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LOW PERFORMANCE MANAGEMENT

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Definitions, thresholds and recordkeeping

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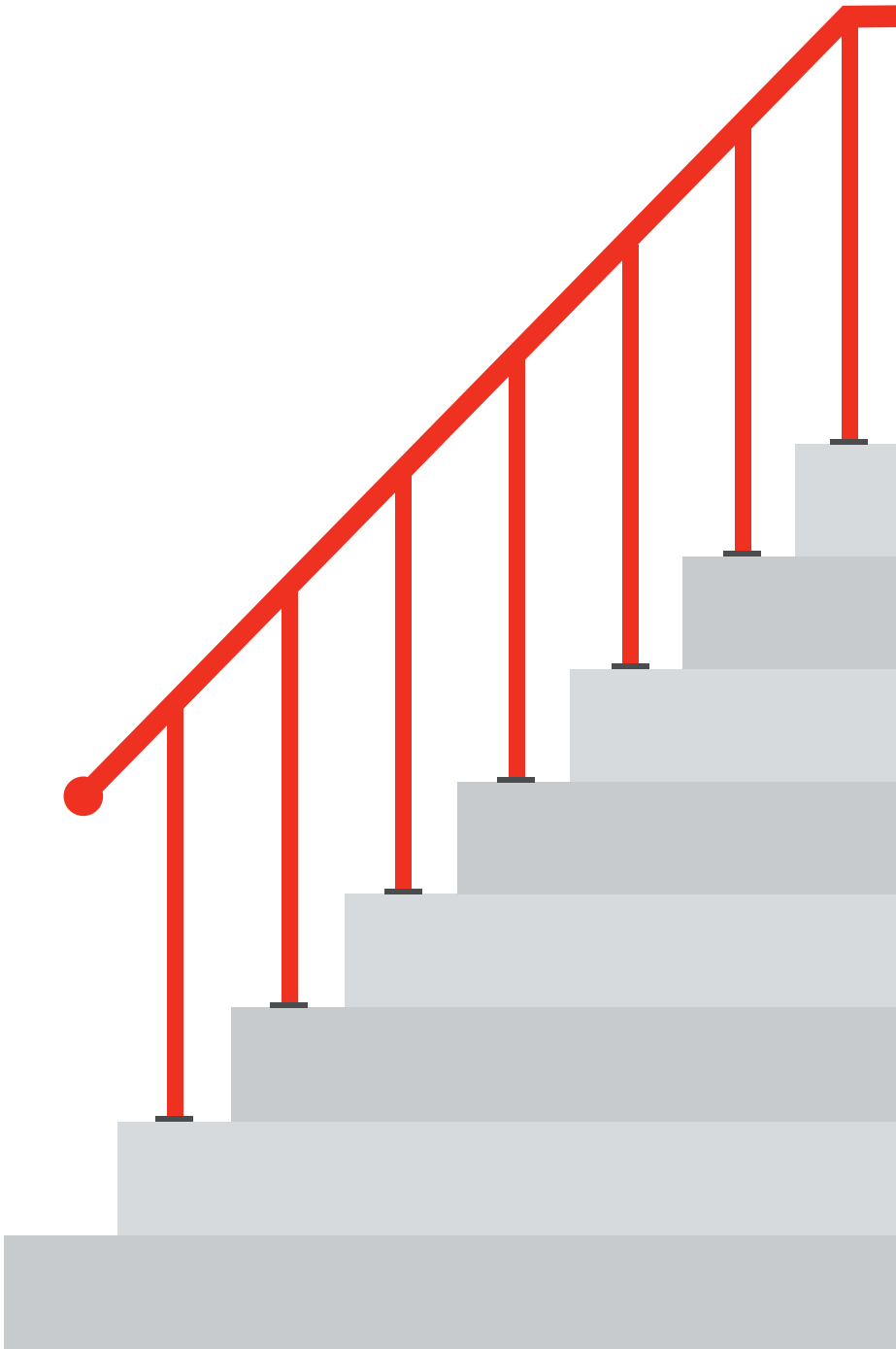

Summary

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Russia

MOSCOW - RUSSIA

Definitions, thresholds and recordkeeping

What marks out an employee as a low performer?

There is no statutory definition of low performance, but in practice, it usually means there are issues with the quality of work performed by an employee. A low performer can be defined as an employee who is not doing a job properly in accordance with set standards. Therefore, low performance covers issues of quality and the ability of an employee to perform at the required level. As there are no mandatory performance standards, employers are free to set their own. Employers usually determine standards in the contract in the form of a job description outlining the employer's expectations and employee's duties. The following may serve as indicators of low performance:

- regular unacceptable quality of work compared to the set standards;
- failure to follow employer's operating procedures;
- failure to keep costs within the arranged budget;
- failure to meet specified deadlines or targets;
- low financial returns on projects conducted by the employee.

However, employers wishing to tackle low performance should be aware of the following legal implications:

- employees need to be made fully aware of the required standards at the beginning of the employment (e.g. they must have been familiarised with the job description) and they must be shown the results of their appraisals and asked to sign them);
- employees should be provided with the facilities they need to work in accordance with the employer's standards.

These factors are particularly important if the employer wishes to discipline or dismiss a low performer.

Is there an objective measure of low performance compared to other employees?

There are no mandatory performance standards set out in law, and so employers are free to set their own. Employers usually determine standards in the contract in the form of a job description outlining the employer's expectations.

Does low performance need to be documented? If so, at what level of detail?

Detailed recordkeeping of employees' work is crucial, since any measures (i.e. dismissal or other disciplinary action) taken as a consequence of low performance need to be justified and formally documented. The burden of proving the legal grounds for dismissal or other disciplinary action brought against an employee is on the employer. Thus, if the employer fails to document the process, the employee may well be successful in challenging the disciplinary action or dismissal.
We recommend the employer should record all information related to employee's performance and in particular it should:

- Provide a written job description, which the employee should be familiarised with and asked to sign. It should be reasonably detailed, as, by law, the employer may only require the employee to perform the duties specified in the job description.
- Provide written details of tasks and instructions given to employees.
- Ensure that if the employee's immediate supervisor or peers become aware of low performance, they inform the general manager (or other authorised officer) of the facts in writing.
- Collect feedback from clients of the employer who have worked with the employee.
- Ensure the employee is aware of the assessment of the work and of any measures that can be offered to him or her to improve performance.

Performance Management

What are the standards and processes for performance management?

There are no statutory standards or processes in Russian law in relation to performance management.
However, in practice many organisations have an appraisal procedure. This is a system of measures aimed at assessing employees' performance against the standards or targets the employer uses for its activities. These could include financial performance and efficiency, for example. There is no obligation on employers to conduct appraisals, but if they wish to be able to dismiss an employee on grounds of unsuitability for the position, they will need to have an official appraisal system, as the results of this should confirm the unsuitability.
The appraisal system should also serve to inform the employee about any dissatisfaction the employer has with the employee's performance, and make clear what the expectations are.

Justification for dismissal

How can an employer justify dismissal?

Dismissal is justified under the following circumstances:

- the dismissal falls within one of statutory grounds for dismissal;
- dismissal is an appropriate and reasonable measure having regard to the gravity of employee's misconduct;
- the statutory procedures for dismissal or other disciplinary sanctions have been followed.

Under Russian law an employee cannot be dismissed for poor performance alone. Instead, the law provides specific grounds for termination of employees and these may be used to dismiss an employee because of poor performance. Specifically, the employer has the right to dismiss an employee whom it considers unsuitable for the position because he or she has insufficient skills or for disciplinary reasons. These are discussed in turn below.

Dismissal of the employee due to unsuitability for the position

The fact that the employee has insufficient skills and is therefore unsuitable should be confirmed by a formal appraisal (or 'attestation' in terms of Russian employment law). The appraisal procedure used by the employer should be available as a company policy and all employees should be made aware of it. The policy should be implemented in accordance with any statutory requirements that might apply (although there will normally be no such requirements in the private sector). It is likely that the only obligation on the employer will be to allow the employee representatives to participate in the decision-making of the appraisal committee.
We recommend that the appraisal policy should include the following:

- the purposes of the appraisal procedure;
- the categories of employees subject to it;
- the members of the appraisal committee;
- the individuals responsible for arranging appraisals;
- the frequency of appraisals;
- the documents to be produced as part of the appraisal (e.g. feedback forms, instructions based on the outcome of the appraisal and a timetable for appraisals);
- the standards against which employees' performance should be monitored.

The results of the appraisal procedure should be formalised. If the employer decides to dismiss the employee as a result of an appraisal, it should first offer any vacant positions at the employee's level of qualification or lower within the organisation. If there are no vacant positions or employee turns them down, the employer can proceed to dismiss the employee.

Dismissal of the employee for disciplinary reasons

The employer may also terminate the employee for disciplinary reasons. In particular, the employer has the right to dismiss the employee for repeated non-fulfillment of job duties. In order to terminate the employee's employment on this ground the employer must already have imposed at least two disciplinary sanctions against the employee. To impose disciplinary sanctions, the employer must:

- Define what actions constitute a breach of the employment agreement, job description, or internal policies of the employer. The employer should also document the breach (e.g. in a written note by the employee's line manager).
- Ask the employee to give a written explanation of the facts within two working days.
- If the employee refuses to provide written explanations, the employer should draw up a written statement to the effect that the employee has refused to provide an explanation and this should be signed by at least two witnesses. Note that the fact that the employee does not provide an explanation does not prevent the employer from imposing a disciplinary sanction against the employee.
- Impose a disciplinary sanction within one month of the date the misconduct was discovered, or the date it should have become known to the employer.
- Only impose disciplinary sanctions up to six months after the date of the misconduct, unless the sanctions are based on the results of an inspection or audit, in which case they may be imposed up to two years after the date of the misconduct.
- Inform the employee that, within three working days of the sanction being imposed, he or she must sign to acknowledge an order setting out the sanction in writing. If the employee refuses to sign, the employer will draw up a statement setting out that fact.

Employees may also be dismissed for gross misconduct. A list of violations that can be considered as gross misconduct is set out in law and includes the following:

- unjustified absence from the workplace for one day, or for more than four consecutive hours during one working day;
- appearance at the workplace in a state of alcoholic, narcotic and/or other form of intoxication;
- the disclosure by an employee of a secret protected by law (i.e. a state secret or trade secret) that became known to the employee as a result of his or her employment;
- theft (including minor theft), embezzlement, misappropriation, intentional damage or destruction of property by an employee at the workplace, as confirmed by a court judgment.
- a breach by an employee of labour protection requirements (i.e. work safety), where the breach has resulted in severe consequences (e.g. an industrial accident or disaster) or created a real danger of such this and the breach has been confirmed by the Labour Protection Commission.

The procedure for terminating employment on grounds of gross misconduct is essentially the same as for repeated non-fulfillment of job duties. However, in most cases of gross misconduct the employer must have supporting documentation to justify termination (e.g. a court ruling is required to prove theft; a ruling of an authorised body is required to certify violation of labour protection rules; and a medical certificate is required to confirm an employee was in a state of alcoholic intoxication).
As an alternative to all of the above, the employer and employee may at any time during employment agree on termination by mutual agreement. This option considerably reduces the risks to the employer of claims against it. Note that the employer must ensure that no pressure is put on the employee to agree, but that otherwise, the law does not regulate how negotiations should be conducted between the employer and the employee. Usually, the parties conclude an employment termination agreement specifying the terms and conditions of employment termination. Often, compensation will be paid to an employee, but there are no legal requirements about this or about the amount.

General requirements for termination

Notification of employee representatives

If the employee to be dismissed is a member of the employee representative body (e.g. a trade union delegate), the employer must notify the employee representatives upon dismissal by submitting to it a draft of the order made by the general manager (or other authorised officer), along with documents justifying the dismissal (e.g. the employee's appraisals). Within seven working days of receipt of these documents, the employee representatives will submit their opinion of the dismissal. If they do not agree with the decision to dismiss the employee, they will ask for a consultation with the employer to try to find a common position. If this does not work, the employer will be entitled to make its own decision.

Special protection against dismissal

Certain categories of employees enjoy special protection against dismissal, such as pregnant women and employees under 18. In addition, employees cannot be dismissed while they are absent from work on sick leave or other leave.

Formalities

Dismissal on any ground must be formalised by an order of the general manager or another authorised officer. The employee must be made aware of the order and asked to sign it in acknowledgement. If the order cannot be brought to the notice of the employee or if the employee refuses to sign, a note must be made on order to record these facts.
On the day of termination the employer must hand over the employee's labour book and pay the employee all amounts owing.
If the employee so requests, the employer should also give the employee copies of documents relating to the employment.

Claims against the employer

What kind of claims can the employee make?

If the employee considers his or her dismissal unfair, the employee may file a claim with the court and request reinstatement at work. The employee must file a claim for unfair dismissal within one month of receiving a copy of the order on dismissal or the labour book. If the employee is claiming the dismissal was unfair, the court may order reinstatement of the employee in the same job, along with financial compensation for forced absence in the amount of the employee's average salary for the period of absence.
An employee can claim moral damages, either as well as reinstatement or separately. If the employee claims the dismissal was unfair, the courts may award compensation for moral harm. However, the sums awarded are not significant.
Employees can also make a claim to the State Labour Inspectorate. The Inspectorate can conduct an inspection of the employer and check its activities for general compliance with Russian labour law.

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