



Representing UCU members in Capability Cases

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What is Capability?

- ▶ In law, there are four lawful reasons for dismissal from employment. They are:
 - ▶ Conduct, Capability, Statutory and Redundancy
- ▶ Capability is about the employer alleging that the employee is incapable of doing their job.
 - ▶ Due to long term sickness
 - ▶ And/or alleged poor job performance
- ▶ *Employment Rights Act 1996* (ERA 96).
“Capability” is defined in the legislation by reference to an employee’s skill, aptitude, health or any other physical or mental quality.

What is Capability?

- ▶ In general, an employee can be fairly dismissed if they cannot do the job they were employed to do.
- ▶ ACAS Code of Practice on Discipline and Grievances applies to many Capability cases:
 - ACAS code applies if there is an allegation of poor performance
 - ACAS code does not apply if the case only relates to if an employee is too sick or injured to be able to do the job.
 - ACAS code applies if there is allegations of culpable behaviour linked to sickness, i.e. if an employee is alleged to not be genuinely unwell.
- ▶ ACAS expect the 'basic principles of fairness' should apply to all cases.

Disciplinary or Capability?

- ▶ Conduct or Capability are similar as reasons for dismissal, as they relate to an individual employee.
- ▶ A disciplinary allegation involves alleged misconduct on behalf of the employee.
- ▶ A capability allegation does not involve an allegation of misconduct
 - The employee could be acknowledged by all parties as making a concerted effort to fulfil their job role, but still not be capable of adequate performance in the job.
- ▶ Employers do not always make this distinction between disciplinary and capability processes
- ▶ Check whether your institution has a separate policy

Capability or sickness?

- ▶ “Capability” is the normal statutory reason for dismissal due to ill health, perhaps due to lengthy or intermittent sickness absence.
- ▶ If an employer needs to consider action due to ill health absence, it should use the capability procedure.
- ▶ In the majority of cases in which an employer is considering using capability for action on ill health, the employee will have a disability, as defined by the Equality Act 2010.

Alleged poor performance

- ▶ An employee should not be dismissed on the basis of a single capability allegation, except in cases of serious negligence.
- ▶ If the consequences are very serious, one error could justify dismissal, provided the employer honestly believes on reasonable grounds that the employee is incapable of doing the job.
- ▶ However, for a dismissal to be fair, there must normally be more than one incident.

Beware hidden discrimination

- ▶ Following the abolition of the default retirement age increased risk that older employees, especially those at the top of the pay scale, may be targeted for formal capability interventions.
- ▶ Understandably, employers rarely admit to direct age discrimination, so look for the following:
 - a change in attitude towards an older worker
 - escalating minor issues inappropriately
 - taking an inconsistent approach to performance issues concerning the older worker when compared with younger colleagues
- ▶ University of Southampton, pattern of alleged poor performance or performance threats against older academics.

Capability Procedures

- ▶ Most colleges and universities will have a capability procedure that takes place in stages.
- ▶ The legal right to be accompanied by a trade union rep is only for disciplinary and grievance hearings
- ▶ Capability hearing may be covered depending on whether the ACAS code applies.
- ▶ Good policies negotiated by UCU should have a right to be accompanied in capability hearings
- ▶ Stage 1 would usually involve a discussion of the alleged poor performance.
- ▶ This would usually result in a 'Performance Improvement Plan (PIP) being drafted.

Performance Improvement Plans

- ▶ These plans can be a useful tool for both employer and employee
- ▶ PIP should set out performance objectives for the employee.
- ▶ These targets should be SMART (Specific, Measureable, Achievable, Realistic and Timed).
- ▶ The employer has the right to set performance objectives for the employee. Good practice is that the objectives should be discussed and agreed.
- ▶ A good PIP should also include support to help the employee reach the performance targets. Examples could include learning mentors, CPD, regular review meetings with manager

Performance Improvement Plans

- ▶ If the employee is concerned about targets in a PIP, this should be mentioned at the outset.
- ▶ The employee has a better chance of having targets amended by asking at the start of a process.
- ▶ Even if the employer does not agree to an amended target, it will be a matter of record that the employee has raised a concern at the beginning, prior to any future allegation of failing to achieve the target.
- ▶ PIP plans should be carefully scrutinised, as this is a key tool for employers to 'manage out' staff.

A reasonable employer?

- ▶ For a dismissal based on capability to be fair, the employer must show that they have acted reasonably.
- ▶ If an employer has set clear standards from the outset which an employee has failed to meet, despite being given adequate training and support, a capability dismissal is likely to be fair.
- ▶ Employers who have failed to provide adequate instructions, training and support for employees from the outset of their role, or who set unrealistic targets, or too unrealistic a timeframe for achieving them, are at risk of a finding of unfair dismissal.

A fair procedure?

- ▶ Check that the college or university is following their procedure!
- ▶ Employees are entitled to have their performance reviewed in a fair and transparent process, with a fair opportunity to challenge unfair assertions and to present their case.
- ▶ A fair procedure requires an employer to show that they:
 - carried out a reasonable investigation or assessment of the performance;
 - warned the employee that dismissal was a likely outcome if they failed to meet the required standard;
 - allowed a reasonable chance to improve; and
 - provided a right of appeal.

Capability Hearings / Meetings

- ▶ The employer must write to the employee, long enough before the meeting to enable the employee to prepare properly and to consult with their rep.
- ▶ This must include enough detail of the alleged poor performance to enable the employee to refute the claims and put their side of the story.
- ▶ Copies of any evidence the employer intends to rely on should be provided.
- ▶ The outcome of early stage meetings is likely to be a warning and PIP.
- ▶ Employees must be given a reasonable chance to improve. This must be long enough to allow the employee to demonstrate genuine improvement.
- ▶ Progress should be monitored, with regular supportive review meetings.
- ▶ At the end of the monitoring period, performance should be measured objectively against standards.

Capability Hearings / Meetings

- ▶ Preparing for Capability Hearings or meetings is similar to preparing for a Disciplinary Hearing
- ▶ Preparing a Capability Case worksheet
- ▶ Discuss with members tactics to use best in their interests. For example, it may be better to use a mitigation argument, than to challenge the fact of alleged poor performance.

Questions?