

Weightmans

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Weightmans Guidance Note

Performance Management & Fairly Dismissing Employees for Poor Performance

– A Guide for Senior Managers

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Key Contact

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1) Introduction:

1.1) This guidance note provides legal and practical guidance in managing poor performance and, should it become necessary, advice about how to fairly dismiss an employee by reason of his or her inability to fulfil his/her job properly. It is up-to-date as at **November 2017**.

1.2) Please note that whilst many incapability cases result from an employee's ill health, such cases are not considered in this guidance note. However, alternative guidance on managing ill health-related cases is available from Weightmans upon request.

2) Definitions:

2.1) The Employment Rights Act 1996 (ERA) sets out five potentially fair reasons for dismissing an employee, one of which: "...relates to the **capability** or **qualifications** of the employee for performing work of the kind which he was employed...to do..."

2.2) "Capability":

a) "Capability" is defined in the ERA as: 'capability assessed by reference to skill, aptitude, health, or any other physical or mental quality'. Capability problems usually fall into one of two categories:

- incapability because of an employee's ill health; and
- incapability because of an employee's poor performance or attitude.

The latter situation typically arises when a new recruit or a newly-promoted employee doesn't measure up to the requirements of the job. It might also arise where an existing employee either begins to miss targets or cannot keep up with the changing requirements of his or her existing job (e.g. as a consequence of technological developments or a re-organisation of the employer's business).

b) Examples of incapability might include:

- an inflexible or non-adaptable worker;
- an employee who fails to reach the employer's required standards (e.g. a teacher whose pupils achieved poorer exam grades than those achieved by his/her predecessor); and
- workers who cannot meet management's newly raised standards (after being given appropriate support and time to improve).

c) Impact of the Equality Act 2010:

The management of poor performance and (where necessary) dismissing an employee by reason of his or her incapability may need to be considered in the context of the protection against discrimination afforded to certain employees under the Equality Act 2010. For example:

- an employer's poor performance may be disability-related, e.g. it may be impacted upon by a progressively worsening physical condition or a mental illness such as depression;
- there may be evidence that an employee's advancing age may be impacting upon his/her performance; or
- an employee's race may be relevant, e.g. because he or she has communication problems as a result of English not being his/her first language.

In all of the above cases, an employer will be expected to seek relevant expert advice (e.g. from an Occupational Health Adviser when dealing with a disabled employee) in order to ensure that it has implemented any reasonable adjustments to help the employee improve his or her performance. Only if such adjustments have been implemented and yet the employee's performance remains unacceptably poor will the employer be likely to be justified in invoking a capability procedure and, where necessary, dismissing the employee.

2.3) **"Qualifications":**

a) 'Qualifications' are defined by the ERA as: 'any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held'. These can include qualifications that are awarded by the employer itself. The meaning of 'qualifications' has been interpreted quite narrowly by the courts and should be substantially concerned with the aptitude or ability of the person to do the job.

b) Qualification problems and (where appropriate) subsequent dismissals usually arise:

- soon after recruitment, where it emerges that the employee does not have the necessary qualifications;
- when the employee is employed on the understanding that they will obtain certain qualifications but they subsequently fail to do so;
- where the employer's requirements change: Employment Tribunals have accepted that employers may reasonably require employees to obtain additional qualifications during their employment; and
- where the employee loses a qualification during employment (e.g. their driving licence because of a drink-driving conviction).

c) It is important to note that the qualifications which the employer requires at the start of the employment relationship are not set in stone: thus an employee may initially be well qualified for

his or her role but may subsequently come to lack the necessary qualifications, e.g. if he or she cannot keep up with technological changes or with the new demands required of the role following a re-organisation. However, although employers are entitled to change their existing policies regarding staff qualifications, they must act reasonably towards any existing employee who doesn't yet meet the new criteria. This would include, for example, providing a reasonable opportunity to acquire the newly-required qualification or skills (where practicable).

3) Managing performance so as to avoid problems arising:

3.1) Recruitment and the effective use of probationary periods:

a) Adopting an appropriate recruitment/promotion process, including the use of relevant selection criteria, should go a long way to ensuring that only the most suitable candidates are recruited for particular roles; this in turn should reduce those instances where a new recruit or someone who has been newly promoted turns out to be incapable of properly performing their new role.

b) Thereafter, probationary periods are an effective tool in performance management both for new recruits and for existing employees who are new to a role (e.g. through promotion or redeployment).

i) New recruits:

A probationary period is an ideal time for the employer to assess the new employee's suitability for the role, since the employer's exposure to claims during this period is limited:

- the contract is likely to be terminable during the probationary period on comparatively short notice; and
- the employee will not have acquired the necessary (two year minimum) qualifying period to be entitled to bring an unfair dismissal claim (unless the reason for dismissal is one of the automatically unfair reasons – e.g. a discriminatory one – for which no minimum qualifying period of employment is required).

It always makes sense for an employer to reserve the right to extend the probationary period if it remains unsure about the new recruit's capability.

If an employee does not perform to the required standard during the probationary period then an employer can dismiss them either before the period expires (there is no requirement that the employee be allowed to complete the full period) or at the end of the probationary period. It is, however, important that:

- management maintain an accurate documentary record of the employee's performance, any appraisals during the probationary period, etc so that it can support its decision (and defend any allegations of discrimination, etc); and
- that an accurate diary entry be kept of the expiry date of any relevant probationary period to ensure that the end date is not overlooked.

ii) Existing employees:

Probationary periods can also be applied to existing employees who are promoted or redeployed into a new role. Where applicable, the existence of the probationary period needs to be clearly communicated to the employee and the employer is expected to conduct a reasonable appraisal of the employee's performance throughout this period, and to bring any inadequacies to the employee's attention, so that he or she has an appropriate opportunity to improve.

3.2) **Establishing and communicating the required standards:**

a) A key to ensuring good performance amongst staff is to establish and clearly communicate the required performance standards and how they will be measured. Performance standards will typically fall into one of the following categories:

- Express contractual terms: e.g. an employee's job title and description, any probationary period, the required qualifications and performance targets (e.g. sales or income) where these are incorporated into the contract;
- Implied contractual terms: e.g. the duty on an employee to take reasonable care in the performance of his or her duties, to work obediently and diligently, and to obey the employer's lawful and reasonable instructions;
- Non-contractual policies and procedures: e.g. operating procedures set out in the non-contractual section of a staff handbook or other reference documents; and
- Industry and local practice: e.g. health and safety operating requirements, professional body standards of performance and the historic standards of performance which the employer has accepted.

b) Some requirements of the job are so obvious that the employee's attention does not need to be drawn to them. Furthermore, those in very senior roles are expected to be more aware of what is required of them and to be capable of judging for themselves when something falls below the required standard. However, an employer will always be better placed to manage performance if the required standards are clearly (and regularly) communicated to the relevant staff. Thus aside from the very obvious requirements of the job, it is important for the employer to have drawn the employee's attention to the required standards at various times, e.g.:

- at the outset of employment;
- if the employee changes roles;
- if the required standards change (e.g. as the employee's job evolves)*; and
- if it becomes necessary for the purposes of managing under-performance via a capability procedure. (If performance targets apply, for example, then these should be drawn to the employee's attention along with the possible consequences of not meeting them).

*(Standards of performance are not set in stone and are liable to change as the business or role evolves, or new technology or equipment becomes available. The appropriate performance

standards must therefore be judged according to the employee's current contractual requirements and role).

3.3) Undertaking effective appraisals:

a) A performance appraisal system that is properly followed by the employer can prove invaluable in motivating and supporting staff and, where performance problems do arise, will provide important evidence to support any performance management process and (where necessary) any subsequent dismissal. (To demonstrate a reasonable belief that an employee is sufficiently incompetent such as to justify his/her dismissal, an employer needs to produce evidence of poor performance and that it has taken steps to support the employee to improve).

b) Appraisals must be conducted sensitively but honestly: if a manager provides unduly positive feedback which does not accurately reflect the employee's true performance then this is likely to hinder any attempts to improve performance (e.g. the employee is likely to challenge the need for any improvement) and could ultimately be used to challenge the fairness of any subsequent capability dismissal. In addition, employers who fail to tackle performance issues through an appraisal system may also find that it will hamper their future business decisions in other respects. For example, in redundancy situations, employers who want to give someone a low score for performance will be hindered if this is not corroborated by past appraisals.

c) With the abolition of the national default retirement age of 65 in April 2011, the need to gauge employees' future plans and to address any performance issues through an effective appraisal system is more important than ever: unless an employer can justify retaining its own retirement age, the only means of tackling an employee's age-related decline in performance will be via a properly implemented capability procedure which must be applied to all employees, irrespective of their age. The best way to demonstrate even-handedness is to incorporate such discussions about performance and future plans within an annual appraisal. (Please see section 8 below for further guidance in this regard).

4) Early intervention when a performance problem arises:

4.1) Addressing performance issues as soon as they arise is important from a practical and legal perspective, e.g.:

- an employee is more likely to improve and achieve the required levels of performance if management concerns are highlighted at an early stage;
- if the provision of early training and support results in a positive outcome then this is less time-consuming and costly than going through a formal dismissal procedure and recruiting a replacement; and
- being able to demonstrate that an employee has been given support and the opportunity to improve will greatly improve the employer's chances of subsequently carrying out a fair dismissal, should this become necessary.

4.2) Confronting an employee about his or her perceived poor performance can prove daunting for some managers who may therefore be tempted to let matters drift. Others may simply want to avoid what they see as a time-consuming performance management process. Regardless of the reasons for doing so, however, a failure to address performance issues properly and promptly can have adverse consequences for an employer:

- performance management is an important aspect of maintaining positive performance and morale, not least because it can be de-motivating for productive members of the workforce if the underperformance of a colleague is ignored;
- incompetence in hazardous working environments can place the employee, as well as his or her colleagues, at risk of injury and a breach of health and safety regulations; and
- performance issues which have not been identified or addressed promptly may also present a significant stumbling block to employers who are contemplating dismissal at a later date for one of the other potentially fair reasons for dismissal.

4.3) When seeking to address performance issues, it is unlikely that an employer who follows a reasonable procedure will be in breach of the implied term of trust and confidence that must exist between an employer and an employee. However, the employer must take care to address poor performance in a sensitive manner, e.g. by not criticising or embarrassing a poorly performing employee in front of colleagues.

4.4) Is performance really the issue?

a) When investigating concerns about a particular employee's performance, employers sometimes find that there are other matters that need to be addressed in addition to, or instead of, the poor performance, e.g.:

- ill-health or disability;
- domestic problems, e.g. with regard to child care or adult caring responsibilities;
- poor management within the team;
- harassment or bullying by colleagues or by a manager; and/or
- an excessive workload leading to an inability to deliver and stress for the employee.

Each of these may create legal liabilities for the employer if it does not seek to address them.

b) Where poor performance is caused or worsened by an underlying disability then, as mentioned above, employers will need to comply with certain obligations under the Equality Act 2010: most notably, management will need to consider what reasonable adjustments might be made to support the employee, which might include both the supportive steps that an employer would consider for any underperforming individual, such as additional training or support, as well as an adjustment to any capability procedure itself.

Full details with regard to an employer's duties towards its disabled staff are available from Weightmans upon request.

5) Fairly dismissing an employee for poor performance:

5.1) Introduction:

a) Whilst the aim of proactive, prompt performance management should always be to avoid an employee's eventual dismissal, sometimes this becomes a necessary outcome. As mentioned previously, the Employment Rights Act 1996 (ERA) sets out five potentially fair reasons for dismissing an employee, one of which "...relates to the capability or qualifications of the employee for performing work of the kind which he was employed...to do..."

b) The employee's poor performance must relate to the type of work which he or she is actually employed to do. This will be determined in accordance with the employee's current contractual obligations: if an employee was originally employed to perform different duties, which duties have subsequently been varied by written or verbal agreement or by conduct, then the Tribunal will focus on whether the employee is incapable of performing his or her current (varied) duties. It should also be noted that a dismissal for incapability may be fair even though the employee can still perform some of his or her contractual duties.

c) It is not the Employment Tribunal's function to substitute its own view of the employee's competence for that of the employer (not least because the Tribunal is not in a position to be able to properly assess the employee's work performance and will frequently not know the standard commonly expected of employees in a particular job). Instead, in order for an employer to satisfy a Tribunal that it has fairly dismissed an employee for incapability, the employer will have to be able to establish that:

- poor performance/incapability was the actual or principal reason for the employee's dismissal (i.e. that the employer honestly believed the employee to be incompetent or unsuitable for his or her job);
- the employer had reasonable grounds upon which to believe that the employee was incompetent or unsuitable (i.e. the employer must be able to put forward the evidence upon which it reasonably relied);
- the employer had taken reasonable steps to verify its conclusions about the employee's incompetence (i.e. it must be able to demonstrate that it adopted a fair procedure when gathering and reviewing the evidence, including giving the employee the opportunity to comment); and
- finally (and as usual), the employer must be able to show that it was reasonable in all the circumstances to dismiss the employee. This will involve the Tribunal in considering factors such as the extent to which management discharged its own responsibilities towards the employee, e.g.:

- Was there appropriate supervision and training so as to minimise the risk of underperformance?
- Were there regular appraisals?
- Was the employee warned about the consequences of underperformance?
- Did management follow an appropriate capability procedure?
- Did the employer considered alternatives to dismissal such as redeployment?
- Was the decision to dismiss taken after a properly convened consideration of dismissal hearing and was the employee given a right of appeal against any such decision?

d) Overlap with misconduct:

Sometimes it can be difficult for an employer to determine whether an employee's poor performance or unacceptable behaviour should be treated as either a capability or a conduct issue (or, perhaps, a mix of the two). It's arguable that the label attached by the employer to the employee's behaviour will not be significant: a generally similar procedure (e.g. involving appropriate warnings and guidance about the required improvement) ought to be adopted when dealing with either incapability or misconduct; furthermore, and provided that the employee understands why his or her dismissal is being considered, mislabelling any subsequent dismissal should not necessarily be fatal to its fairness. Arguably the only practical significance is that an employer should show more patience with capability-related issues.

5.2) Establishing evidence of incompetence

a) It is for the employer to establish the reason or principal for dismissal in any unfair dismissal claim. Where the employer has dismissed an employee for incompetence, it will have to show that it had a reasonable belief in the employee's incompetence when it took the decision to dismiss. The employer must be able to produce evidence of poor performance or a lack of qualifications and show that this was the real reason for dismissing the employee.

b) The starting point is likely to be the employer's appraisal system, although appraisals or personal development reviews may need to be supplemented by further evidence. Whilst such evidence will vary from job to job, the following are examples of evidence which have been accepted by the courts:

- a failure by sales people or piece workers to reach their targets (although in such cases the Tribunal will also consider the surrounding circumstances, such as whether the employee's target was realistic; the reasons for the employee's failure to reach the target (e.g. the current economic climate); how other staff fared by comparison, and the employee's length of service);
- an employee's inability to maintain the standards of his or her fellow workers;
- a failure by the employee to perform a critical part of his or her job;

- complaints by customers or other staff members about the employee; and
- the honestly-held views of the employee's superiors about the employee's inability to do their job, which may be particularly relevant where the nature of the job is such that it is difficult to produce quantifiable, clear evidence of incompetence, as is sometimes the case with managers.

c) It is not possible for an employer to rely on issues which only come to light after the decision to dismiss has been taken to justify its decision and show that its belief was reasonable

d) Single acts of negligence or incompetence:

In rare cases a one-off act can be sufficient to justify dismissal, e.g. where the incompetence might have potentially disastrous consequences (e.g. for an airline pilot). In general, however, it is unlikely to be fair for an employer to dismiss an employee (and especially a long-standing one) for a single error of judgment unless the consequences are potentially very serious or damaging to the employer. Instead, in the vast majority of situations, employers are expected to investigate and to consider offering support to facilitate improved performance before they can reasonably contemplate dismissal.

e) Small but persistent errors:

The cumulative impact of a number of small incidents (which individually would not justify dismissal) may over time provide a sufficient reason for dismissal (e.g. in one case an estate manager was dismissed after seven minor incidents within a seven month period, none of which individually might have justified his dismissal).

f) Inconsistent evidence:

The sort of evidence referred to above which may substantiate the employer's view that the employee is incompetent may likewise be used by the employee to rebut such a claim (e.g. in one case an allegedly incompetent sales manager produced evidence that his sales were 40% above the national average). In addition, an employer may undermine its assertion that the employee is incapable of doing the job if, for example, the employee has recently received an above-average pay increase or positive appraisal. (That said, sometimes the introduction of a new appraisal system will reveal a lack of capability which was not previously apparent. However, in these circumstances a Tribunal would expect to see the employee being given proper support, guidance and time to improve his or her performance before a decision to dismiss him or her is taken (see below).

5.3) Adopting a Reasonable Procedure

a) According to the Court in one case:

'An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance'.

b) In practice, this means that an employer should:

- carry out a careful investigation into, and appraisal of, the employee's poor performance and any underlying reasons for it, and identify and discuss its concerns with the employee, giving him/her an opportunity to respond;
- warn the employee of the consequences of a failure to improve; and
- give the employee a reasonable opportunity to improve (whilst providing appropriate support).

In addition, it will be relevant to consider whether the employer has fulfilled its responsibilities in creating the conditions which enable the employee to carry out his duties satisfactorily, for example, by providing adequate training and supervision (please see below).

c) It is also worth emphasising that the basic principles of fairness set out in the ACAS Code of Practice on Disciplinary and Grievance may be taken into account by Tribunals when assessing the reasonableness of a dismissal on the grounds of capability. This will include those matters set out in paragraph 4 of the Code as follows:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;
- Employers and employees should act consistently;
- Employers should carry out any necessary investigations, to establish the facts of the case;
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made;
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting; and
- Employers should allow an employee to appeal against any formal decision made.

Moreover, an award of compensation against an employer can be subject to an uplift of up to 25% if the employer has unreasonably failed to comply with the Code of Practice.

d) Investigation / Appraisal:

i) It will be extremely difficult for an employer to claim that it has acted fairly in dismissing an employee for incapability if it fails to carry out a proper investigation into the employee's underperformance or lack of qualifications:

- the employer may fail to establish (and satisfy any subsequent Tribunal) that it had a fair reason for the dismissal;

- the employer may also fail to determine the reason for the employee's poor performance (which in turn might have enabled the employer to remedy the situation and avoid the dismissal); and
- the employer might fail to uncover and address management's own failings, such as weaknesses in the support provided to the employee, which in turn would determine what a reasonable response by management should have been.

ii) The Acas Code reiterates the important principle that, before embarking on any course of action, an employer should carry out an assessment or investigation, provide the employee with the findings of that investigation and allow them the opportunity to respond. This may involve interviewing the employee and/or presenting them with collated evidence to comment on. The employee does not have the right to be accompanied at an investigatory meeting, but does have the right to be accompanied at a hearing that could result in disciplinary action being taken.

iii) Any capability procedure should be referred to in the context of the investigation. Where it is relevant and helpful to do so, managers should also refer to one or more of the following documents:

- the employee's employment contract and up-to-date job description;
- his/her training records;
- the employee's previous performance appraisals;
- any relevant staff handbook or operating procedures; and
- any previous action plan under a poor performance procedure.

iv) Full notes of the investigations, including notes taken during meetings with the employee, should be made and retained for future reference. A preliminary investigation may reveal underlying reasons for the underperformance which the employer will need to consider before deciding on the next step. For example:

- it may become apparent that the employer has failed to provide proper training; or
- there may be indications of ill-health or a disability which will require the employer to consider making relevant any adjustments before thereafter re-assessing the employee's performance.

As a result of the investigation, the employer may decide to take no further action or else to hold a formal hearing with a view to issuing a formal warning.

v) It will also be extremely difficult for an employer to claim that it has acted fairly in dismissing an employee for incapability if it has failed to carry out proper appraisals, providing ongoing feedback and appropriate guidance and training to the employee so as to give him or her a reasonable opportunity to achieve the required standard. This is particularly likely to be the case with probationers, either new employees or those new into a role.

e) Warnings:

i) Generally speaking, employers will not be considered to have acted reasonably in dismissing an employee for incapability unless they have given the employee fair warning of the way(s) in which he or she is failing to perform and have allowed the employee an opportunity to improve. In one case, the Employment Appeal Tribunal stated:

"...An employer should be very slow to dismiss upon terms that an employee is incapable of performing his work, without first telling him of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance..."

This is endorsed by the Acas Code of Practice, which recommends that at least two warnings are given before an individual is dismissed for poor performance, unless there is gross negligence or dismissal arises during a probationary period.

ii) Employers should make it clear to employees that they are being given a warning and of the consequences should they fail to improve. Furthermore, after the warning has been given the employer should abide by its terms: if, for example, the employee was warned that a failure to improve could lead to his or her demotion, it would be unfair to instead dismiss him or her if he or she failed to improve following that particular warning.

iii) If an employer intends to rely upon an earlier warning to justify an employee's dismissal for incapability then the previous warning should usually be relevant to the current problem.

iv) Whilst it is obviously safer from the employer's perspective to have issued one or more formal warnings before dismissing an employee on capability grounds (and certainly such an approach is to be recommended, as mentioned above), the absence of a formal warning won't necessarily make a subsequent capability-related dismissal unfair. In some cases Tribunals have accepted that a warning can be implied, e.g. from a failure to give a pay rise or from the deterioration in a previously close working relationship. Ultimately, the key issue for the Tribunal is whether the employee was aware of the employer's dissatisfaction.

v) There are, in addition, certain categories of capability-related dismissals where appeal courts have expressed the view that a warning is sometimes not necessary. In these cases either a warning would be irrelevant, or it would be imposing an unfair burden on the employer. The following are the types of situation in which a warning might be dispensed with – but employers need to be aware that it is not a rigid rule that warnings are unnecessary in such cases:

- gross incompetence or unsuitability: in some (fairly rare) cases it may be reasonable for an employer not to give a warning to an employee who is highly unlikely to improve and whose continued retention is damaging the organisation's interests;
- serious consequences of incompetence: in certain rare circumstances the consequences of even a simple error would or could be so serious that the employer might be justified in dismissing an employee without warning for a single act of incompetence, on the basis

that the employer cannot be expected to take the risk of a recurrence (e.g. a mistake by an airline pilot);

- cases where the employee has committed an act of negligence which has in fact significantly damaged the employer's interests, even though it was not inevitably going to do so. (However, tribunals will not readily find that one careless act justifies dismissal without a warning, particularly of longer-serving employees);
- an employee who is incapable of or unwilling to change, or who is unwilling to admit that he or she is underperforming, such that a warning would have made no difference.

vi) Some Tribunals have accepted that there will frequently be less need to give senior employees a specific warning that their jobs are in jeopardy as this will often be clear to them from the circumstances. For example:

- in one case the court commented that: "... Those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances the need for warning and an opportunity for improvement are much less apparent...";
- in another case, the employee was informed that his work was unsatisfactory but the warning letter did not explicitly state that a failure to improve might lead to loss of employment. The Employment Appeal Tribunal nevertheless found the dismissal to be fair, commenting that: "...Moreover, any professional man, any man of the employee's talent would, if he stopped to think, realise that if it was brought to his notice that his work was not up to standard, and if he did not improve the standard of his work sufficiently, he might be faced with dismissal. That was plain common sense with a man of his calibre and a man of his intellectual position..."

By contrast, there has been one case in which the EAT held that there was in fact a *greater* obligation to warn a senior employee about his or her poor performance. However, the view of commentators is that the key point in all such cases is whether the employee – however senior – was aware that his or her job was in jeopardy: this will depend upon the facts of the particular case.

vii) *Lapsed warnings*: whilst it is sensible for the employer to review the employee's performance at the end of any trial period set out in a warning, courts have commented that employees cannot assume that a warning will automatically lapse at the end of such a period if no action has been taken by the employer. Whether or not this is a reasonable inference will depend on the circumstances.

f) Reasonable opportunity to improve:

i) If an employer warns the employee that his or her job is in jeopardy but then dismisses him or her without giving the employee a proper opportunity to improve, or without the employer having

had a sufficient period of time in which to assess whether any improvement has in fact been made, then this is likely to render the dismissal unfair.

ii) What constitutes a reasonable improvement period will depend on the circumstances of each case. If a capability procedure provides for a certain timescale for improvement then this should be adhered to, as should an industry standard that is considered reasonable. In the absence of such established timescales, relevant factors are likely to include:

- the nature of the job (e.g. the extent to which relationships with a customer or other third party are affected by the underperformance);
- the employee's length of service;
- the employee's past performance during that service;
- the employee's status and the extent to which he or she was underperforming;
- how long the employee had known of the employer's dissatisfaction before a formal warning was given.

Tribunals will not adopt a "tariff" approach to the timescale question, but will focus instead on what was reasonable in all the circumstances. Often it will make sense for employers to link the timescale to a natural part of the business cycle, for example a quarterly sales target period or the duration of the particular phase of a project.

iii) Tribunals have also commented that allowing longer periods to improve is often appropriate where the employee has been asked to take on new kinds of work. Furthermore, if the employer terminates the contract before the trial period has expired then it may be more difficult to justify the dismissal.

iv) Employers should not set unrealistic targets during the improvement period, particularly if they have waited for some time before acting and have previously kept their concerns to themselves. Furthermore, it's important that an employer is not seen as merely going through the motions when giving an employee an opportunity to improve: the capability procedure must include some objective basis by which any improvement can be measured. Furthermore, the employer should of course properly monitor the employee's progress during the improvement period.

g) Poor performance hearings:

i) Where the employee fails to improve sufficiently, a formal meeting should be arranged. The employee should be notified, in writing, of the following:

- the nature of the shortcomings in their performance;
- the date, time and place of the capability meeting;
- a summary of relevant information and a copy of any relevant documents;
- the procedure to be followed;

- the possible consequences if performance is found to have fallen short of the required standard; and
- the right to be accompanied by a trade union official or a fellow worker.

ii) The Acas Code of Practice requires that the hearing must be held without unreasonable delay, but not so quickly that the employee has not had a chance to prepare their case. The employer should adhere to the relevant internal procedure (if any) for timescales. The aim of the meeting should be to:

- enable both the employer and the employee to explain their cases fully;
- give the employee ample opportunity during the interview to respond and give their explanation about the issues raised in relation to their performance;
- explore and, if possible, identify the cause of the underperformance;
- determine what, if any, remedial action can be taken;
- obtain the employee's commitment to reaching the required standard;
- set a reasonable period for the employee to reach that standard;
- agree on a monitoring system during that period; and
- tell the employee what will happen if that standard is not met.

Most importantly, the employee should be notified in writing of the outcome of this meeting and of their right of appeal, along with any applicable time limit.

h) The decision to dismiss:

While there is no absolute obligation on an employer to consider alternative employment or demotion before taking the decision to dismiss, it may be unreasonable in the circumstances not to do so, depending on the size and administrative resources of the employer.

i) Right of Appeal:

An employee should always be offered a right of appeal against a decision to dismiss him or her on capability grounds. An appeal should, if practicable, be held by a level of management that was not previously involved in the decision to dismiss

6) Potential claims by employees:

6.1) Whenever poor performance issues are raised, there is scope for claims by employees. Claims may arise out of the way in which concerns with the employee's performance are handled, because a contractual procedure has not been followed, or as a result of the employee's dismissal.

6.2) Breach of contract:

a) Express terms:

i) if the employer fails to follow a contractual disciplinary or poor performance procedure then this may give rise to claims for breach of contract, as well as supporting a case for unfair dismissal (e.g. where a contractual procedure has been breached, this may be evidence of unreasonableness). Usually, the period of loss in a breach of contract claim will be limited to the time it would have taken for the employer to operate the procedure correctly. However, the Court of Appeal held in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2010] that an employee could, in principle, recover greater damages if he could show that the relevant procedures (in that case, disciplinary) were likely to end in his favour.

ii) In a slightly unusual case, which is only likely to arise in the public sector, a doctor was able to obtain an injunction, preventing her employer from invoking its capability procedure, on the basis that to do so would be a breach of contract.

b) Implied terms:

The employer may breach the implied duty of trust and confidence, in the context of poor performance proceedings, if there is a failure to give adequate support or training, or the matter is handled in such a way as to undermine trust and confidence.

6.3) Unfair dismissal:

Unfair dismissal claims may arise where the employee is dismissed for poor performance, or else where the employee resigns and claims constructive dismissal as a result of the way in which the poor performance procedure has been operated. Employees commonly argue that their dismissal was unfair on the basis that:

- allegations of poor performance are unfounded or unsubstantiated;
- they were not given prior warning that their performance was an issue;
- they were not given a reasonable timescale within which to improve; and/or
- the targets which were set for improvement were unrealistic.

6.4) Discrimination and harassment:

Disability discrimination is not the only form of discrimination to which an employer may be exposed if a fair approach is not adopted in handling performance-related issues. Disparity of treatment, such as dismissing one employee who fails to meet performance targets while retaining another, can lead to problems if the motivation might be interpreted as discriminatory, for example on the basis of age or gender. Further, where the poor performance issue is raised in an oppressive or heavy-handed manner, this can lead to allegations of harassment.

7) Miscellaneous issues:

7.1) Management's own responsibilities:

a) Introduction:

i) As mentioned previously, in order for an employer to satisfy a Tribunal that it has fairly dismissed an employee for incapability, the employer must be able to establish that:

- incapability was the actual or principal reason for the employee's dismissal;
- it had reasonable grounds upon which to regard the employee as incompetent or unsuitable;
- the employer adopted a fair procedure when dealing with the employee; and
- that it was reasonable in all the circumstances for the employer to dismiss the employee.

ii) In determining whether it was reasonable in all the circumstances to dismiss the employee, a Tribunal will consider – in addition to the other matters already described – whether management fulfilled its own responsibilities towards the employee.

b) Supporting the employee:

i) Employers are expected to create a working environment which will enable their employees to carry out their duties satisfactorily. This is likely to involve providing adequate training and supervision, along with a satisfactory physical environment in which the employees can work.

ii) Whilst a Tribunal won't go so far as to imply an actual contractual obligation on the employer to provide training, a failure to do so may render a dismissal unfair. In exceptional circumstances, a failure to give adequate support may give rise to a constructive dismissal claim by the employee. In some cases, a failure to provide adequate staff in support, properly trained for the job, has been an important factor in rendering a dismissal unfair.

c) Alternative employment

i) If an employee fails to make the grade despite adequate training and support, then the extent to which the employer may be obliged to consider redeploying that employee will depend upon the facts of the case. In this situation the size and administrative resources of the employer will be especially important. Normally this duty will involve looking for vacancies within the company itself, but in some cases an employer might be thought to be acting unreasonably if he does not cast his net wider, e.g. amongst Group companies.

ii) There is likely to be a greater expectation that the employer will consider redeployment in those cases where a newly promoted employee has failed to make the grade, despite being given adequate supervision and training. There is no general right for an employee to return to his old job if the promotion proves unsuccessful (although sometimes his or her employment contract or the terms of the promotion will provide for this). However, a dismissal may be unfair if the

employer does not at least seek to discover whether there is suitable alternative employment available for the employee, or put him back into his old job if it is still available. It is possible that the duty is more onerous where the employee is promoted in circumstances where the company has doubts at the outset whether he will make the grade.

iii) Employers will never be expected to create a post artificially.

7.2) Employees who lapse after improvement:

a) It can be frustrating and seemingly counter-productive to manage the performance of an employee who improves during the warning period but who then lapses soon afterwards. This is acknowledged in the non-statutory Acas guide, which contains good practice advice and states:

"There may be occasions where an employee's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where a pattern emerges and/or there is evidence of abuse, the employer's disciplinary record should be borne in mind in deciding how long any warning should last".

b) In such cases, it may be reasonable for an employer to impose a longer warning period than usual (longer than, for instance, six or twelve months), pointing out to the employee that there needs to be a sustained improvement. In cases where it is suspected that such behaviour is deliberate, amounting to wilful underperformance, it may be appropriate to deal with the matter as a misconduct issue. The dividing line between inherent incapacity and idleness can be a thin one.

7.3) Can a final written warning be given for the first instance of poor performance?

a) Since poor performance procedures usually operate in stages, with the time allowed for improvement between each stage typically being between three and six months, it can take time for the employer to reach the point where it is possible to dismiss, particularly if more than one warning is involved. While the Acas Code recommends that employees should usually be given more than one warning before they are dismissed, there may be cases where it is appropriate to move straight to the final written warning stage:

"If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation."

b) An example is given in the Acas Code of a final written warning being administered to the employee of a small firm who promises impossible delivery dates to a key customer, with the result that the customer threatens to take his business elsewhere. It is often the case that those in client-facing roles will place the organisation at risk of greater harm than those in roles which do not involve contact with third parties. This might be a factor which leads an employer to decide that a final written warning is appropriate. Where possible, the employer should document the particular risk or prejudice to the business which justifies this approach.

8) The impact of the abolition of the Default Retirement Age:

8.1) As from 6 April 2011, the Government phased out the national default retirement age (DRA) of 65 along with the accompanying statutory retirement procedures. Whilst, going forward, consensual retirement is likely to become the norm, it will still be possible for employers to compulsorily retire employees following the abolition of the DRA as long as the employer can justify retaining its particular retirement age; otherwise, the employer will risk a finding of unfair dismissal and age discrimination.

8.2) Even if an employer doesn't operate a contractual retirement age, a time may come when it will have to manage out those employees who, for one reason or another, are underperforming: any consequent dismissal will therefore be by reason of capability (and the Government has made reference to the need for fair, objective and consistent performance management for all staff, irrespective of age). Previously, employers have often tolerated less than satisfactory performance or sick absence levels from employees who are approaching retirement on the basis that it's been simpler and kinder to wait and retire the individual (or, indeed, offer them early retirement). However, in the absence of a contractual retirement age an employer will need to be able to dismiss an employee whose performance or attendance is unsatisfactory and who does not want to retire. This in turn is likely to raise a number of potentially complex issues.

8.3) As described above, adopting a fair procedure for fairly dismissing an employee for poor performance or attendance is typically time consuming, particularly for the manager overseeing the employee. It involves factors such as:

- clearly identifying the way(s) in which the employee is underperforming / his or her attendance is unsatisfactory;
- in the case of poor performance, providing coaching and other assistance, together with clearly defined and measurable goals, to help that employee improve his/her performance;
- allowing sufficient time to determine whether the employee has achieved the required improvement; and
- adopting a consistent approach.

8.4) Given the increasing incidence of disability with age, it's likely that many cases involving poor performance will also involve the need to avoid disability discrimination, including the consideration of reasonable adjustments, and the protection against discrimination arising from disability and indirect disability discrimination (full details of which appear in Weightmans guide to disability discrimination). It's also likely that age discrimination will be a factor in performance dismissals. For example:

- is it reasonable to demand the same physical and/or mental performance standards from both a 38 year old and a 68 year old employee?

- will an employer be able to justify spending less time and money on adjustments for older employees on the basis that the business won't be able to gain as much benefit as it might from a younger employee who is likely to provide longer future service?
- by contrast, what sort of allowance should be made for 'rewarding' past long service by adopting a more tolerant, patient approach?

It's likely that we shall see a fair number of test cases, exploring the lengths to which employers should go.

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