



## GUIDE TO DISMISSALS IN RESPECT OF CAPABILITY AND ILL HEALTH

### CAPABILITY

There are five fair reasons for dismissal and capability is one of these. This means that if the employer can show that he/she dismissed the employee by reason of capability then a dismissal will potentially not be an unfair dismissal provided that a fair procedure has been followed..

Capability is defined as *'capability assessed by reference to skill aptitude, health or any other physical or mental quality'* It can be broken down into:

- I. **Qualifications** – cases here are rare as employers should know the employee's qualifications when the job is given. Qualification is given a narrow interpretation and must be connected substantially to the employee's job. This may become relevant when an employee has lied about his/her qualifications on their job application or where, for example, an employee employed as a driver loses his/her driving licence.
- II. **Incompetence** – Employees can be held to be incompetent when they cannot perform their duties as required under the terms of the contract. Examples include slow completion rates, mistakes, lack of adaptability and inability to work with colleagues. It is rare for one off incidents to amount to this.
- III. **Ill Health** – If an employee's absence from work means that he/she is unable to do their job the employer can potentially rely on this as a reason for dismissal. The absence can be prolonged or intermittent but frequent. Some absences which are unjustified e.g. calling in sick when actually out with friends would probably count as conduct rather than capability (conduct being another potentially fair reason for dismissal).

## PROCEDURE FOR CAPABILITY DISMISSALS

### Things that should be considered:

If an employer claims that a dismissal was fair by reason of incapability the tribunal will want clear evidence not just a vague assessment. With such dismissals emphasis has to be placed on the evidence of incapability and whether the employee has been given an opportunity to improve in performance dismissals or an opportunity to return to health in ill health dismissals. Also, if an employee disagrees with what the employer is saying the employee should be given **a chance to put his/her case forward**. If employers fail to allow this then the dismissal may be found to be unfair.

#### I. **Fairness in Dealing with Incompetence** – the following should be considered:

- i. Is there a proper appraisal system in place?
- ii. Has the employee been told why he/she falls short of the required standard and been given a set time to improve?
- iii. Has the employee been told that if he/she fails to improve they will receive a written warning and if he/she still fails to improve within a reasonable time they may be dismissed. Has a meeting been held to discuss this?
- iv. If the employee has failed to improve was he/she invited to a second meeting to discuss why and was he/she given chance to explain their failure?
- v. Was the employee given a further chance to improve within a set time limit and was the employee made aware that failure to improve may result in dismissal?
- vi. Were any objectives set by the employer unreasonable and unobtainable?
- vii. Were any opportunities for training or retraining given?
- viii. Has the employer fully supported the employee?
- ix. Were alternative, more suitable positions for the employee considered?
- x. Was any consideration given to the employee's length of service or status and past performance?

- xii. Have the employees in the business been dismissed in this way in the past?

## II. Fairness in Dealing with Lack of Capability due to Ill Health

Before dismissing an employee for reasons of ill health an employer should find out the current medical position. This will usually involve obtaining with the employee's consent a report from the employee's GP or consultant.

As we have mentioned there are two types of absences down to ill health, intermittent and prolonged. It may be worth noting that dismissals on the grounds of ill-health are treated cautiously by tribunals.

### a) Prolonged absences

When dealing with long term absences the employer has a duty to ascertain the true position and to discuss the position and future position with the employee. When the employer has properly informed him/her self of the position then he/she needs to decide what action to take. Things to consider include:

- I. The nature of the illness and the likelihood of it reoccurring
- II. The length of the absence or absences and periods of good health
- III. The impact on the business ie does the employee hold a key position?
- IV. The impact of the absence on other employee's i.e. the increase in their workload.
- V. The employee's length of service and any contractual sick scheme
- VI. Alternative positions in the business which may be better for the employee
- VII. Whether the employee could be considered disabled. **This will be discussed later.**
- VIII. Where permanent incapacity is likely an employer should also consider ill health retirement.

b) **Intermittent Absences**

Where there are lots of intermittent but frequent absences for possibly different medical reasons it is still worth considering the items listed above. An employer's tolerance of such absences does not have to be infinite. The employee should be told what level of attendance he/she is expected to attain and the period it is to be achieved by and that dismissal may follow if there is no improvement. The employee should then be monitored. A second warning would be appropriate in most cases. Medical evidence may also be useful.

c) **Prolonged absences with a disability.**

If an employee's illness is disability related different rules apply:  
A person is said to have a disability if that person:

*has a physical or mental impairment and the impairment has a substantial and long - term adverse effect on that person's ability to carry out normal day to day activities.*

It is worth reiterating that the impairment can be mental and so it can include things such as depression. If an employee is 'disabled' then it would be unlikely that it would be sufficient for an employer merely to show that such an employee was incapable. The tribunals will take into account the requirements of good practice by the employer.

The employer in such situations will be required to take **positive** steps to help disabled employees return to work which may mean making extensive arrangements for transferring jobs for example allowing a phased return or physical changes like letting them put the desk near a window or putting ramps into the workplace.

Employers are also prohibited from discriminating against disabled employees because of something arising *in consequence of that disability* and so they are not

able to discriminate against an employee who has been absent for long periods due to his/her disability related illness.

Employees only have to establish unfavourable treatment because of something that is related to their disability. This does not mean that an employer cannot take absences that are disability related into account it simply means that where sickness is tied in with a disability the employer has to be able to **objectively justify** any actions as regards the disability.

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