

EVERSHEDS
SUTHERLAND

White Paper Conference on Dismissal

Dealing with drug and alcohol
addictions

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The 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?



Key Principles

Risks of dismissing employees with drug or alcohol addiction

- Principal risks:
 - unfair dismissal
 - disability discrimination
- Which procedure?
 - capability/performance
 - disciplinary
- Provision of support

Managing performance issues

- Regular feedback
- Support and coaching
- Need for difficult conversations
- Capability procedure
 - Identify the performance issue
 - Explain the improvement required
 - Set a timescale for the improvement to be achieved
 - Fix a review date
 - Confirm support (including training) employer will provide

Managing conduct issues

- Conduct reasonable investigation
- Disciplinary hearing
 - identify the misconduct and provide relevant evidence
 - give the employee opportunity to make representations
 - allow employee to be accompanied
 - right of appeal
- Did the employer have a genuine belief in the employee's guilt based on reasonable grounds?
- If the employee is dismissed, then was the decision to dismiss within the range of reasonable responses?
- Support

Disability Discrimination

Is the employee a disabled person?

- Definition: a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities
- Addictions to, or dependencies on, alcohol, nicotine or any other substance are excluded
- But impairments caused by those conditions might amount to disabilities, e.g.
 - cirrhosis/liver disease
 - depression
- *Power v Panasonic* (2003)

Disability Discrimination

Types of disability discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Duty to make reasonable adjustments
- Harassment
- Victimisation

Case study

Background

You are the HR director of Ivory Tower Communications, a media agency based in London and the UK subsidiary of Ivory Tower Inc, a major US media company.

You attended the UK Exco meeting this afternoon and were surprised that Malcolm, the Head of IT, did not attend as he was supposed to deliver a presentation on a major IT upgrade.

You speak to Sarah, the HR Business Partner for the IT team. She tells you that for the last week or so Malcolm has been turning up to work smelling of alcohol. He left the office at 12 noon today and told his PA that he had a meeting out of the office. She was surprised as he had nothing in his diary apart from the Exco meeting.

What action would you take?

Conversation with Malcolm

You speak to Malcolm informally the following day. He tells you that he has been having a difficult time recently as his wife has asked for a divorce and he has been feeling low for a few months after his father died earlier this year. He says that he just completely forgot about the Exco meeting and had left the office to “clear his head”. He says that he probably is drinking a bit more than usual, but denies having a drink problem. You mention the company’s EAP to him and offer him support but he says he will be fine.

Call with Global Head of IT

The following week you get an urgent message late at night from Rick, the Global Head of IT in the US. Rick says that he was on a call with Malcolm earlier that evening. Rick was concerned because (a) Malcolm seemed drunk and (b) he had not progressed some key items on the IT upgrade. When Rick raised these items with Malcolm, Malcolm reacted very aggressively and accused Rick of being unreasonable and “out to get him”.

Rick says that he has serious reservations about Malcolm and wants you to suspend him in the morning and commence a disciplinary process.

Questions

- Are you in a position to be able to suspend Malcolm?
- Do you agree with Rick that you should commence disciplinary proceedings against Malcolm?
- If not, how would you practically manage this situation?

Further developments

You persuade Rick that suspension and disciplinary proceedings are not the best way forward. However, you tell him that you will meet with Malcolm in the morning to discuss things informally.

When you arrive at the office Malcolm has already phoned in sick. Later in the day he emails you a fit note signing him off for six weeks with “depression/workplace stress”.

Just as you are about to go home Julia, one of Malcolm’s direct reports, comes to see you. She says that one of their key suppliers told her today that they had lunch with Malcolm recently. Over lunch Malcolm had apparently drunk two bottles of wine and made a number of derogatory and offensive remarks about Rick.

What do you do now?

Occupational Health report and investigation

You refer Malcolm to OH. The OH report states that Malcolm is suffering from depression and that this is not helped by his heavy drinking. It states that, if he moderates his drinking and takes steps to improve his mental health, then he should be fit to resume his duties in six weeks' time.

In the meantime, an investigation has been carried out into Malcolm's conduct. The supplier confirmed that Malcolm had made derogatory and highly offensive comments about Rick after drinking heavily during the lunch. You therefore invite Malcolm to attend a disciplinary hearing.

Disciplinary hearing

Malcolm refuses to attend the disciplinary hearing, but sends written representations. He admits making derogatory and offensive comments about Rick but says that this was the result of his “severe depression” following the death of his father. He apologises for this and says that he is now receiving CBT which is helping him deal with his issues. He also says that the company has turned a blind eye to much more serious matters and that “it’s common knowledge that Clive (the Marketing Director) regularly snorts cocaine in his office every time he has an important client meeting”.

Rick is insistent that Malcolm be dismissed now that he has admitted making the comments.

The Global CEO, Martina, wants Clive to take a drugs test and his office to be forensically examined.

Questions

- What are the risks of dismissing Malcolm?
- Do you think that the company can dismiss Malcolm lawfully?
- What should the company do about the allegations Malcolm has made about Clive?
- Can you force Clive to take a drugs test?
- Can you forensically examine Clive's office for traces of drugs?

Questions?



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