

FAIR DISMISSAL OF EMPLOYEES ON THE GROUNDS OF CAPABILITY



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- How can I dismiss an employee who is not performing?



DEFINITION OF CAPABILITY

- 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.*”

CAPABILITY

- Incompetence or Poor Performance
- Ill Health



CAPABILITY DISMISSAL

- Capability – fair reason for dismissal
- **First**, did employer honestly believe the employee was incompetent or unsuitable for the job and
- **Second**, were the grounds for that belief reasonable?

FAIR DISMISSAL

1. Genuine belief the employee is incapable of doing the job:
 - examples of an employee's work;
 - statements from line managers;
 - performance targets that an employee has missed

FAIR DISMISSAL

2. Carry out a proper investigation of the employee's performance:
 - 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?

FAIR DISMISSAL

3. Clear warnings:

- 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.

FAIR DISMISSAL

4. Give the employee a reasonable chance to improve:

- 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.

FAIR DISMISSAL

5. Offer the employee suitable alternative work:
 - whether more could have been done to find the employee other work.

FAIR DISMISSAL

6. Is decision to dismiss within the range of responses of a reasonable employer?



REASONABLE RESPONSES

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.

III HEALTH DISMISSALS

- Carry out a reasonable investigation about the employee's condition:
 - 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.

III HEALTH DISMISSALS

- Consult employee before decision to dismiss:
 - Was employee warned before the disciplinary process that their employment could be ended so that they were fully aware of the seriousness of the situation;
 - Was employee 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?

III HEALTH DISMISSALS

- Reasonable efforts to explore other options.
 - Light duties;
 - Part-time work;
 - Another job;
 - Adjustments to the workplace.

DISMISSAL – WAS IT A REASONABLE RESPONSE?

- How long has employee worked for the employer?
- How does employee's absence affect business and other staff?
- How important is it for the employer to have an employee?
- Is employee likely to get better?
- Was reason for absence work-related?

STATUTORY DISPUTE RESOLUTION PROCEDURES

- Letter
- Meeting
- Appeal



RECENT CASES

- *BS v Dundee City Council [2013] CSIH 91*
- *NHS Fife Health Board v Stockman [2014]*
UKEATS/0048/13/JW

FAIR CAPABILITY DISMISSAL

- Avoiding Discrimination Cases – disability and age
- Disability – ***Royal Bank of Scotland v Ashton (2011) ICR 632***
- Now overruled by ***Griffiths v Secretary of State for Work and Pensions (2015) EWCA Civ 1265***