



MONTHLY BREAKFAST BRIEFING – Capability Dismissal Presenter – Kevin Duffy

Wednesday 12 January 2022
(First Wednesday of every month –
except this one !)

AGENDA



- > Recap: what is a dismissal?
- > Potentially fair reasons for dismissal
- > Capability dismissal
 - Poor performance
 - Ill-health
- > Discrimination risks
- > Q&A

WHAT IS A DISMISSAL?



- > Contract terminated by employer
- > Limited term contract expires without renewal
- > Employee resigns due to employer conduct

Section 95 of the Employment Rights Act 1996

POTENTIALLY FAIR REASONS FOR DISMISSAL?



- > Conduct
- > Redundancy
- > Statutory ban
- > SOSR
- > Capability / qualifications
- > NB – these only activated if employee has over two years' service

[Section 98 of the Employment Rights Act 1996](#)

CAPABILITY DISMISSAL OVERALL



- > ” *capability*”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- > “*qualifications*”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[Section 98\(3\) of the Employment Rights Act 1996](#)

CAPABILITY DISMISSAL



In practice, capability dismissals generally fall into two main groups:

- > The employee's poor performance
- > The employee's ill health

‘Qualification’ dismissals still occasionally arise.

CAPABILITY DISMISSAL – POOR PERFORMANCE



- > Did the employer honestly believe, on reasonable grounds, that the employee was incapable of performing their job.
- > Reasonable behaviors expected of employer
- > Did management fail to discharge its own responsibilities towards the employee?

CAPABILITY DISMISSAL – POOR PERFORMANCE (Cont'd)



Key Elements of Fairness

- > Proper investigation
- > Employee made aware of the problem and given opportunity to improve within realistic timescale
- > Progress is reviewed during the review period
- > Appropriate support and possibly training
- > Right of appeal against the decision to dismiss

CAPABILITY DISMISSAL – POOR PERFORMANCE (Cont'd)



Setting the required standard

- > Implied contractual term of employment that an employee will perform the role to a minimum required standard
- > Role specific standards
- > Senior roles: higher expectation of what is required

CAPABILITY DISMISSAL – POOR PERFORMANCE (Cont'd)



Setting the required standard

- > Some requirements of the job are so obvious that the employee's attention does not need to be drawn to them:
 - “a van driver ... does not need to be warned that he should not drink before he drives; the personnel director of a large company does not need to be told that he should not make racist or sexist comments about or to members of his staff; a pilot does not need to be warned that he should not crash the plane.”

[Burns v Turboflex Ltd EAT/377/96](#)

CAPABILITY DISMISSAL – POOR PERFORMANCE (Cont'd)



Monitoring the Required Standards

- > Probationary periods
- > Appraisals /reviews
- > Documents!!!
- > Provide additional training/support as required
- > Deal with problems at early stage
- > Consider formal warnings, ideally following [ACAS guidelines](#)

CAPABILITY DISMISSAL – POOR PERFORMANCE (Cont'd)



Dismissal Process

If no improvement, despite reasonable management actions, then:

- > Final dismissal meeting
- > Ensure employee has all evidence beforehand
- > Can be accompanied by work colleague or TU rep
- > Employee given full opportunity to speak
- > Employer considers matters objectively and makes decision
- > Right of appeal

CAPABILITY DISMISSAL – ILL HEALTH



- > As above, a fair process will need to be followed
- > Employer should establish the true medical position
- > Consult with the employee before deciding whether to dismiss
- > *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position".*

[East Lindsey District Council v Daubney \[1977\] ICR 566](#)

CAPABILITY DISMISSAL – ILL HEALTH (Cont'd)



- > Relevant factors for reasonable dismissal:
 - The nature of the employee's illness
 - The prospects of the employee returning to work and the likelihood of the recurrence of the illness
 - The need for the employer to have someone doing the work
 - The effect of the absences on the rest of the workforce
 - The extent to which the employee was made aware of the position
 - The employee's length of service

CAPABILITY DISMISSAL – ILL HEALTH (Cont'd)



Long term absence – factors to consider

- > Ascertaining the up-to-date medical position
- > Consulting with the employee
- > Considering the availability of alternative employment
- > Company sick pay

CAPABILITY DISMISSAL – ILL HEALTH (Cont'd)



Short term absence – key elements for fairness

- Review the pattern of absences and the reason for them
- Warn the employee of the required improvement in attendance, giving them the chance to make
- Consider whether there is the required improvement in attendance; if there is not, dismissal is likely to be reasonable
- The mere fact that an employee is fit at the time of dismissal does not necessarily make the dismissal unfair; one has to look at the whole history and the whole picture.

> **BUT....**

CAPABILITY DISMISSAL – ILL HEALTH (Cont'd)



..... be wary of discrimination risks

- Long and/or short term absences can be linked to disability
- Even if not disclosed, ETs have found employers, "should have known" about disability
- Another reason why up to date medical information is important
- Avoid discrimination
- Positive obligation to put in place reasonable adjustments

CAPABILITY DISMISSAL – QUALIFICATIONS



Recap: Dismissal will relate to an employee's qualifications if it relates to any "*degree, diploma or other academic, technical or professional qualification*" relevant to the employee's position

Common situations:

- > Soon after recruitment, where it emerges that the employee does not have the necessary qualifications
- > When the employee is employed on the understanding that they will obtain certain qualifications and they fail to do so
- > Where the employer's requirements change. Tribunals have accepted that employers may reasonably require employees to obtain additional qualifications during employment
- > Where the employee loses their qualifications during employment. Most commonly, their driving license.
- > Again, fair process, discussions with employee and search for suitable alternative vacancies important (certainly for employees over two years' service)

ANY QUESTIONS?



- Kevin Duffy

Tel: 0141 221 3818

Email: kevinduffy@scottishengineering.org.uk

- Thank You