



Common Mistakes to Avoid When Dismissing Employees, Capability Procedures and Dismissing Fairly for SOSR

Wednesday 22 June 12noon-1pm
Employment Law Webinar



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Common Mistakes to Avoid When Dismissing Employees

Outline

- Resourcing
- Suspension
- Investigation
- Documents
- Back-seat driving
- Paperwork
- Dismissal
- Timing



Context

- Range of reasonable responses
- Breach of contract
- Acas Code



Resourcing

- Investigation
- Hearing
- Appeal



Suspension

- Implied right
- Necessary
- Knee-jerk
- Not a neutral act
- Tactics



Investigation

- Prompt
- Ambit
- Confirmation bias
- Look both ways



Documents

- Inter-staff communications
- Disclosable
- Privilege
- DSAR



Back-Seat Driving

- Royal Mail Group Jhuti [2019] UKSC 55

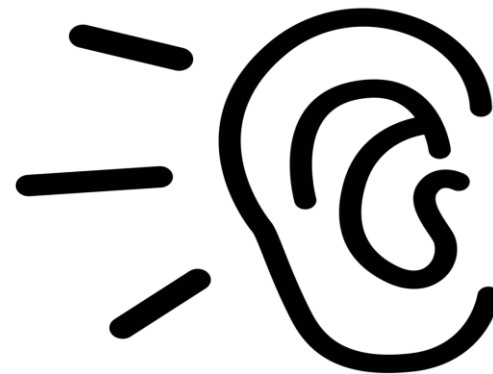


Paperwork

- Invite letter
- Importance of clear thinking and precision
- Cross refer to express terms
- Evidence relied on

Disciplinary Hearing

- Fairness
- Deal with employee's case
- May need exploration or teasing out



Dismissal

- Find facts
- Then consider sanction
- Consult d/p procedure
- Mitigating factors



Off-Piste

- Only dismiss for allegations raised



Timing

- Effective date of termination for statutory purposes
- *Gisda Cyf v Barratt* [2010] UKSC 41



Timing

- Notices at common law
- Newcastle on Tyne Hospitals NHS Foundation Trust v Hayward [2018] UKSC 22





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Capability Procedures

Capability Procedures



“If we learn from our mistakes, shouldn’t I try to make as many mistakes as possible?”

Capability Procedures

- Capability in general
 - The law
 - Performance
 - Ill-health
- Following a fair procedure
 - Performance improvement procedures
 - Long term illness
- Disability
 - Discrimination
 - Reasonable adjustments

The Law

- Capability is one of the five potentially fair reasons for dismissal
 - S98(1) and (2) Employment Rights Act
 - (1) In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show-
 - (a) the reason for dismissal
 - (b) that it is a reason falling within s(2) or some other substantial reason
 - (2) A reason falls within this subsection if it-
 - (a) Relates to the capability or qualifications of the employer for performing work of the kind he is employed to do,

The Law

- It is distinct from conduct
- Think of capability as “can’t do” rather than “won’t do”
- Assessed by reference to skill, aptitude, health or any other physical or mental quality
- Capability concerns can arise where:
 - There are performance issues – the employee isn’t producing work of the required standard
 - There are ill-health issues – the employee can’t work to the required standard (or at all) because of a health condition

The Law

- But having a fair reason is not enough to avoid an unfair dismissal claim.
- S98(4) Employment Rights Act
 - Where an employer has a fair reason the determination of whether a dismissal is fair or unfair:

“Depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee” and “shall be determined in accordance with equity and the substantial merits of the case”

The Law

- The employer need only establish an honest belief held on reasonable grounds that the employee was incapable of performing his job— Taylor v Alidair [1978]
- Before dismissal an employer should inform the employee of the ways in which the work is being performed inadequately, what is required, inform him he may be dismissed and offer the opportunity to improve – James v Waltham Holy Cross [1973]
- Before dismissing for reasons of ill-health an employer should take reasonable steps to inform themselves of the medical position. In light of that evidence it must be reasonable for the employer to conclude the employee was not capable of performing his duties.— D B Schenker v Doolan [2011]

Following a fair procedure – performance



Following a fair procedure – performance

- So the law provides that:
 - Poor performance is potentially a fair reason to dismiss
 - An employer must show it has acted reasonably in dismissing for that reason
- An employer will therefore need to have good evidence of:
 - The poor performance
 - That the employee was informed of the employer's concerns
 - That the employee was informed of the standards required
 - That he was given the opportunity to improve

Following a fair procedure - performance

This should include:

- Appraisal records
- Evidence that a formal procedure has been followed
 - Performance improvement plans
 - Time and help to improve

Informal Procedures

- It is always best to try to resolve issues informally
- But don't be too informal or keep having informal discussions if this doesn't address the concerns
- Many employers will initiate an informal performance improvement plan before proceeding to a formal procedure
 - Evidences concerns
 - Conveys seriousness of concerns better than a series of informal discussions
 - Gives more time to remedy concerns

Formal procedures

- If an employee fails to improve after informal steps then it will be necessary to start a formal procedure
- All employers should have formal written procedures for addressing performance concerns – quite often a disciplinary procedure will combine both conduct and capability into a single document
- Following and recording the procedure will allow employers to evidence that a dismissal is fair in the event that dismissal is necessary

A fair procedure for addressing performance

1. Gather evidence of the poor performance
 - Appraisal records
 - Sales figures or other performance indicators
 - Feedback from others
2. Hold a first meeting with the employee
3. Give the employee time (and where necessary training) to improve
4. If there is no improvement hold a second meeting with the employee
5. Give the employee time to improve
6. If there is no improvement then hold a meeting at which the decision to dismiss may be taken

The First Meeting

- Formal meeting and procedure – ACAS Code on Disciplinary and Grievance Procedures applies:
 - Give reasonable notice and copies of any evidence so do send a formal “invitation” letter;
 - Right to be accompanied
 - Do take minutes
- Do explain the concerns fully
- Do ask whether there are any reasons which may explain poor performance and be prepared to adjourn to consider these
- Do ask if the employee requires any training or other assistance
- Do consider and communicate the remedial action to be taken and agree targets for improvement
- Consider if a written warning should be given in light of the discussions and inform the employee of the consequences of a failure to improve
- Do write to the employee to confirm the outcome of the meeting and remedial actions and targets

Time to Improve and Support

- Acas Code recommends at least two warnings are given before a dismissal (unless there is gross negligence)
- Time to improve must be given between the warnings – but what is a reasonable timescale?
 - Fact sensitive, relevant factors include:
 - The quality and length of previous service
 - The requirements of the business and the business cycle
 - The improvement required
- A failure to offer appropriate support or training may be unreasonable
- Diarise meetings to review progress

Further meetings

- If the employee fails to improve then further meetings will be necessary
- The number of further meetings depends on the decision taken by the employer with regard to warnings – but Acas Code recommends at a least a written and final written warning before dismissal
- Consider alternative roles with employee before dismissing – there is no duty to do so, but it will be more reasonable

Procedure – Ill-health

CS245180



'It's a sick note from Benson...looks like he's going for the long haul.'

Procedure – Ill-health

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. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done.

East Lindsey District Council v Daubney [1977]

Procedure – Ill-health

- Slightly different procedure to performance, particularly where there is chronic ill-health rather than a series of acute incidents
- When to start?
 - Usually 2 – 3 months of absence will trigger the employer to consider commencing a procedure
 - But depends on needs of business and nature of illness
- Must base decision on current medical position – employer needs to take reasonable steps to ascertain medical position
 - Obtain medical report
 - AMRA 1988

AMRA 1988

- Access to Medical Reports Act
- Provides employees with specific rights including:
 - Employer must notify the employee that they intend to apply for a medical report
 - An employer cannot apply to a medical practitioner for a report without the employee's consent
 - Employee has right to see medical reports provided to employer before it is sent and to withhold consent
- Employers should take care to provide information to employee about their rights and reasons for report, to record consent and should be aware that such reports will be special category data under UK GDPR
- GP vs specialist OHP
- What if employee will not consent?
 - Potential breach of contract/misconduct – so do examine contract of employment – but no case law here
 - Dismissal may be reasonable where employer has done all it reasonably can to obtain a report but employee will not consent

The Medical Report

- Usually the case that the Employer will ask the doctor to address certain questions:
 - What is the underlying condition
 - What is the prognosis for a return to work
 - Is the employee fit to perform their duties or will they be fit to perform their duties
 - Will ongoing treatment be required
 - Could there be a relapse
 - What adjustments might facilitate an earlier return to work
 - Is the condition a disability
 - Could any reasonable adjustments be made to mitigate the effect of the disability

The Meeting

- Once the employer has obtained medical evidence then it should meet/consult with the employee to discuss that evidence
 - Act promptly so the medical evidence does not become 'stale'
 - More than one meeting may be necessary to consult
- ACAS Code does not apply to ill-health dismissals but recommended that employers still allow the employee to be accompanied – and consider whether it is appropriate to widen the range of companions
- Warn the employee that dismissal is a potential outcome
- The key questions are whether a reasonable employer would determine from the evidence that the employee is incapable of returning to their duties (D B Schenker Rail v Doolan) and whether a reasonable employee would dismiss at that time, or give more time to recover (Harris v Monmouthshire County Council [2015])

Factors to consider

- In determining whether it is reasonable to dismiss the employer should consider:
 - The employee's length of service, state of health and prognosis for return
 - The likelihood of further absence and the length of absence
 - If temporary cover is available and its cost
 - The needs of the business for work of the type done
 - The impact of absence on other employees and the size of the employer
 - Whether reasonable adjustments or alternative roles can be offered
 - The extent to which the impact of the illness has been communicated to the employee
 - Is there a permanent health insurance policy or ill-health retirement option in place
 - Whether there is alternative employment available

Factors to consider

- For persistent short term absences rather than a chronic absence, then the employer should warn the employee before dismissal and set attendance targets and give time to improve much as it would in a performance dismissal.
- The proper approach in such cases is to:
 - 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 representations.
 - Consider whether there is the required improvement in attendance; if there is not, dismissal is likely to be reasonable.
 - International Sports Co Ltd v Thompson [1980]
- A dismissal will be on notice
 - notice may have to be paid at usual rate rather than SSP
 - s88 ERA

The Impact of Disability

- Disability will clearly be a factor to consider in both performance and ill-health capability procedures.
- S6 Equality Act 2010
 - A person has a disability if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities
 - Plus cancer, HIV+ status and multiple sclerosis are all conditions deemed to be a disability
- Potentially covers a very wide range of conditions
- It is a matter of fact that you are more likely to come across disabilities when dealing with people who are chronically ill.

Disability and Reasonable Adjustments

- **S15 Equality Act**
 - Discrimination arising from disability – perhaps more likely than direct discrimination
 - A discriminates against B if A treats unfavourably because of something arising in consequence of B's disability where A cannot show the treatment is a proportionate means of achieving a legitimate aim
- **S19 Equality Act**
 - Indirect discrimination
 - Applying a provision, criterion or practice which puts persons with a disability at a particular disadvantage
- **S20 Equality Act**
 - Duty to make reasonable adjustments

Reasonable Adjustments

- An employer should consider adjustments as part of any ill-health capability procedure as a matter of good practice
- But it must consider reasonable adjustments where the employee is disabled
- Reasonable adjustments can apply to:
 - A Provision Criterion or Practice (PCP)
 - Physical features
 - Auxiliary aids
- Common reasonable adjustments in ill-health procedures:
 - Discounting sickness which arises from disability as counting towards overall absence levels
 - Disapplying trigger points for levels of absence
- Whether an adjustment is reasonable depends on the resources of the employer

Tips

- Don't wait too long to address capability issues
 - Do give informal measures a chance but don't delay if they don't work
 - Frustrating for employers to discover that a formal process can take months
 - Do be aware of the two year qualification period that applies to unfair dismissal claims
- Do be honest in appraisals and performance reviews
 - Valuable evidence of poor performance
 - But reluctance to confront employees means employers may not record concerns
- Do keep minutes and records of performance concerns
 - Including informal chats
- Do ensure your policies and procedures are up to date



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**Dismissing Fairly
for SOSR**

Some other substantial reason

“In determining... whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason.... for the dismissal; and*
- (b) that it is either a reason falling within subsection 2 or **some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held**”.*

Employment Rights Act 1996, section 98(1)



Some other substantial reason

Employment tribunal decisions



Search

4,206 decisions

By jurisdiction Unfair Dismissal

Search

4,487 decisions

By jurisdiction Unfair Dismissal

Search

2,418 decisions

By jurisdiction Unfair Dismissal

Breaking SOSR down

- Substantial.
- Other reason.
- Overlap with other section 98 reasons.

Fair procedure

- ACAS code does not expressly apply.
- But procedural fairness still an important factor in SOSR dismissals.
- If disciplinary procedure has been or should be used, then follow ACAS Code.
- **Jefferson (Commercial) LLP v Westgate [2012]**.
- *“No responsible employer will, on reflection, wish to reach a decision having a material effect on one of his employees whether it is redundancy, mobility, switch of job or something similar without discussion, explanation or consultation”.*

White v Reflecting Roadstuds Ltd [1991] ICR 733

- In rare cases, Tribunals will recognise that a procedure would be meaningless.

Business reorganisation - refusal to accept new contractual terms

Glasgow City Council v Deans [2005]:

- Employer must show evidence to demonstrate non-trivial business reasons for the change.
- A balancing act.

▪ **Scott and Co v Richardson [2005]:**

- ET can't substitute its own opinion for that of the employer on whether the change is advantageous to your business.

▪ **Catamaran Cruisers Ltd v Williams [1994]:**

- No need for employer to prove reorganisation was crucial to survival of the business.



What if a third party wants you to dismiss a staff member? (1)

- Potentially fair for SOSR.
- Relevant factors:
 - Importance of the customer's business.
 - Threatening to end business with you?
 - Consider injustice to the employee.
- **Henderson v Connect (South Tyneside) Ltd [2010]:**
 - Bus driver dismissed at behest of Council.
 - Court of Appeal held dismissal was fair.
 - Tried to get Council to change its decision.



What if a third party wants you to dismiss a staff member? (2)

▪ **Petrofac Offshore Management v Olley [2005]:**

- Employer criticised.
- Insufficient efforts to persuade the third party.
- Failure to properly consider redeployment.



Breakdowns in trust and confidence/reputational damage

▪ **Wadley v Eager Electrical Ltd [1986]:**

- Employee's wife convicted of dishonesty.
- Dismissal of employed husband.
- SOSR.
- Customer evidence.

▪ **Leach v OFCOM [2012]:**

- Police disclosures.
- Reputational risk if matter became public.
- Duty to interrogate the police disclosures.



Conflicts of interest (1)

▪ **Simmons v SD Graphics Ltd [1979]:**

- Long-serving and well regarded employee.
- Husband joined a direct and aggressive competitor.
- Wife dismissed.
- Employer entitled to protect own interests.



Conflicts of interest (2)

- **Skyrail Oceanic Ltd v Coleman [1980]:**
 - Risk of “industrial espionage”.
 - Relatively junior employee.
 - Confidentiality undertaking.
 - Dismissal unfair.

- **Weal v Insulpak [1963]:**
 - Father/daughter relationship not comparable.
 - Employee not exposed sufficiently to confidential information.



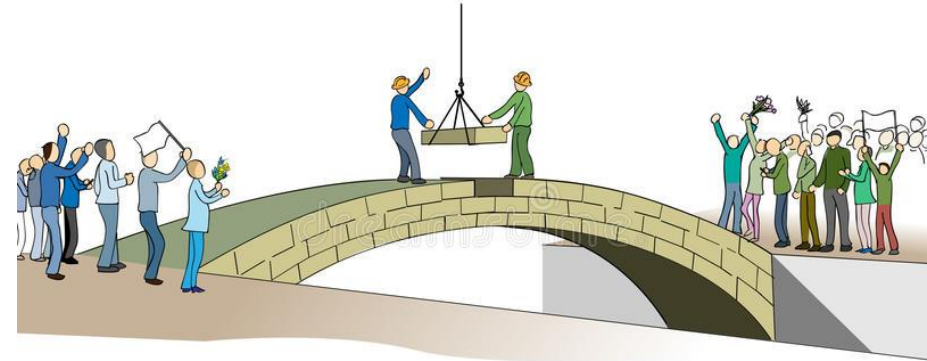
Personality clashes

- **Treganowan v Robert Knee and Co Ltd [1975]:**
 - Employee's frank discussions about sex life.
 - Tense environment.
 - Size of workplace relevant.
- **Perkin v St George's Healthcare NHS Trust [2005]:**
 - Employee's difficult personality alone insufficient.
 - How it manifests in relationships with colleagues etc. can be sufficient.



Personality clashes

- Conflict must be causing substantial disruption to the business.
- Before dismissing, other steps must be taken:
 - Redeployment
 - Attempting to mediate
 - Changing work patterns
- Is the employee interested in repairing relationships?
- Be aware of discrimination risks.



Tips

- Calculated use of SOSR
- Avoid knee-jerk reactions.
- Consider alternatives, think creatively.
- Consider the employee's particular role and duties.
- Remember a prosecution does not mean a conviction.



Any Questions?

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