

How to Deal with Alcohol and Drug Addition in Conduct and Capability Disciplinary Procedures

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The Problem

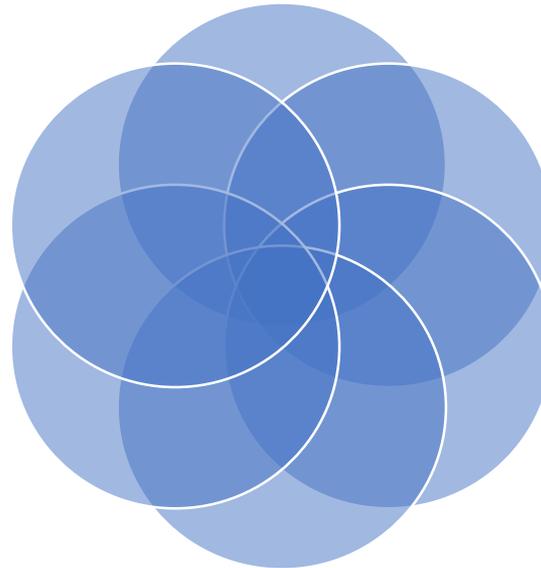
1/3 of employers believe there is misuse at work

Drugs

- Legality is an issue
- Is rehabilitation possible?

Alcohol

- social drinking as part of a normal workplace culture, or
- an employee drinking heavily and consistently

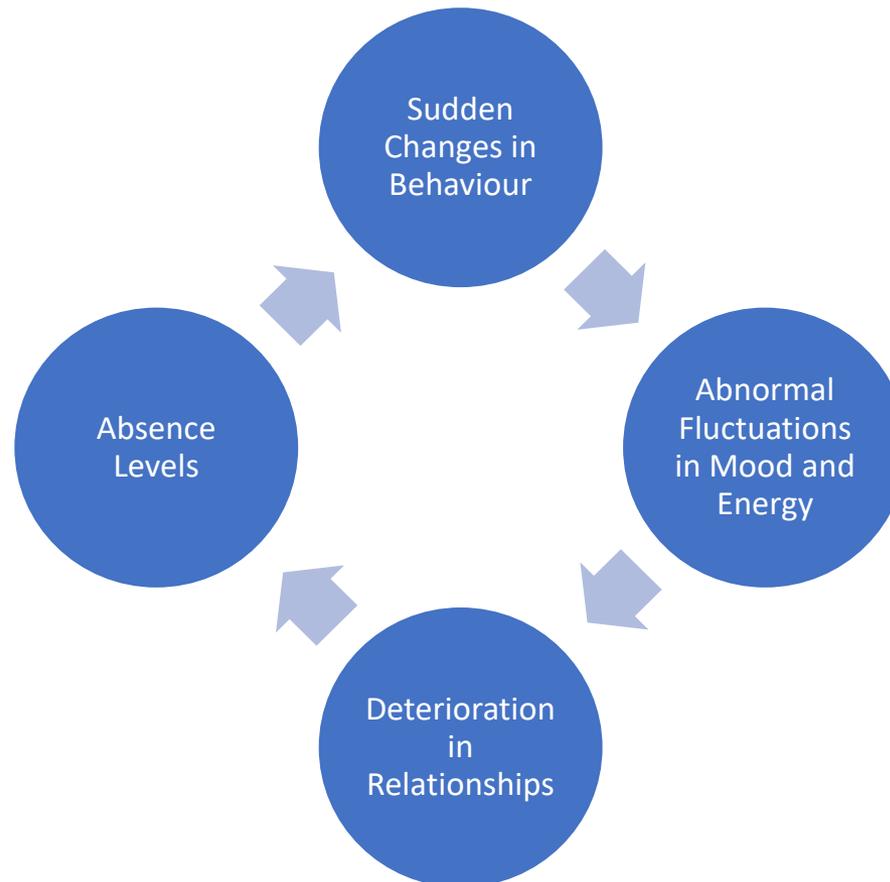


1/2 say it affects work

£1.9 billion cost a year to businesses from alcohol misuse

5 per cent of all workplace absence

Spotting the Signs



Legal Framework

Section 98 ERA 1996

(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) **the reason** ... for the dismissal

(2) A reason falls within this subsection if it [...]

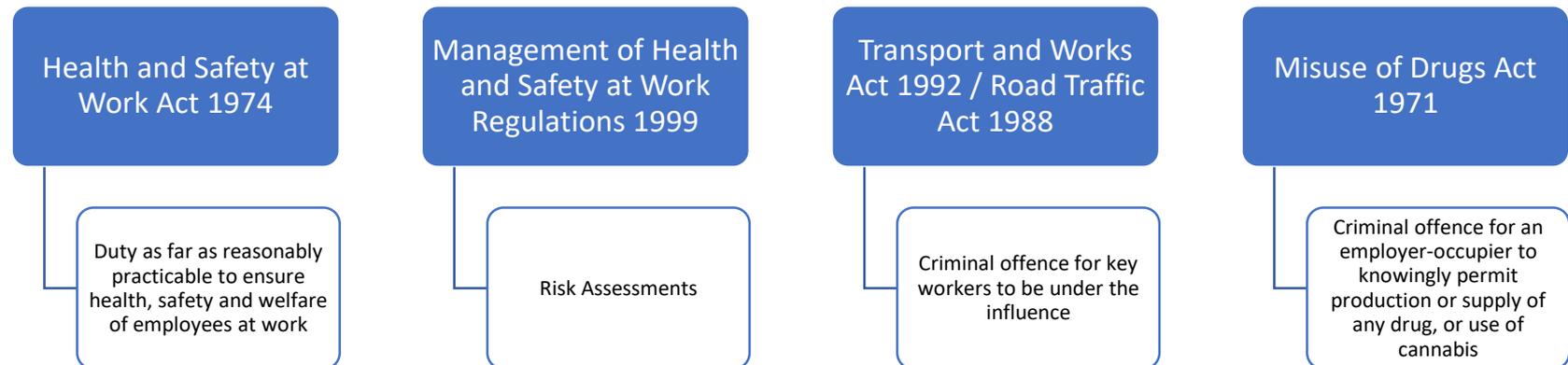
- (a) relates to the **capability** [...] of the employee [...]
- (b) **relates to the conduct** of the employee

s.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.

Drugs & Alcohol Legislation



Addiction as a 'Disability'?

ACAS:

- Policy should include “a statement that the organisation recognises that a drugs problem may be **an illness to be treated in the same way as any other illness**”

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.

Addiction as a 'Disability'?

Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128)

- Addiction not to be treated as an 'impairment'

What about an impairment caused by addiction?

What about an impairment that is causing the problem?

- *Wood v Durham County Council* UKEAT/0099/18

Therefore, may be necessary to obtain further medical evidence.

Fair Capability Dismissal Procedures

Must follow own procedures

Initial Meeting:

- Prior notice and invitation to be accompanied
- Notetaker present
- Tell the employee the details of the ways in which they fall short
- Give a timescale for improvement
- Indicate that a warning will be given in default of improvement
- And that dismissal may follow thereafter
- Send a written summary afterwards

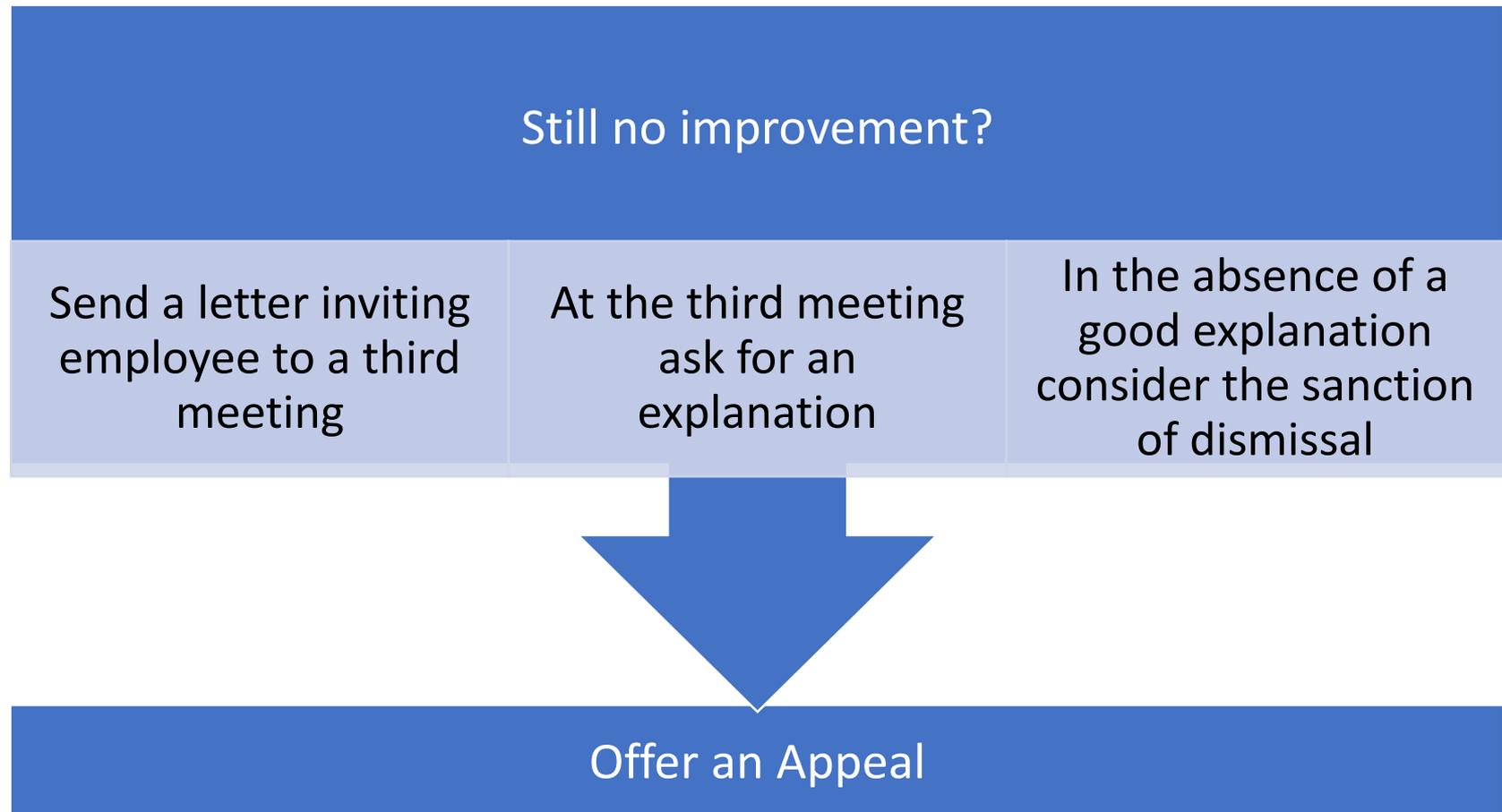
Fair Capability Dismissal Procedures

In the event of no improvement:

- Send a letter indicating the problem and setting a second meeting
- At the meeting set out the details and ask for an explanation
- Give a further period for improvement
- Give a clear warning that failure to improve will result in dismissal
- Send a written summary afterwards

Consider offering training / rehabilitation

Fair Capability Dismissal Procedures



Fair Capability Dismissal Procedures



Where the initial or later meeting raises questions of ill-health, alcohol or drugs issues:

- Consider obtaining a report from an appropriate medical practitioner
- Is dismissal justified considering:
 - Length of absence
 - Prognosis for the future
 - Impact on the business / other employees
- Is there a more suitable alternative role that would mitigate the problem, as an alternative to dismissal?
- If there is a disability, what reasonable adjustments can be made?
- Check internal policies for an ill-health retirement provisions

ACAS Advice

Have a clear Drugs & Alcohol Policy

- *Angus Council v Edgely* EAT/289/99

Confidentiality

Interview in private

Ask if there could be a “health problem”

Arrange regular meetings to monitor progress

<http://www.acas.org.uk/media/pdf/8/n/Health-work-and-wellbeing-accessible-version.pdf>

Testing

Intrusive – only justifiable when reasonably necessary

Must have a clear policy on it

A refusal may amount to misconduct, depending on all the circumstances

First Bristol Ltd v Bailes UKEAT/0526/13

Ball v First Essex Buses Limited [2018] ET/3201435/2017

O'Flynn v Airlinks UKEAT/0269/01

Guidance from the Cases

McElroy v Cambridgeshire Community Services NHS Trust ET/3400622/14

Employee coming into work smelling of alcohol	One off incident did not justify summary dismissal	Should have given a warning first	Decision not justified by employee's refusal to attend OH, because employer had not indicated that such a refusal could justify dismissal
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Guidance from the Cases

*Asda Stores v
Coughlan*
UKEAT/0453/10

- Employee purchased cannabis out the back door of workplace
- Stored in a locker
- Asda's disciplinary process clearly provided for possession of drugs to be gross misconduct
- Dismissal therefore 'within the band of reasonable responses' and fair

Guidance from the Cases

Glassford v Royal Mail Group Ltd UKEATS/0012/18/JW

Postman attended for work heavily under the influence of alcohol	Given a two year suspended dismissal	Later telephoned his manager to 'call in sick' when under the influence, which he later admitted in an appeal hearing, accepting that he had an addiction	Dismissal was fair	Employee's argument that he should have been offered a rehabilitation program was rejected
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Thank you! Any questions?

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