

UNFAIR DISMISSAL: THE CONDUCT VS CAPABILITY CONUNDRUM

Dismissals can often be tricky to navigate. Where conduct and capability concerns overlap and become intertwined, this can present further difficulties for an employer and can place the fairness of a dismissal in jeopardy.

Do I need a reason?

The Employment Act 2006 provides us with five potentially fair reasons for dismissal:

1. Capability or qualifications
2. Conduct
3. Redundancy
4. Illegality
5. Some other substantial reason – this serves as a “catch-all” provision and can be useful for employers handling more unusual scenarios that don’t fit neatly in any of the other reasons.

An employer who dismisses an employee without a fair reason lays themselves open to a claim for unfair dismissal. Remember that every employee has the right not to be unfairly dismissed once they have completed one year of continuous service.

Conduct vs Capability

Parties and Tribunals alike can struggle to determine whether a dismissal is on the ground of conduct or capability. Whilst both are potentially fair reasons, recent UK case law has confirmed that the distinction is important. This is because each reason requires a different analysis and approach.

Where an employee’s conduct is in issue, this is typically dealt with through a series of warnings and can sometimes take on a combative or adversarial manner. Where an employee’s capability is in issue, this is typically dealt with by way of reasonable adjustments and/or Performance Improvement Plans (**PIP**), often requiring the employer to play a more supportive role.

What is vital however is that the employer and employee are crystal clear about what it is that is putting the employee’s continued employment at risk. Where an employer is unsure about the distinction between conduct and capability, this can result in unfair procedures being followed or a lack of clarity in the procedure, which may render any subsequent dismissal unfair.

Sickness absence: conduct or capability?

The overlap between capability and sickness absence can often be tricky for an employer to navigate.

Whether it is persistent short-term absences or one long-term absence, sickness absence can have a significant impact on employers. Having consulted with the employee through meetings and written correspondence, sometimes an employer reaches the conclusion that dismissal is the only option. The first step in this process is setting out the reason for the dismissal.

Considering the potential interplay between sickness absence and disability, “sickness absence” is not a potentially fair reason for dismissal under Employment legislation. This does not mean that sickness absence cannot give rise to a dismissal, but the employer needs to be clear on the reason for dismissal from the outset as this will dictate the correct procedure to be followed.

For short-term absenteeism, the reason for dismissal will likely be “some other substantial reason” or potentially conduct where there has been continued unauthorised absences without valid reason, or where it can be proved that the absences were not for genuine ill-health.

For long-term absences however, this will likely constitute a capability issue. As discussed earlier, where dismissing for capability reasons, the employer will need to consider whether it has any duties under equality legislation to make reasonable adjustments or whether a PIP is appropriate in the circumstances.

Sickness absence considerations

It will not serve an employer well to jump straight to dismissal in the case of absence(s). An employer should therefore keep the following under consideration throughout the absence to help them determine the appropriate next steps:

- Whether the absence is genuine – this may determine whether it is a conduct or capability dismissal.
- Identifying the cause of the absence – is it work related?
- Determining what support measures, if any, are necessary and can be implemented.
- Identifying any patterns of absence.



- Arranging absence cover and support for the wider team (if required).
- Determining if the employee is likely to return to work (you may need the benefit of medical evidence or an Occupational Health report for this).

Ultimately the best way to avoid claims for unfair dismissal is to ensure that you are clear on the reason for dismissal, and that you follow the policies and procedures your company (hopefully!) has in place.

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