



Capability Dismissals

Employees with protected characteristics

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Capability dismissals

- What do we mean by ‘performance’?
- Is performance management objective or subjective?
- What can we do to make it more objective?
- Why is that important in this context?

Creating a level playing field?

- Setting standards and measuring performance
 - Targets and financial metrics
 - Fixed objectives
 - Competencies
 - ‘Behaviours’
- This matters when it comes to demonstrating that you have not discriminated or disadvantaged an employee with protected characteristics

Which types of protected characteristics are most challenging in this context?

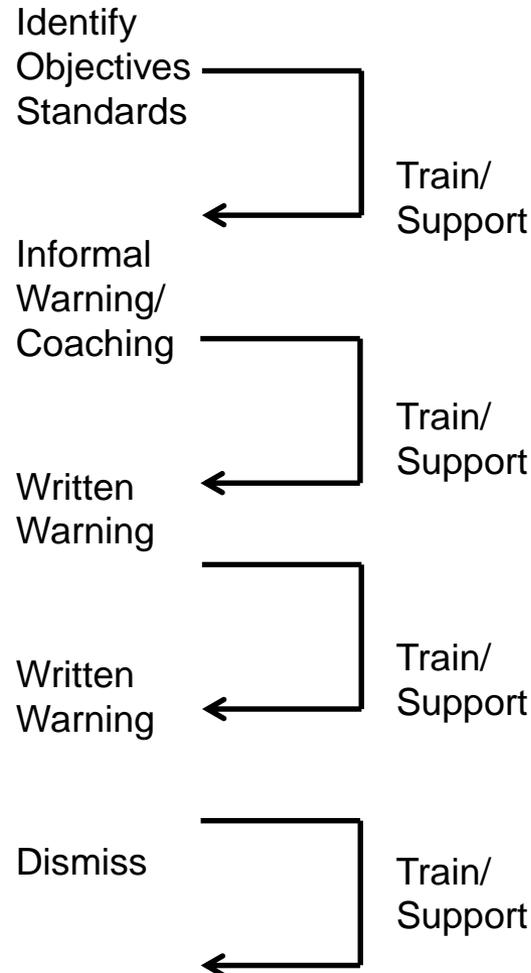
Forms of discrimination for all characteristics

- **Direct**
- **Indirect**
- **Association/perception**
- **Victimisation**
- **Harassment**

How does the Equality Act accommodate differences - disability, maternity and age?

- Disability
 - unfavourable treatment “arising in consequence of” – no comparator
 - ‘arising’ and indirect discrimination can be justified
 - Knowledge requirement
 - requirement to make reasonable adjustments – can result in something that feels like ‘more favourable treatment’
- Pregnancy/maternity
 - ‘unfavourable treatment’ – no comparator
 - rule that justifies special treatment for women in connection with pregnancy or childbirth (care) [13 (b) (b)]
 - no justification
- Age –
 - direct and indirect discrimination can both be justified

The Standard Performance Management Process



Disability and reasonable adjustments

Key principles

- The extent to which the adjustment will ameliorate the disadvantage.
- The extent to which the adjustment is practicable.
- The financial and other costs of making the adjustment, and the extent to which the step would disrupt the employer's activities.
- The financial and other resources available to the employer.
- The availability of external financial or other assistance.
- The nature of the employer's activities and the size of the undertaking.

Occupational health input important – but beware of adjustment check lists

Disability adjustments

Three main categories of adjustments in this context:

- Adjust the *process* for managing performance
- Adjust the performance standards
- Adjust the job/role

Adjusting the process

- More warnings
- Extra training
- Longer time frames for improvement

Adjusting standards

- Adjust targets following rehabilitation/temporarily
- Adjusting targets permanently?
- Do you have to accept less for the same pay?

Adjusting the role

- Working hours, place of work
- Changing the scope of the role
- Slotting in to a vacancy – no competitive interview – *Archibald v Fife Council/Wade v Sheffield Hallam University*
- Creating a new role? – *South Hampton City Council v Randall*
- Swapping out employees – *Chief Constable of South Yorkshire v Jelic*

Performance management and maternity

- Handling appraisals or performance management before or after periods of leave – can be done but is often avoided
- Not uncommon to find that a manager starts to focus on a performance issue as someone is about to go on leave or just before they come back – alarm bells!
- Can lead to poor management of return
- Making up scores? – Beware *De Belin v Eversheds*
- Dismiss someone on maternity leave for poor performance = HR suicide....

Wilkinson v Springwell Engineering Limited

ET/2507420/07

18 year old brought in to replace her aunt – dismissed after 3 months because she was too young for the job

- "lack of application to any form of orthodox procedure in both engaging the claimant or dealing with her termination".
- failure to respond to a complaint of discrimination and a statutory questionnaire submitted before proceedings were commenced demonstrated an "equivocality of approach and attitude".
- Springwell had made stereotypical assumptions founded on age to the detriment of Miss Wilkinson. They had assumed a relationship between experience and age and capability. They formed a view of her capability which was not borne out by the evidence of her work they claimed to have relied upon in dismissing her.

Performance management and age

- Standards still matter – you are entitled to ask that a person do the job you need them to do, irrespective of age
- In fact, an assumption that someone is less able is dangerous
- There is no formal concept of ‘adjustments’ in play here – that may in itself be discriminatory against a younger or older worker unless justified
- Critical to work out how to both have conversations about ‘retirement’ and not mix them up with discussions about performance issues
- Some organisations have a separate forum within which the employee can talk about retirement plans – keep this discussion away from the line manager who is dealing with a performance issue.

Age and disability discrimination

- Is it wrong to assume that an older worker might be more likely to have a disability?
- Focus on the disability and not age
- Don't make the connection

Settlement agreements

- Caution
- Protected and without prejudice discussions - won't protect a discriminatory act
- You usually have to be prepared to pay
- If the process has been well managed the employee may accept that it is time to go

So.....

- In summary....
 - The law aims to keep people in work but....
 - You are entitled to expect performance
 - You can get the right balance by creating objective standards and a level playing field

QUESTIONS?