Labour & Employment Law

Fair Dismissal On the Grounds of Capability
by Lisa Sturgeon

The dismissal of employees on the grounds of capability is a very topical and emotive issue and it is an issue which employers are faced with on a day to day basis. Indeed, in the recent climate of austerity and mass redundancies in both the public and private sector, employers have often sought reasons other than redundancy to dismiss employees to avoid a redundancy payment – capability and underperformance are fair reasons for dismissal and thus avoid the need for such payments.

Definition of Capability

Capability refers to an individual’s ability to perform the work expected of them to the required standards. Capability, in relation to an employee, is defined in the Employment Rights (Northern Ireland) Order 1996 (Article 130 (3)(a)) as “his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.”

Hence, capability falls into two categories – an employee’s incompetence and also his inability to do his job as a result of illness.

1. Incompetence or poor performance – this occurs where an employee is simply incapable of delivering work to the required standard. In a recent report by the CIPD, it was noted that poor staff performance is one of an employer’s most common complaints.

Indeed, managers have a tendency to avoid dealing with employees and their work standards particularly if an employee is potentially litigious.

However, ignoring the issue can demotivate other staff so tackling poor performance firmly is a must. That said, great care must be taken to ensure that the incompetence is not related to a disability which could result in a disability discrimination claim. This issue will be considered later in the presentation.

2. Illness – an employee’s illness can make it impossible for them to perform their duties if they are on long term sickness absence. This illness can be physical or mental.

An employer must take great care to ensure that absences are managed effectively – a balance must be struck so that employees with health problems are supported to stay in or return to work.

Steps to Ensure a Fair Capability Dismissal

Capability is one of five potentially fair reasons for dismissal. To avoid potential unfair dismissal claims, an employer must not only get the procedure correct but also be able to show that capability is the actual reason for the dismissal.

When dealing with a capability dismissal, there are two questions a tribunal will expect an employer to be able to answer:

- First, did they honestly believe the employee was incompetent or unsuitable for the job? and
- Second, were the grounds for that belief reasonable?

In answering these questions, employers will need to be able to point to objective evidence. This will first of all help to ensure the fairness of any action taken, in the eyes of the employee, which could make it less likely that the decision will be challenged and viewed as discriminatory.

Also, and of equal importance, this evidence will be required to back up the assertions as to lack of capability. A tribunal cannot substitute its own view of the employee’s capability. An employer must show that there was evidence available to him of the employee’s incapability and that, relying on that evidence, it was reasonable to dismiss.

Incompetence/Poor Performance:

Proving incompetence/poor performance is not straightforward. In many cases, employers have appraisal or performance management systems in place that can be used to initiate capability proceedings when an employee is accused of not meeting certain standards.

It is imperative that such procedures are followed in order to ensure a dismissal is fair.

An analysis of case law suggests that there are a number of factors which a Tribunal will look for to see if an employee was given time and the correct support to improve before an employee was dismissed for capability on the grounds of poor performance.
Specifically, the Tribunal will look at whether an employer:

1. **Genuinely Believed** the employee was incapable of doing the job and if there were reasonable grounds for them to believe this;

2. **Carried out** a proper investigation of the employee’s performance;

3. **Told** the employee about the under-performance and gave clear warnings;

4. **Gave** the employee a reasonable chance to improve;

5. **Offered** the employee suitable alternative work, if this was possible.

6. The **tribunal** will also consider whether the decision to dismiss was within the range of responses of a reasonable employer.

### 1. Genuine Belief

In determining whether an employee genuinely believed the employee was incapable of doing the job, the tribunal will want to know exactly why an employee was dismissed.

### 2. Did an employer carry out a reasonable investigation of the employee’s performance?

A tribunal will look at whether an employer looked at why an employee was performing badly and whether there were any reasons that contributed to it. A tribunal will ask:
- what the employer did to investigate an employee’s performance, who they spoke to and what evidence they got;
- whether they could have done anything else to find out why the employee was under-performing; and
- were there any reasons why the employee was under-performing, such as ill health, family problems or stress?

### 3. Was an employee told about their under-performance?

A tribunal will look at whether an employee was warned about their under-performance and the consequences of failing to improve.

### 4. Was an employee given a reasonable chance to improve?

The tribunal will look at the length of time between an employee first being told there was a problem and the employee’s dismissal to ensure the employee was given enough time to improve.

### 5. Was the employee offered suitable alternative employment?

A tribunal will look at whether an employer offered an employee suitable alternative employment and whether more could have been done to find the employee other work. If an employee doesn’t have the skills to do the job, it may not be reasonable to offer alternative work. However, it will depend on the circumstances.

### 6. Was it reasonable to dismiss the employee?

Having considered all of the above, a Tribunal will consider whether the employer:
- genuinely found the employee incapable of doing their job after they did a proper investigation;
- used reliable evidence to support their claim;
- tried steps to help the employee improve, which failed and
- gave the employee enough time to improve.

### Ill Health Dismissals

Ill-health dismissals are also considered capability dismissals. Deciding whether to dismiss on the grounds of ill health is a finely balanced and difficult decision. Generally, in the absence of a catastrophic illness or accident, this will necessitate a process of consultation with the employee; a thorough investigation of the up-to-date medical condition and prognosis; and consideration of other options apart from dismissal.

For the procedure to be fair, the employer needs to have discussions with their employee at regular intervals. They also need to make sure the employee understands at what point dismissal may be an option.

This should involve personal contact between the employer and the employee. In addition, the employer should obtain up-to-date medical evidence from the employee’s general practitioner and, if appropriate, their hospital consultant.

Their discussions should also include a look at what steps the employer could take to get the employee back to work including any adjustments that may be necessary; and, where the employee is not in a position to return to their substantive position, perhaps think about alternative jobs.

A review of case law suggests that a tribunal will look for the following when they are trying to decide if it’s reasonable to dismiss an employee because she or he is unable to do their job because of long-term sickness.

They will want to know whether an employer:

1. **Carried out** a reasonable investigation about the employee’s condition, and whether it would be likely that the employee could return to work;

2. **Consulted** the employee before they made the decision to dismiss; and

3. **Made** reasonable efforts to explore other options, such as flexible working, adapting the workplace or finding other work for the employee.
As with any dismissal, a tribunal will always ask itself whether the decision to dismiss an employee was within the range of responses that a reasonable employer could be expected to make. In doing so, a tribunal will look at the following:

- How long an employee has worked for the employer;
- How an employee’s absence affects the business and other staff.

A tribunal might ask:

1. Could other staff do the work or work overtime?
2. Could the employer hire a temp or use agency staff?
3. What would it cost the employer to arrange temporary cover?

- How important is it for an employer to have a permanent employee?
- Is an employee likely to get better?
- Was the reason for the absence work-related?

NHS Fife Health Board v Stockman (2014) UKEATS/0048/13/JW

In this recent case, the EAT had to decide whether it was fair to dismiss an employee on grounds of capability without fully investigating all the medical evidence surrounding the case.

Facts

Stockman, a doctor, was convicted of driving while under the influence of alcohol. His registration with the General Medical Council (GMC) was suspended on an interim basis for 18 months.

He was signed off as unfit for work while undergoing a course of treatment for alcoholism involving attendance at a centre most of the day and part of the evening.

Given Stockman’s suspension from the medical register, the employer said he would have to be dismissed on grounds of capability unless he could be redeployed. No alternative position was available. At an internal appeal hearing against the dismissal, Stockman presented evidence to the effect that:

- He was likely to respond to alcoholism treatment
- His suspension from the GMC was likely to be revoked
- Most doctors in his position did recover
- Other NHS employers would not dismiss at an early stage of receiving treatment.

The appeal failed, Stockman was dismissed after six weeks on suspension, and claimed unfair dismissal.

Tribunal

An employment tribunal found the dismissal for capability was unfair. The employer argued that it did not need any medical evidence because it would have made no difference – Stockman’s registration as a doctor was suspended so he could not fulfil his contractual duties.

The tribunal noted that the test of reasonableness involved looking at the actions of an employer in the same line of business or profession.

The expert medical evidence presented showed that NHS employers would always get an up to date medical report, that a doctor was unlikely to be dismissed while receiving treatment, and the majority succeeded in getting back to work.

In addition, an HR specialist, who had been an assistant secretary at the doctors’ professional body, the BMA, for seven years, stated that she had never known of a doctor being dismissed in these circumstances.

The employer appealed, arguing that the tribunal had substituted its own view for the employer’s and had wrongly admitted evidence of the supposed attitude of other health service employers.

EAT

The Employment Appeal Tribunal rejected the appeal, holding that the tribunal was entitled to decide that the employer had applied its policy in such a way as to make its decision to dismiss inevitable, and had acted unfairly in deciding to dismiss Stockman without having considered vital information.

Comment

The practical implications arising from this case are threefold. In circumstances where an employer is questioning employees’ ability to carry out their duties:

- Any decisions must be based on the most up to date medical opinion
- Where employees provide their own medical evidence, it must be given careful consideration.
- If there is any doubt about the medical evidence, the employer should obtain its own medical report, before taking a decision to dismiss.

Conclusion

Performance management procedures and sickness absence procedures are not difficult to implement but they do require patience and time.

Hastily pushing through the procedures, while not adhering to all the steps that the procedure requires, can cost an employer in the long run as they may end up in a long, drawn out litigious unfair dismissal claim.

Tribunals expect employers to follow a number of steps and consider a number of questions before dismissing an employee. The benefits of following such steps significantly outweigh the risks. I would encourage all HR practitioners to follow such steps and if, in any doubt, always seek legal advice.

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