Capital Law

Capability Dismissals
How to derisk

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How do you de-risk capability dismissals in long-term sickness cases where:

01 OH is sitting on the fence, but a return to work seems unrealistic, and

02 the employee insists on returning but repeatedly and quickly falls sick again?

The Law

Capability Dismissal Risks- General Fairness

Employment Rights Act 1996

— **s. 94** (general right not to be unfairly dismissed)

— **s. 98 (2) (a)** (capability dismissals)

— **s. 98 (3) (a)** (assessment of skill, aptitude, health or any other physical or mental quality)

— **Holmes v Qinetiq Ltd (2016) UKEAT/0206/15, [2016] IRLR 664, [2016] ICR 1016** (application of ACAS Code)

Capability Dismissal Risks- Disability

Equality Act 2010

— **s. 6 (**Defining disability)

— **s. 13** (Direct discrimination)

— **s. 15** (Discrimination arising from disability)

— **s. 20** (Duty to make reasonable adjustments)

Medical evidence

— **Access to Medical Reports Act 1988** (AMRA)

— **UK GDPR-** Article 9(1)

Case Law

Hutchinson v Enfield Rolling Mills [1981] IRLR 318

Merseyrail Electrics 2002 Ltd v Taylor [2007] UKEAT/0162/07/MAA

Liverpool AHA v Edwards [1977] IRLR 471

East Lindsey District Council v Daubney [1977] IRLR 181

K Spencer V Paragon Wallpapers Ltd [1976] IRLR 373

BS v Dundee City Council [2014] IRLR 131

O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145

O'Donoghue v Elmbridge Housing Trust [2004] EWCA Civ 939

Case Law

DB Schenker Rail (UK) Ltd v Doolan [2011] 4 WLUK 345

Brightman v TIAA Ltd UKEAT/0318/19

Crampton v Dacorum Motors [1975] IRLR 168

Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471

CFS Management Services Ltd v Thomas [2012] UKEAT/0511

What can employers do?

Practical steps to de-risk capability dismissals

—Sickness absence policy

—Data protection policy

—Investigation & consultation

—Consider alternatives & adjustments

—Keep an audit trail

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