

## (4) 'HEAD SHUNT'

- Encourage employee to leave externally
- Risk of constructive dismissal claim
- Costs of recruiter



## CREATIVE: BUT RISKY

BEING WRONG IS NOT THE SAME AS BEING CREATIVE, BUT IF  
YOU'RE NOT PREPARED TO BE WRONG YOU'LL NEVER COME UP  
WITH ANYTHING ORIGINAL

SIR KEN ROBINSON

LITTLETON

# QUESTIONS



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# LITTLETON

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