

Carey Olsen Starting Point Employment Law Guide

– performance management

Service area / [Employment, Pensions and Incentives](#)

Location / [Jersey](#)

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Introduction

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey law.

They are a summary of the most important issues that we come across. It is very much the edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do give us a call.

The aim of this Starting Point Guide is to:

- raise management awareness of the issues surrounding performance;
- ensure that managers are provided with practical and easily understood tools to be able to manage performance within their teams; and
- provide an introduction to performance management for managers.

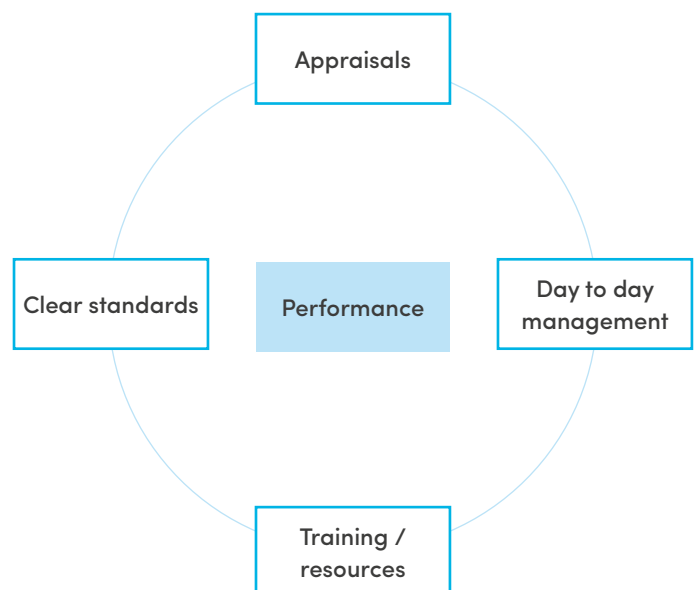
This Starting Point Guide should be read in conjunction with your organisation's performance management policies and procedures.

What is performance management?

Performance management is a process which seeks to maximise the performance of the organisation through enabling individual employees and teams to achieve high levels of performance.

Performance management is best understood as a continuous process, which is based upon setting achievable objectives and regular feedback. Performance management is not just corrective; it is a process of ensuring that management is geared to encouraging the improvement and development of individuals and teams. The aim of managing performance is to encourage performance improvement and, where the required standards are not met, to enable appropriate and proportionate corrective action to be taken.

To be truly effective, performance management needs to be aligned to the goals of the organisation (both long term and short term).



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Organisations should seek to develop integrated approaches which assist in achieving and maintaining high performance standards. This should include a focus on:

- **Recruitment and Retention** – getting and keeping the right people is key to achieving high performance standards.
- **Learning and Development** – recruiting employees is an expensive business; growing and developing your own is often more effective, not to mention cheaper.
- **Performance Standards and Objectives** – unless individuals and teams understand what is expected of them, it is difficult to then expect them to perform well; be clear and be consistent.
- **Confronting Problems** – unless employees know they are underperforming, how can they improve?

Why is it so important?

Enabling and helping individuals, teams and organisations to identify, achieve and maintain high levels of performance should be the focus of every employer. A structured and well executed performance management regime may help significantly in that regard.

More fundamentally, the unfair dismissal regimes in both Jersey and Guernsey identify capability (which includes performance) as a potentially fair reason for dismissal. A dismissal on capability grounds will, however, generally only be fair as long as the employer can demonstrate that a full and fair procedure has been followed (see the section on Corrective Action below).

Setting standards

Employees must:

- know the standard of work performance expected of them and be encouraged to seek clarification if unsure;
- be kept informed of progress at all stages of any formal procedure;
- be advised that they may be represented by a colleague or trade union representative; and
- undertake any additional training or development or other remedial action recommended by their supervisor or manager.

Managers must:

- know and communicate the standard of work performance expected of their staff and provide clarification where appropriate;
- monitor and manage performance appropriately;
- investigate all the salient facts;
- advise or warn the member of staff of the problem as soon as their performance falls below expected standards;
- give the member of staff a suitable period during which (s)/he has a chance to improve performance;
- inform the member of staff of progress at all stages of the procedure and advise them that they may be represented at the formal stages by a colleague or trade union representative;

- take any appropriate action to assist and support the member of staff during the performance review period (whether formal or informal); and
- maintain a complete, written record of all discussions and actions throughout the formal process. This record is confidential and should be restricted to those who need to know, i.e. the member of staff, those involved in the process and HR.

Corrective action

Performance management procedures

Performance management procedures are designed to manage staff whose performance is not of an acceptable standard.

They do not generally form part of contracts of employment although they may result in contractual consequences (such as the termination of a contract of employment).

Employers naturally seek to ensure that staff achieve and maintain a high level of performance in their work. To this end managers need to ensure standards are established, performance is monitored and that staff are given appropriate training and support to meet these standards. When it is apparent that a member of staff is not capable of achieving the required level of performance, managers need to confront matters at an early stage.

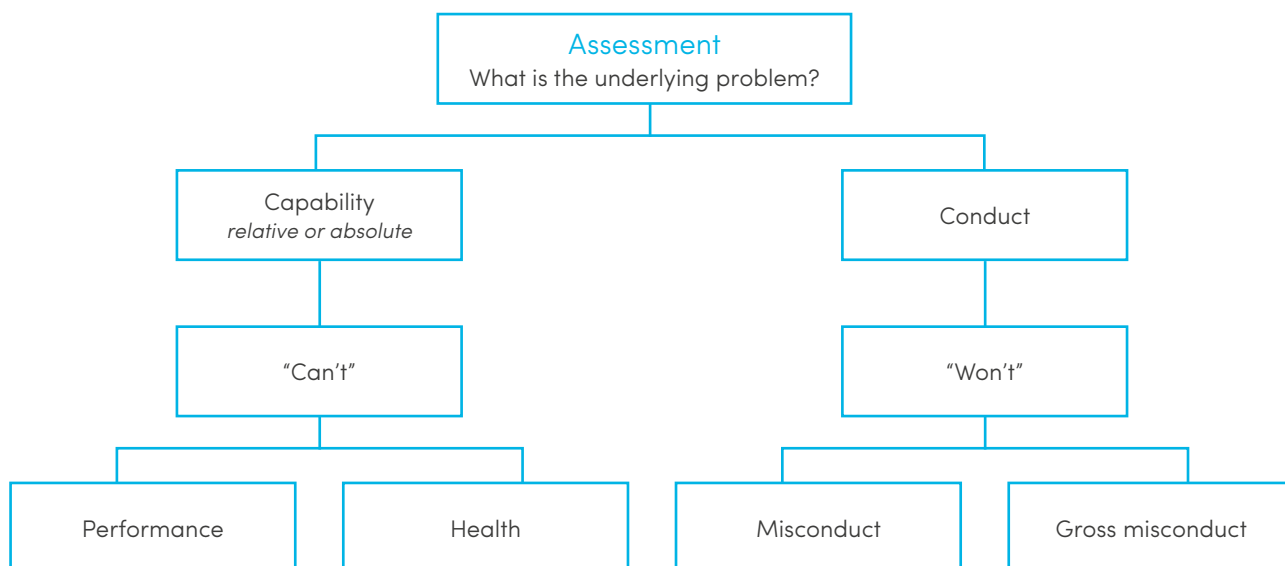
When are performance management procedures not appropriate?

In certain circumstances it may not be appropriate to apply a performance management procedure. For example:

- new staff who are still within their probation period (although such staff are often appraised);
- cases of misconduct should be handled under disciplinary procedures; or
- cases of incapacity due to ill health may initially be handled under incapacity/sickness absence procedures.
- It is often difficult for managers to decide which procedure should apply. The following guidance may assist:
 - the employee being unable to deliver the requisite performance in which case consideration should be given to:
 - a. performance procedures; or
 - b. incapacity/sickness absence procedures in the event of ill health;
 - the employee being unwilling to deliver the required standard in which case disciplinary procedures should be considered

There is a degree of overlap – HR specialists can assist in deciding the best course of action.

Continued



Lack of capability implies that there is no element of choice in the employee's failure to measure up to the required standards. This may be due to an innate lack of ability, skill or experience or to a lack of adequate training and/or supervision. In these cases, staff should be given reasonable help and encouragement to reach a satisfactory level of performance, before any formal action is embarked on. The organisation also needs to make sure that objectives, expectations and standards are clearly documented at the outset.

Conduct, in contrast, normally involves a measure of personal culpability, negligence, wilful conduct or misconduct. The member of staff's performance could be inadequate due to a lack of motivation, interest or attention. In all matters of conduct, including negligence, disciplinary action will often be appropriate rather than performance management procedures.

Wherever possible, managers should seek to address any individual or minor performance problems as they occur and without the need to implement formal procedures.

Performance management procedure – an example

The following sets out a typical example of how a performance management process should operate.

In addition, managers should follow the fundamental principles and guidance set out in the Code of Practice on Disciplinary and Grievance Procedures (the 2014 Code) which states at paragraph 1:

"Part 1 of this Code of Practice applies in disciplinary situations which can include misconduct and poor performance. If employers have a separate capability procedure, they may prefer to address performance issues under that procedure. If so, however, the principles of fairness set out in this Code of Practice should still be followed, although they may need to be adapted."

Breach of the 2014 Code does not of itself amount to a breach of the law, but the 2014 Code will be taken into account by a Court or Tribunal when determining whether there has been a breach of the Employment (Jersey) Law 2003.

References to the 2014 Code are included at various points in the example below to assist managers with the process of seeing how the 2014 Code can be adapted to the performance management process.

A flowchart showing a typical procedure is set out at Appendix 1.

Where a manager considers that the issues which have arisen are serious or otherwise have (or may have) a material commercial impact on the business of the company, a performance management procedure may need to be invoked at any stage without completing the earlier stages.

How issues arise

Concerns and expectations regarding performance should be communicated at least annually via a robust appraisal scheme. However, there may be occasions when a manager becomes concerned that an individual's work performance requires more support and guidance. This procedure is designed to assist managers in supporting staff to reach an acceptable standard.

Initially, in situations where there is a decline in performance or where an acceptable performance level has never been achieved, a line manager should explore with the individual concerned the reasons or any underlying cause for a decline in their ability to carry out the role. The manager should encourage an open and honest discussion of any underlying factors. Where health and/or attendance may be a factor in underperformance, the manager should generally take advice from an HR specialist before proceeding.

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Informal management support

Where performance is considered by the line manager to be below acceptable standards, the normal course of action in the first instance (unless an issue is considered too serious to be resolved informally) would be to attempt to resolve problems with the employee on an informal basis.

A brief note will be made of the general issues discussed and the dates of any meetings. At this stage line managers are encouraged to set and clarify objectives, help with the prioritisation of action and agree timescales and review dates. Many poor performance problems may be resolved in this way.

The manager should generally ensure that the following points are discussed and recorded (at least informally):

- identify and clarify the required standards of performance;
- identify the level of under-performance;
- discuss and establish the cause of under-performance (including any personal circumstances which may need to be taken into account);
- discuss any support that may be required and identify any action that can be taken to help to improve the situation. This may include:
 - a. monitor and review (including any variance in) workload;
 - b. reviewing the availability of suitable resources or materials;
 - c. training, development or coaching specifically aimed at achieving an improvement in performance;
 - d. identifying a mentor; and
 - e. reviewing the amount of supervision needed.
- set a reasonable and achievable time-scale for the individual's performance to improve (identify "milestones" if appropriate).
- set a date (or dates) for a review meeting to ensure that progress is being made and reviewed.

(The above guidance is reflected at paragraphs 5 to 7 of the 2014 Code).

Formal procedure

This formal procedure may become necessary if initial management support does not lead to an improvement in performance (or insufficient improvement in performance); or if the matter is considered too serious to be resolved informally (paragraph 8 of the 2014 Code).

Managers should generally consult their relevant HR advisor for advice and guidance before taking formal action. When addressing a performance issue, employers should ensure that they comply with both the terms of the organisation's performance management procedure and the 2014 Code.

At all stages, the method to be followed by the manager will generally be:

- to investigate the facts, circumstances and causes of the under-performance;
- to state the problem(s) and provide the evidence to support this;
- to give the opportunity for the employee to respond to the issues raised;
- to state the expectations, i.e. what acceptable performance should look like;
- to identify the support, training and other resources needed to assist the employee in achieving the required standards; and
- to set a reasonable timescale over which performance will be monitored for improved performance. Milestones will often need to be set to ensure that performance improvement is incremental and sustained.

(See also paragraph 3 of the 2014 Code).

Stage One

The line manager should invite the employee to a meeting. Arrangements should be communicated before the meeting.

The employee should be given a minimum written notice of the time, date, venue and purpose of the meeting (see paragraph 13 of the 2014 Code) and prior to the meeting should be given copies of any relevant information and evidence (see paragraph 14 of the 2014 Code). The employee should also be given sufficient time to prepare (see paragraph 15 of the 2014 Code).

The employee should also be advised of their right to be represented at the meeting by a trade union representative or work colleague (see Representation below).

A member of Human Resources should normally be present.

At the meeting the line manager will:

- state the problem(s) and provide the evidence to support this;
- give the opportunity for the employee to respond to the issues raised; and
- state the expectations, i.e. what acceptable performance should look like.

See in particular paragraphs 18 and 19 of the 2014 Code.

Continued

Following this discussion, the manager should adjourn to consider what the outcome of the meeting should be (rather than notifying the employee of the outcome there and then; see paragraphs 24 and 25 of the 2014 Code in particular). The possible outcomes are as follows:

- no further action under the Performance Management Procedure;
- an extension of (or return to) the informal resolution stage; or
- if the manager confirms that there is a performance issue to address, a first written warning will be issued.

The manager should inform the employee of the outcome (and provide reasons) and confirm that outcome in writing to the employee (see paragraphs 26 and 27 of the 2014 Code).

If a warning is issued, the employee should be warned that failure to reach the required standard may result in further action, ultimately up to and including his/her dismissal. The employee should also be informed of their right to appeal against the decision.

The employee should also be given a performance improvement plan ("PIP"). The PIP should be discussed with the employee (and ideally agreed with him/her) and should cover:

- the required standards of performance;
- the level of under-performance;
- any supporting measures to be implemented, for example:
 - a. monitor and review (including any variance in) workload;
 - b. resources or materials;
 - c. training, development or coaching;
 - d. providing a mentor; and
 - e. providing additional supervision/management support.
- set a reasonable and achievable time-scale for the individual's performance to improve including appropriate milestones if appropriate;
- set a date (or dates) for a review meeting to ensure that progress is being made and reviewed.

Stage Two

Where there has been insufficient improvement during the review period following Stage 1, or where the matter is sufficiently serious to progress directly to Stage 2, the line manager will invite the employee to a Stage 2 meeting, which will follow the same format as for Stage 1.

Arrangements should be communicated before the meeting.

The employee should also be advised of their right to be represented at the meeting by a trade union representative or work colleague (see Representation below).

A member of Human Resources should normally be present.

Having heard the case, the line manager should adjourn to consider the possible outcomes (rather than notifying the employee of the outcome there and then; see paragraphs 24 and 25 of the 2014 Code in particular). The outcomes may include:

- no further action under the performance management procedure;
- an extension of (or return to) Stage 1; or
- issuing a final written warning.

The line manager should inform the employee of the outcome (and provide reasons) and confirm that outcome in writing to the employee.

If a warning is issued, the employee should be warned that failure to reach the required standard may result in further action, up to and including his/her dismissal. The employee should also be informed of their right to appeal against the decision.

Stage Three

Where there has been insufficient improvement during the review period following Stage 2, or where the matter is sufficiently serious to progress directly to Stage 3, the employee should be informed and the matter investigated by a previously uninvolved manager (if practicable in view of the size of the employer).

Arrangements should be communicated before the meeting.

The employee should be given a minimum written notice of the time, venue and purpose of the meeting (see paragraph 13 of the 2014 Code) and prior to the meeting should be given copies of any relevant information and evidence (see paragraph 14 of the 2014 Code). The employee should also be given sufficient time to prepare (see paragraph 15 of the 2014 Code).

The employee should also be advised of their right to be represented at the meeting by a trade union representative or work colleague (see Representation below).

A member of Human Resources should normally be present.

The manager will generally present the case and the employee will be given the opportunity to respond. The meeting should then be adjourned to consider all the facts before a decision is reached (rather than notifying the employee of the outcome there and then; see paragraphs 24 and 25 of the 2014 Code in particular). The possible outcomes are as follows:

- no further action under the performance management procedure;
- an extension of (or return to) Stage 2;
- alternatives to dismissal such as:
 - a. redeployment
 - b. demotion; or
- dismissal on capability grounds.

Continued

The manager should inform the employee of the outcome (and provide reasons) and confirm that outcome in writing to the employee (see paragraphs 26 and 27 of the 2014 Code).

Where redeployment and/or demotion are possible as alternatives to dismissal, the employee should be given a short period of time to consider his/her position and the employer's offer. The consequences of not agreeing (e.g. dismissal) should be made clear. If these options are being considered we recommend seeking advice from an HR specialist before notifying the employee of the decision.

Where the outcome is dismissal, the outcome letter should specify the date of termination and confirm whether or not the employee will be required to work his notice, paid in lieu or placed on garden leave.

Once again, the employee should also be informed of their right to appeal against the decision.

Representation

Employees attending meetings and appeal hearings have the right to bring a colleague or trade union representative to the hearing with them (see paragraphs 41 and 42 of the 2014 Code).

In the event that the colleague or trade union representative is not available on the date chosen for the hearing then the hearing may be postponed for up to 5 working days to allow the chosen representative to attend.

Further guidance is set out at: <http://www.jacs.org.je/legislation/codes-of-practice/jacs-guide-to-revised-disciplinary-and-grievance-code-of-practice/>.

Appeals

Appeals should be available in relation to the outcome of any of the formal stages outlined above. Please refer to paragraphs 43 to 46 of the 2014 Code.

The standard deadline for appeals is within 5 working days of the formal outcome of the meeting, however, managers should check the wording of their performance management procedure to see whether a different time period is specified.

Wherever possible, appeals should be heard by a manager who has had no previous involvement in the case (see paragraph 44 of the 2014 Code).

The manager hearing the appeal should investigate the appeal grounds and should subsequently arrange an appeal hearing.

An appeal hearing may either be a review of the original decision or a full rehearing; the decision as to which it should be is one for the individual hearing the appeal, taking into account:

- the grounds of appeal;
- any new evidence or facts which have come to light; and
- any obvious errors in the process followed.

The employee should also be advised of their right to be represented at the meeting by a trade union representative or work colleague. A member of Human Resources should normally be present.

Arrangements should be communicated before the meeting.

At the appeal hearing, the employee should be asked to go through his/her grounds of appeal. The hearing may be adjourned if necessary for further investigation.

Following this discussion, the manager should generally adjourn to consider what the outcome of the meeting should be. The possible outcomes are as follows:

- no further action under the performance management procedure;
- upholding the decision but not the sanction – this will result in an extension of (or return to) any of the stages referred to above; or
- upholding the original decision and sanction.

The manager should inform the employee of the outcome (and provide reasons) and confirm that outcome in writing to the employee.

Minutes

Minutes of the above meetings should be circulated to the employee and relevant managers for comment (see paragraph 23 of the 2014 Code).

Useful information

Link to the 2014 Code:

www.statesassembly.gov.je/AssemblyReports/2014/R.003-2014.pdf

Jersey Arbitration Conciliation Service:

www.jacs.org.je/

Link to the ACAS Code of Practice 1 – Disciplinary and Grievance Procedures (which also contains an embedded link to a non-statutory guide):

www.acas.org.uk/index.aspx?articleid=2174

Link to the ACAS advisory booklet on managing performance:

www.acas.org.uk/media/pdf/g/7/Acas_how_to_manage_performance-accessible-version-Nov-2011.pdf

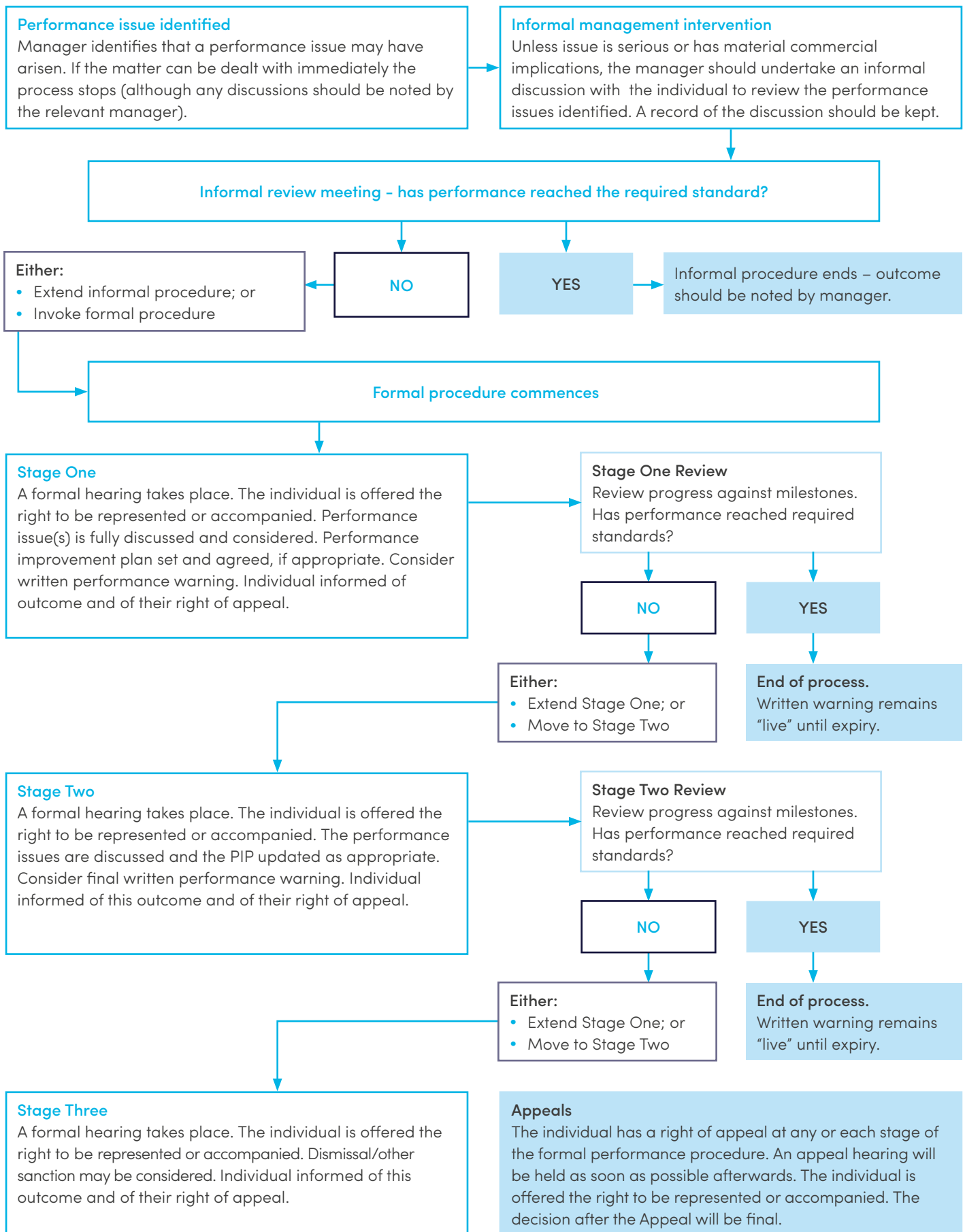
Further information

We are happy to supply specific advice where required.

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Appendix

Appendix 1 – Correcting issues: a typical performance process





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