

Absence and Underperformance

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5 December 2017

Introduction

- How do you manage an employee whose underperformance is driven by absence?
- In the case of disability, are you expected to tolerate the underperformance so as not to exacerbate the illness?

Contract

Equality

Unfair Dismissals

Health and Safety

Underperformance

Absence

Disability

**Occupational
Health**

Relevant Questions

1. What does the **contract** say?
2. **Performance management** generally?
3. Position under **equality** law where absence is due to a disability?
4. **Practical Tools** in addressing the issue.

1. Contract

- Entitlement to manage.
- Obligation on employee to follow reasonable instructions.
- Obligation on employee to perform the duties of the position.
- Mutual obligation of trust and confidence.
- Entitlement to refer to company nominated doctor and to receive results of assessment.

2. Performance Management

Unfair Dismissals Acts

- 6(1) Dismissal deemed unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.
- 6(4) Dismissal not an unfair dismissal if it results wholly or mainly from ...(a) the **capability, competence or qualifications** of the employee for performing work of the kind which he was employed by the employer to do....
- 6(7) in determining if a dismissal is unfair, regard may be had to the **reasonableness or otherwise of the employer's conduct.**

Performance

- *“Capability”*
is taken to refer to cases where there is unsatisfactory levels of absence.
- *“Competence”*
is taken to refer to the level of the employee’s performance.

Unfair Dismissals Acts (continued)

Section 6(4) merely sets out potentially fair reasons for termination.

Durnin v Building and Engineering Co. Limited UD 159/1978

*“In our opinion, reasons which might justify a dismissal are set out in section 6(4), with a more general area of ‘justification’ in a form of ‘other substantial grounds’ provided for in section 6(6). In any area of ‘justification’ even when clearly provided for in section 6(4), there is at best only, a **prima facie ‘justification’ and the substance of such ‘justification’ may be enquired into by the Tribunal which attaches the question of fairness to same.**”*

Unfair Dismissals Acts (continued)

- EAT: If an employee is dismissed for incompetence or incapability it is sufficient that the employer honestly believes on reasonable grounds that the employee is incompetent or incapable.
- **Bolger v Showerings (Ireland) Limited [1990] ELR**

The company claimed that the ill health of the plaintiff rendered him incapable of performing his duties as a forklift driver”. For the employer to show that the dismissal was fair, he must show that:

 - It was the ill-health which was the reason for his dismissal;
 - That this was a substantial reason;
 - That the employee received fair notice that the question of his dismissal for incapacity was being considered;
 - That the employee was offered an opportunity of being heard.

Performance Improvement Plan

- Employer/line manager must act reasonably and fairly and with due regard to the dignity of the problem performer.
- Purpose of PIP: to improve performance
- Imposition of disciplinary sanctions and termination of employment can only be secondary objectives.

Principles for Performance Dismissals

- Employer must show that it was its honest belief on reasonable grounds that the employee was incompetent in respect of the work for which the employee was hired or into which the employee was promoted.
- Employer must show that it established a reasonable performance standards/goals and communicate those standards/goals to the employee.
- Disputes with regard to the standards/goals set by the employer must be resolved at the time.

Principles continued

- There must be coaching/advice/communication to the employee when performance issues first arise.
- The employer must monitor performance against the reasonable expected standards/goals.

Principles continued

- If, as a result of the monitoring, the employer believes that the employee's performance has fallen below the reasonable expected standards, then the employer must:
 - enquire into the reasons for the poor performance and give the employee the opportunity to explain;
 - notify the employee of what the problem is and what is required of the employee;
 - give the employee a clear warning of the consequences of continued poor performance;
 - give the employee a reasonable time ("*cure period*") to effect improvement;
 - give the employee a reasonable work situation to concentrate on the performance issues and reasonable levels of training and support if relevant.

Principles continued

- If, after the reasonable cure period, the employee's performance continues at an unacceptable level, the employer may progress towards dismissal.
- The employer must comply with its own procedures (performance, management, disciplinary, etc).
- The disciplinary procedures require:
 - progressive warnings;
 - due process:
 - representation,
 - information,
 - opportunity to respond,
 - unbiased decision maker.

3. Equality Considerations

- Potentially an additional layer of complexity in addressing performance in the case of excessive absence due to possibility that a disability is present.
- Employment Equality Acts prohibit direct discrimination and indirect discrimination on the disability ground.
- Prohibition on discriminatory dismissal.

Disability Ground

- That one is a person with a disability and the other either is not or is a person with a different disability.

Disability

- No threshold for severity.
- Temporary disabilities have been accepted.
- The following have been accepted as constituting “disabilities”: alcohol addiction, anorexia, depression, vertigo, ulcerative colitis.
- Current trend is to adapt a more restrictive view as to what constitutes a disability. Severity and duration being considered.

A Worker -v- a Government Department 2006

- Labour Court: **Alcoholism** is a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour such that it fell within the definition of disability.

Section 16 (1) EEA:

- Recognises that there is no legal obligation on an employer to retain an employee who, even with the provision of reasonable accommodation, is not able to perform the essential function of their job.
- Full defence to claim of discrimination.
- Contingent on obligations of reasonable accommodation being relied on in full prior to termination of employment.

Section 16 (3): Reasonable Accommodation

- Can require adaptation of working patterns, distribution of tasks.
- “Disproportionate burden”.
- Objective is to place disabled employees in similar position to non disabled colleagues.

Humphreys -v- Westwood Club 2004

- Employer should ensure he is in full possession of all material facts concerning employee's condition.
- Employee should be given fair notice that dismissal for incapacity is being considered and an opportunity to influence decision.

Two Stage Enquiry:

- A. Degree and duration of impairment based on medical evidence;
- B. Consideration of reasonable accommodation.

Nano Nagle School -v- Daly 2015

- High Court:
 1. Not necessary for reasonable accommodation to render employee fit for full remit of duties.
 2. Adaptation of working time patterns will include elimination of some of that time.
 3. Adaptation of distribution of tasks will result in elimination of some tasks.

Nano Nagle School -v- Daly 2015 (Continued)

- High Court did not express a definite view on the issue of whether an employer is required to create a vacancy or move an employee to a different position.

Disproportionate Burden

Appropriate considerations:

- Financial cost.
- Scale and financial resources of the employers business.
- Possibility of obtaining public funding.

Identify the problem:

- Conduct (e.g. non adherence to policies);
- Competence; or
- Capability?

Tools to identify the problem

- Analyse pattern.
- Medically certified or falling under threshold?
- Refusal to accept medical certificates can constitute discrimination.
- Review sickness absence policy and contract
- Consider circumstances
 - Probationer?
 - Longer service and change in behaviour?
 - Personal difficulties?
- Engage with employee.
- Consider referral to company nominated doctor.

End of the road?

Performance

- Ensure that the employee has been informed of the respects in which he is failing to do the job adequately and has been given advice on how to improve.
- Dialogue with employee.
- Cure periods.
- Training/support.
- Reviews.
- Ensure that the employee has been informed of the possibility of dismissal.
- Ensure that the employee has been provided with meaningful opportunity to improve.

Disability

- Ensure that you have engaged with the employee and, as appropriate, the company's medical advisor as to the reasons for the absences.
- Ensure you have fully considered reasonable accommodation and invited suggestions from the company's medical and other advisors and from the employee.
- Ensure you have appropriate medical evidence to support a basis for reasonably concluding that the employee is not capable to perform the duties.

Thank You

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5 December 2017*