

Forward thinking.
Straight talking.

Constructive Knowledge

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Your speaker



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QUESTION

In a capability or disciplinary process, how do you deal with an employee with a drug or alcohol addiction, particularly when there may be an underlying disability?

Procedures

- Disciplinary or capability?
- Drug and alcohol policy?
- ACAS guidance
 - Deal with issues effectively and consistently
 - Ensure compliance with legal duties
 - Train managers to support workers seeking help
- Often treated as an illness
- Aim is to help recovery

Practical steps

- 1.** Keep accurate, confidential records of instances of poor performance or other problems
- 2.** Interview in private
- 3.** Concentrate on the instances of poor performance that have been identified and ask for reasons
- 4.** Ask could it be due to a health problem?
- 5.** If appropriate discuss your alcohol and drugs policy and the help available
- 6.** Agree future action/ arrange regular meetings to monitor progress

Improving management skills

How to deal with workers who have a problem

Being aware of early signs

Where advice and help is available

Statutory duties

- Health and Safety at Work Act 1974
 - To ensure health, safety and welfare of employees at work
- Management of Health and Safety at Work Regulations 1999
 - To assess risks – particularly if someone is under influence of drink or drugs
- Misuse of Drugs Act 1971
 - Not to allow use, production or supply of drugs
- Road Traffic Act/Transport and Works Act
 - Criminal offence to drive under influence or for workers to be under the influence working on railways, trams etc

Dismissal – what are the risks?

- Unfair dismissal?
- Section 98 ERA 1996
- *(a) the reason ... for the dismissal*
- *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- *(a) relates to the **capability** [...] of the employee [...]*
- *(b) relates to the **conduct** of the employee*

Reasonableness

- Section 98(4) ERA 1996
- *...whether the dismissal is fair or unfair—*
- *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably*
- *(b) shall be determined in accordance with equity and the substantial merits of the case*
- Straightforward case for dismissal?

McElroy v Cambridge Community Services NHS Trust

- Healthcare worker smelling of alcohol
- Previous concern raised about small of drink
- Dismissed for gross misconduct
- Decision - unfair dismissal
- No allegation that unfit for duty
- Smell of alcohol did not constitute gross misconduct

Glassford v Royal Mail Group

- Postman with 27 years service previously given warnings for being under the influence
- Denied any drink problem and given 2 year suspended dismissal
- Subsequent absence led to his dismissal
- At appeal said absence was due to drinking and he admitted he did have a problem
- Decision - fair dismissal
- Admission had come too late in process

Definition of 'disability'

- Equality Act 2010, s.6:
- (1) A person (P) has a disability if—
- (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities

Definition of 'disability'

- Equality Act 2010 (Disability) Regs 2010, Reg 3(1)
- *“addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act”*

Mental health and addictions

- If underlying mental health condition – exclusion may not apply
- Statistics
 - Mental health second only to heart disease as cause of disability worldwide
 - Person with a mental health condition twice as likely to have an addiction problem

Mental health and addictions

- Knowledge of mental health issue
- Don't ask?
- EHRC Code
- *Do everything you can reasonably be expected to do to find out if the employee is disabled*

Constructive knowledge

- A Ltd v Z
- Signed declaration that no impairment
- Lied about reasons for absence to avoid employer knowing of mental health issues
- GP note raised question about mental health - employer should have asked her more questions?
- What difference would it have made if she would not have told them

Constructive knowledge

- Donelien v Liberata UK Ltd
- What steps should an employer take?
- Medical reports
- Return to work interviews
- Cooperation from employee
- Reasonable enquiries required not every possible enquiry

Constructive knowledge

- Constructive knowledge of the disability itself required not the causal link
- An employer must do all they reasonably can to find out if a worker has a disability
- Reasonableness entails a balance between
 - the duties to make enquiries
 - the likelihood of such enquiries yielding results
 - the dignity and privacy of the employee

Actual knowledge

- Would it be sufficient if someone knew the worker was disabled?
- Key question what did the decision maker know?
- Royal Mail v Jhuti
 - What was the real reason for dismissal
- Uddin v London Borough of Ealing
 - What others knew extended to the question of reasonableness

Conduct that is a consequence of the disability

- S.15(1) of the Equality Act 2010
- *“discrimination arising from disability” occurs where both:*
- *A treats B unfavourably because of something arising in consequence of B’s disability*
- *A cannot show that the treatment is a proportionate means of achieving a legitimate aim*
- Can the drink/drugs incident be in consequence of the disability?

Risby v London Borough of Waltham Forest 2015

- Mr Risby was disabled and used a wheelchair
- After being told about a change in venue which would cause him problems he lost temper and used offensive and racist language
- Claimed disability discrimination
- The employer disputed that his conduct was linked with his disability.
- Held that “direct linkage” between Mr Risby’s disability and his conduct was not necessary
- Loose connection only was required

Grosset v City of York 2016

- Mr Grosset was a teacher who suffered from cystic fibrosis
- Increased stress was caused when his workload was increased
- He showed an 18 rated film to a class of 15-year-old pupils
- Mis-judgment was arising from stress linked to his disability
- Employer liable for disability discrimination even though it had been unaware of the link

Mr Martin James Scott v Kenton Schools Academy Trust 2019

- Mr Scott, a teacher, handed out notes to pupils during a controlled exam
- Claimed his actions were as a result of his suffering with mental health issues at the time
- Employer dismissed as no sign that he was unable to make proper judgments and he admitted that he knew what he was doing was wrong
- Relatively loose link satisfied the “in consequence test”

Wood v Durham County Council

- Mr Wood had depression, PTSD and dissociative amnesia
- Dismissed for theft outside work
- Argued he was prone to forgetfulness due to disability and forgot to pay for the items
- Held tendency to steal rather than tendency to forget and this was an excluded condition
- No disability discrimination

*Be alert to
signs of a
problem*

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