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Fair Dismissal On the Grounds of Capability

Introduction

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.

This session will look at the definition of capability in terms of employees' performance at work, the steps an employer should follow so the matter can be progressed through the disciplinary or capability procedures, the obligations on employers to act reasonably when dismissing employees on the grounds of capability, and thereby avoid Tribunal claims for unfair dismissal and discrimination, and what an employer can do to minimise costs.

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 employers' 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, the other four reasons being misconduct, redundancy, contravention of a duty or restriction and some other substantial reason. Hence, 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 contemplating a capability dismissal, it is important therefore to get to the bottom of the issue. In particular, does the individual know what is required of them or are they simply ignoring instructions? This may mean that the matter is one of conduct, rather than capability, and should be treated as such. The question is whether the employee "can't" do the job or "won't" do the job.

If it is clear that it is a capability situation, 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. Any deviation from such a procedure will render the dismissal automatically unfair. The Labour Relations Agency has published a useful guidance on managing poor performance. This is available at http://www.lra.org.uk/advisory_guide-managing_poor_performance_-_august_2012.pdf.

An analysis of case law, through the years, 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. An employer doesn't have to prove that an employee was incapable of doing the job. They just have to show that they genuinely believed the employee couldn't do it and there were grounds for believing this. This can be difficult to challenge.

In order to show that there were reasonable grounds for believing that the employee was under-performing, an employer will have to prove there were reasonable grounds for believing an employee was incapable of doing the job. Evidence they may use includes:

- examples of an employee's work;
- statements from line managers;
- performance targets that an employee has missed

If an employee thinks they were set unreasonable performance targets, an employee will have to prove that no reasonable employer would have set that target. An employer is entitled to set tough performance targets, particularly if others meet them. An employee will have to show that the target was unachievable or that they were the only person asked to meet them and that colleagues were set easier targets.

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?

If there were other reasons why an employee was under-performing, an employer should acknowledge this and the tribunal will want to see what support the employee was given.

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. A tribunal will want to know whether:

- the employee was told before that their performance needed to improve and what action had been taken against them
- the employee was warned that s/he could be dismissed if their performance didn't improve
- the employer offered to support the employee with training or mentoring.

If an employee was offered support, a tribunal will want to know, when it took place, whether it was adequate and whether it helped. **I**f an employee wasn't offered support, a tribunal will want to know what kind of support the employee needed, how it would have helped and how easy would it have been for the employer to do this.

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.
How long an employee should be given to improve and how many warnings s/he should have received before they were dismissed will depend on:

- how long the employee was employed;
- whether there were any recent changes in the workplace or in the employee's job, which the tribunal would expect an employer to provide support for;
- whether the employer co-operated with the process;
- whether there were other reasons for the employee's under-performance, such as family problems or ill health; and
- whether the employee made any improvement at all.

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. If an employee struggled with a change of duties, for example, it may have been reasonable to consider moving the employee to another job rather than dismissing the employee.

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.

If an employer can show that it has taken all of the above steps, a tribunal will usually consider it reasonable for an employer to dismiss because the employee is incapable of doing the job.

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.

As with underperformance, any sickness absence procedure must be followed when dealing with an employee on long-term sickness absence. The Labour Relations Agency published guidance in February 2013 which sets out the steps an employer should take when dealing with an employee off on long-term sickness absence:

http://www.lra.org.uk/managing_sickness_absence_february_2013_-_3.pdf.

A review of case law suggests that a tribunal will look for the following things 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.

The tribunal will also look at the general legal tests that apply to unfair dismissal claims. These include whether the employer followed the correct disciplinary and dismissal process according to the Statutory Dispute Resolution procedures.

1. **Did the employer carry out a reasonable investigation of the employee's condition?**

   A tribunal will look at whether an employer looked into an employee's medical condition to find out the likelihood of the employee returning to work. They will want to know:
   - how long the employee was off work and whether the employer had an accurate record of the employee's sick leave;
   - what the employer did to get information about the employee's medical condition;
   - what any medical evidence said about the employee's condition, including the ability to do alternative work or when the employee might be likely to return to work; and
   - whether the employee was due to have any further treatment that might have improved their chance of returning to work.

2. **Did an employer carry out a reasonable consultation with the employee?**

   An employer can dismiss an employee on the grounds of his ability to do the job because of long term sickness. Before they do this, they should follow the disciplinary and dismissal process according to the statutory dispute resolution procedures. A tribunal will look at whether:

- The employee was warned before the disciplinary process that their employment could be ended so that they were fully aware of the seriousness of the situation;
- The employee was shown copies of any medical evidence and given a chance to respond to it and the employers' views;
- If the employee disagreed with the medical evidence, could the employee provide their own medical evidence and did the employer take this into account?

If an employee was too ill to attend a disciplinary meeting, a Tribunal will also want to know if an employer considered:

- postponing the meeting, or
- holding the meeting somewhere more convenient for the employee, or
- agreeing that the employer could supply written evidence.

3. **Did an employer make reasonable efforts to help an employee return to work?**

A tribunal will look at what an employer could have done to make it easier for an employee to return to work. This could include finding the employee some work, such as light duties, part-time work or another job or making adjustments to the workplace to help the employee do their job.

If an employer can show that they did these things and discussed them with the employee but the employee didn't take up the offer, they may be able to justify dismissing the employee.

However, an employer only has to make a reasonable effort and a tribunal will also look at how big the employer is and how easy it would be to make the changes.

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 things:

- How long an employee has worked for the employer – for example, it could be considered reasonable for an employer to put up with a year's sick leave if an employee worked there for a long time, but this may be considered less reasonable if an employee has only worked a short time.

- How an employee's absence affects the business and other staff - an employer should look at how they could cover an employee's work while the employee is absent. 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**?** Depending on the work situation, it may be harder for an employer to manage without an employee.

- Is an employee likely to get better? A tribunal will want to know whether an employee is likely to get better and when this would be; if an employee needs further treatment, when this will happen and if an employee is likely to make a full recovery, it may not be reasonable to dismiss (***McAdie -v- Royal Bank of Scotland [2007] EWCA Civ 80)*.**

- Was the reason for the absence work-related? If the reason an employee is off sick is because of an employer's negligence, it may still be reasonable to dismiss if an employee is unlikely to be fit enough to return to work and they can't offer an employee suitable alternative employment. However, a tribunal will look to see if an employer did everything they possibly could to help the employee. If it seems that the employee is unlikely to return to work, the employer should consider any contractual entitlements and benefits to which they may be entitled before dismissing them, in particular enhanced ill health benefits ***(First West Yorkshire Ltd t/a First Leeds -v- Haigh UKEAT/0246/07; [2008] IRLR 182).***

Carrying out the Dismissal

Generally, issues to do with capability develop over time. Tribunals therefore expect employers to provide a structured improvement programme or return to work programme which the employee is expected to complete over a set period. This should also make clear the consequences if an employee fails to improve or return, including dismissal.

Having said that, it may be reasonable for an employer to dismiss an employee without warning if the consequences of a single act undermine their confidence in the ability of the employee to do their job. For example, in ***Taylor -v- Alidair Ltd 1978, ICR 445, CA***, a pilot was held to have been fairly dismissed after he landed an aircraft negligently and put the lives of passengers at risk.

If an employee's performance does not improve or the employee fails to return, employers are required to follow the Statutory Dispute Resolution Procedures before taking the decision to dismiss. A failure to do so will render the dismissal automatically unfair.

1. The employer must write to the employee to invite them to a meeting. The employee must be given sufficient information about the circumstances that will be taken into account and the possible outcomes (i.e. that dismissal will be a possibility) to allow the employee to respond meaningfully. The employee must also be given the right to be accompanied to this meeting.

2. The employer should hold a meeting with the employee and give them the opportunity to present their case against dismissal. The main question will be whether it will be reasonable to expect the employer to keep the employee's job open for any longer.

   The outcome of the meeting should be confirmed to the employee in writing. If the decision is to dismiss, this must be confirmed to the employee with the reason for the dismissal, the effective date of dismissal and the employee should be offered the right of appeal from the dismissal decision.

3. If an appeal is requested, an appeal meeting should be held and any outcome confirmed in writing to the employee.

Two Recent Capability Dismissal Cases Considered

1. BS v Dundee City Council *[2013] CSIH 91*

This recent Scottish Court of Session case has provided some welcome clarity for employers who are unsure of how to tackle ill-heath dismissals.

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Facts

BS was dismissed on ill-health grounds by Dundee City Council in September 2009. His absence started in September 2008 and was caused by a foot injury. However, the reason for the absence changed after he was arrested in connection with an allegation made by a woman with whom he had been having an affair. The arrest triggered a nervous debility which spiralled into depression and anxiety, causing him to remain off work for 12 months.

The local authority met with him and then sent him to see an occupational health nurse a few times during his absence. The reports that came back, although vague, confirmed he was unfit for work. After a while the employer learned of the criminal allegation against the employee and began disciplinary proceedings. The criminal allegation was later dropped, and so were the disciplinary proceedings, but the process still caused BS to relapse with regard to his mental health.

By September 2009, the employer had lost patience with his continued absence so it obtained a report from an occupational health physician. The report indicated that he was making progress and would be fit to return to work (on a phased basis) within one to three months. Nevertheless, the employer concluded there was no reasonable prospect of him returning to work in the short term and he was dismissed. BS complained to the employment tribunal that he had been unfairly dismissed.

Tribunal

The employment tribunal held that the employer had been right to try to consult with BS about his health. However, it decided the quality of the consultation was poor. Its main criticism was that the employer, having received the physician's report, had failed to clarify the true medical position regarding BS' ability to return to work. The tribunal held no reasonable employer would have dismissed him after receiving that report, and no reasonable employer would have disregarded the advice contained in it. Unhappy with the tribunal's finding of unfair dismissal, the employer appealed to the Employment Appeals Tribunal.

EAT and Court of Session

The EAT reversed the decision, finding that the tribunal had placed too much emphasis on the principles of procedural fairness. BS challenged the EAT's decision and appealed to the Court of Session. Although the court stated the tribunal had placed too much weight on the employer's failure to obtain further medical advice before dismissing BS, it preferred the tribunal's decision to that of the EAT. The case was sent back to the employment tribunal to be reconsidered.

Comment

While this case is not binding on tribunals in England and Wales or Northern Ireland, tribunals will certainly find it persuasive, and it provides useful guidance to employers of the main issues to consider when deciding whether to dismiss an employee on ill health grounds. These are whether:

- a reasonable employer would wait any longer to dismiss, taking into consideration any outstanding entitlement to sick pay, the availability of temporary staff and the size of the business

- sufficient and meaningful consultation with the employee has taken place, balanced against medical evidence
- reasonable steps have been taken to discover the prognosis for the employee's illness. Employers are not required to obtain a detailed, specialist medical report, but they have to ensure the right questions are asked and answered.

An employee's length of service, while relevant, is not conclusive when looking at these issues. However, tribunals may think employees who have served the employer loyally and performed to a high standard are more likely to return to work as soon as they are able.

2. ***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. But the tribunal found that if the employer had taken a less strict approach to the operation of its policy, it may well have considered that an up to date medical report would have been valuable when reflecting on what would have been reasonable in the circumstances.

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. So, the dismissal was outside the range of reasonable responses.

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. The medical opinion evidence was admissible and the tribunal was entitled to hold that the employer had not carried out a reasonable investigation and had not acted fairly in all the circumstances.

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.

Avoiding Disability Discrimination Claims if dismissing on the grounds of Ill-Health or Underperformance?

If an employee is disabled, they are entitled to greater protection in terms of the employer's obligations to consider and make reasonable adjustments that may include modifications of attendance policies and redeployment opportunities.

1. Modification of policies

As part of the duty to make adjustments, employers may have to modify or be more flexible in applying their attendance policies to discount absences arising from disability. However, the EAT held in ***Royal Liverpool Children's NHS Trust -v- Dunsby UKEAT/0426/05/LA; [2006] IRLR 351*** that there is no rule that an employer, when operating a sickness absence procedure, must discount disability-related absence. It also held that the Disability Discrimination Act did not mean that employers could not dismiss an employee who was absent either wholly or in part because of a reason related to their disability.

In the case of ***Royal Bank of Scotland v Ashton (2011) ICR 632***, the EAT held that the bank wasn't under a duty to relax their sickness policy as they had done in this case. However, that decision has now been overruled in the decision of ***Griffiths v Secretary of State for Work and Pensions*** (2015) EWCA CIV 1265.

Background

G was employed by the Secretary of State for Work and Pensions (SoS) as an administrative assistant. She had a number of periods of absence from work which were mainly due to a disability. The SoS operated an Attendance Management Policy (the Policy) which provided that formal action would be taken against an employee where her absences from work exceeded 8 days in any rolling period of 12 months (the Consideration Point). In May 2012, on her return to work from a continuous period of absence lasting 62 days, G was given a Written Improvement Warning under the policy and informed that further unsatisfactory attendance could lead to more serious sanctions. After pursuing an unsuccessful grievance, G presented a complaint to the employment tribunal in which she contended that two reasonable adjustments should have been made for her. They were:

- That the period of disability–related absence which led to the issue of the Written Improvement Warning should have been disregarded for attendance management purposes and the warning rescinded;

- The Consideration Point at which formal action would be taken against her should have been increased for the future by 12 days i.e. to 20 days in any rolling period of 12 months, to accommodate the fact that she was likely to have a higher level of sickness absence than non-disabled workers in the future and to reduce her risk of being dismissed for a reason related to her disability.

Was the duty to make adjustments engaged?

In resisting G's claim, the SoS argued that the duty to make reasonable adjustments had not been triggered at all. He contended that the application of the Policy to G had not placed her at a substantial disadvantage in comparison with the employees who were not disabled because the Policy applied in the same way to all employees and a non-disabled employee with the same level of absence as G would have been subjected to the same sanctions. In support of this contention, the SoS submitted that the like-for-like comparison adopted by the House of Lords in ***Lewisham London Borough Council v Malcolm*** [2008] 1 AC 1399 in the context of disability-related discrimination under the Disability Discrimination Act 1995 should be applied when determining the proper comparator in a complaint of a failure to make reasonable adjustments.

The SoS also argued that the adjustments proposed by G were not "steps" within the meaning of section 20(3) EqA, because they would not enable G to carry out her duties and might simply facilitate her absence from work.

Both arrangements found favour with the majority of the employment tribunal (ET) and with the EAT.G appealed to the Court of Appeal.

Duty to make adjustments may apply to an attendance management policy

The Court of Appeal had no hesitation in rejecting the Respondent's contention that the approach in ***Malcolm*** must be applied to a claim under section 20 of the EqA. Elias LJ pointed out that the nature of the comparison exercise in a complaint under section 20 is clear: one must simply ask whether the provision, criterion or practice (PCP) puts the disabled person at a substantial disadvantage in comparison with a non-disabled person. The fact that both may be subjected to the same disadvantage when absent for the same period of time does not eliminate the disadvantage, if the disabled employee is more likely to be absent than the non-disabled colleague. He decided that comments in ***Ashton,*** holding that in the context of attendance management policies the comparison was with persons

who were not disabled but were otherwise in the same circumstances, were incorrect. Hence both the ET and EAT were wrong to find that the s.20 duty was not engaged because the policy applied to all employees. Ms Griffiths was substantially disadvantaged by its application because she was more likely to be absent owing to her disability.

The Court of Appeal also rejected the Respondent's contention that "steps" within the meaning of section 20 are confined to measures that will enable disabled employees to return to work or carry on working. Elias LJ expressed the view that any modification or qualification to a PCP which would or might remove a substantial disadvantage to a disabled person is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for that step to be taken.

Although the Court of Appeal overturned the ET's conclusions on these two important issues of principle, it upheld the tribunal's alternative finding that, on the particular facts of her case, the adjustments that G had proposed were not reasonable. In the Court's view, it had been open to the majority of the ET to find that in all circumstances, including the length of G's future anticipated absences the suggested adjustments were not steps which the SoS could reasonably be expected to take.

However, Elias LJ emphasised that the fact that an employer may be under no duty to make positive adjustments to an attendance management policy does not mean that he will be entitled to dismiss the employee. The section 15 duty not to treat an employee unfavourably because of something arising from disability also requires an employer to make allowances for a disabled employee. If the employee is dismissed, the question will still arise as to whether dismissal is a proportionate response to the employee's pattern of absences in all the circumstances, including the important fact that the absences may be wholly or partly disability-related.

Practical implications of Court's ruling

It is understood that numerous tribunal claims were strayed pending the decision in ***Griffiths*** on the basis that, following ***Ashton,*** the duty to make reasonable adjustments might not be engaged by the application of attendance management policies to disabled Claimants. It now seems clear that, in any case in which a disabled person has disability –related absences which trigger the application of the policy, the duty to make reasonable adjustments will normally be engaged. It will be for tribunals to decide on the facts of each specific case what adjustments are reasonable. As Elias LJ explains in ***Griffiths,*** claims may also potentially be brought on the same facts for discrimination arising from a disability (s.15) or, perhaps, for indirect discrimination under s.19 EqA.

2. Redeployment

When a disabled employee is absent because they can no longer continue in their substantive position through ill health or injury, employers should consider redeployment as an alternative to dismissal if they are fit to work in some capacity. This will ultimately depend on whether there are vacant positions. The leading case remains that of ***Archibald -v- Fife Council*** *[2004] UKHL 32, [2004] IRLR 651* in which the House of Lords (now the Supreme Court) determined that, in certain redeployment circumstances, disabled employees may be treated more favourably than non-disabled employees. Their Lordships stated that the duty is triggered when it becomes apparent that the employee can no longer satisfy the requirements of their job description. This case confirmed that the duty to make adjustments entails a degree of positive discrimination. In cases of long-term absence, redeployment will

arise where the employee is fit to work but not in their substantive role. While it is generally the case that employers are not required to create a post where one does not exist, this may be a reasonable adjustment when there has been a complete reorganisation or restructure, as in ***Southampton City College -v- Randall*** *UKEAT/0372/05.* In this case, the EAT ruled that the legislation did not preclude creating a new post in substitution for an existing vacant post. In practice, however, these situations are likely to be limited.

3. Phased return

When an employer dismisses an employee rather than allowing them to make a phased return following an absence arising out of their disability, this may constitute a failure to make adjustments on the basis of that refusal, as in the case of ***Fareham College -v- Walters*** *EAT/0396/08, 0076/09.* However, the EAT said in ***Salford NHS Primary Care Trust -v- Smith*** *UKEAT/0507/10/JOJ* that this did not extend to rehabilitative work and career breaks.

Avoiding Age Discrimination Claims if Dealing with Older Workers

The number of UK workers over 65 has increased dramatically in the past 20 years, from 753,000 in 1993 to 1.4 million in 2011. With the abolition of the default retirement age (DRA), it means an employer can no longer force an employee to retire at 65 (or any other age) unless the company can objectively justify this. If an employer now chooses to retain a fixed retirement age, they need to be able to satisfy a tribunal that the age they've chosen is both appropriate and necessary.

While older workers may be perceived as having declining health or ability. the fact that an employee is older should make no difference to the capability procedure adopted. Employers should deal with any performance or health issues in the same way for all employees, regardless of age, to avoid discrimination claims. And they should avoid focusing discussions about future aspirations only on workers in certain age groups, which would also be discriminatory.

Employers should avoid not dealing with performance or capability issues in order to preserve older workers' "dignity". In the case ***Newey v Sainsbury's Supermarkets*** *(ET/2514387/09),* decided under the age regulations, the employer suggested early retirement to an older under-performing employee as an alternative to undergoing a capability procedure. The tribunal decided this constituted age discrimination.

Not dealing adequately with an older worker's capability or performance issue also risks an employee's disability being overlooked, and the possibility of the employer failing in its duty to make reasonable adjustments.

Guidance

The ACAS guidance for employers, Working without the default retirement age, while not

applicable in Northern Ireland, but certainly useful guidance, is useful when employing - or dismissing - older workers. It focuses on how to handle discussions on workers' future plans, or on performance issues. It suggests employers should:

- build workplace discussions into the appraisal system for all employees and conduct them at least annually (this also helps identify any training or development needs or any requirements for reasonable adjustments)
- address poor performance consistently for employees of all ages and establish reasons for it, and avoid falling into the stereotype that it is more likely to be associated with older workers
- Avoid asking questions which could be seen as discriminatory, such as suggesting an employee is preventing younger workers from progressing, and ask all employees open questions about their short, medium and long-term plans.

Conclusion

The above is an analysis of how to effectively carry out a capability procedure while adhering to due process. 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. It is evident, from the case law cited, that 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

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