

Comprehensive Guide to Unfair Dismissal: Poor Performance/Incapability

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Employers have the right to dismiss workers who consistently underperform and are incapable of performing the job at the required level.

However, if a worker is dismissed for alleged poor performance/incapability (i.e. failing to meet goals/targets or not fulfilling responsibilities as expected) and the proper process is not followed, that dismissal may be deemed unfair.

The test is: whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief.

The employer does not have to prove that the worker was incompetent, but he must show that he honestly & reasonably held the belief.

In ***TD NO. GSD-TD 402/2017 National Workers Union v Radisson Trinidad***, the worker was hired as Housekeeping Manager at the employer's hotel. The terms of the worker's employment provided for a probationary period of six (6) months. The Worker was not given a job description at the start of or at any time during her probation. During the course of her employment, the Worker received 3 letters from the General Manager expressing his dissatisfaction with her performance. The first letter came 8 weeks into her employment, the second (referred to as a "Final Warning Letter") came 10 days later, and the third one came 10 days after the second. The GM never held a meeting with the Worker to discuss the areas of concern. The third letter stated that as a result of being dissatisfied with the worker's performance as manager, she was being offered the role of Housekeeping Supervisor. The worker saw this as a demotion and she declined. The worker was dismissed 8 days after the third letter. The letter terminating the Worker's employment did not state clearly that the reason was unsatisfactory performance of her duties, but it was obvious from the letters issued to her by the General Manager in the lead up to her dismissal that that was the reason. The Company's dismissal of the Worker was tantamount to a summary dismissal, and it was harsh, oppressive and contrary to the principles and practices of good industrial relations.

The court held that:

1) An employer has an obligation to ensure that an employee is provided with an adequate job description, with objectives clearly mapped out, with adequate facilities and support staff and is properly trained and supervised where necessary. Where an employer fails to do so, it may mean that any shortcomings on the employee's part, may not be entirely his fault and it may be unfair to dismiss him in such circumstances.

The absence of a job description which clearly outlined the Worker's duties as well as the standards by which she would be appraised was a very poor management practice.

2) The General Manager's approach to correcting what he saw as the Worker's shortcomings in appraisal and warning letters combined, was not in keeping with good industrial relations practice, especially for a probationer.

3) The Worker was not given sufficient time in which to realise any improvement in her performance between the warning letters issued.

4) There was no credible evidence that the Worker received the necessary coaching and/or training and/or resources required to achieve the targets which the General Manager clearly had in mind but which he omitted to have reduced to writing.

5) The offer of an alternative position to the Worker may have been reasonable in circumstances where she was given a fair chance to succeed in the position of Manager, that is to say, that she was given at minimum a job description with clear duties, standards of performance and targets to be achieved in the period of her probation, along with mentoring and coaching and she failed. However, in the circumstances of this case, it was not reasonable.

Reference No. 9 of 2007 Colet Acham v Caribbean Star Airlines Ltd [Antigua and Barbuda]

The Employee worked as an airline pilot. His employment was terminated due to his failure to pass a Base Check which rendered him incapable of flying pursuant to the relevant statute. Issues to be determined included: whether the employee's performance manifested any incapacity and if it did was the Employer required to give the Employee a written warning before he dismissed him; and whether the Employer honestly and reasonably believed that the Employee was incapable and had demonstrated at the time of his dismissal that he was able to perform his duties in a satisfactory manner?

Whether or not an Employee was capable of performing his duties is to be determined by making use of a subjective test...That test was succinctly stated...as follows: 'If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent...In other words, the test...is a subjective one...it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent.'

Having regard to all the circumstances of this case, the Employer, as a reasonable employer, honestly believed on reasonable grounds that the Employee had not demonstrated at the time when his services were terminated that he was able to perform his duties satisfactorily. The Employer acted reasonably. The employee was fairly terminated.

In **Davison v Kent Meters Ltd [1975] IRLR 145**, the claimant was dismissed for assembling nearly 500 components in the wrong sequence. She claimed that she had followed the pattern of work in accordance with the instructions received from her chargehand, but the latter denied having shown her how to assemble the parts, and maintained that she was entirely to blame for the errors. The employment tribunal thought that if the chargehand had not shown her what to do, he should have done so, and the mistakes were therefore hardly her fault. Further, he should have checked on her performance, and supervised her properly. The dismissal was held to be unfair.

Issues to be examined in such cases include:

- whether the incompetence of the employee was pointed out to him (**James v Waltham Holy UDC [1973] IRLR 153**),
- if he was afforded training (**Davidson v Kent Meters Ltd [1975] IRLR 145**) and mentoring, or
- whether he was given a chance to improve his performance before the decision to dismiss was in fact taken.

It should be noted that one act of incapability would not normally warrant dismissal but this is also dependent on the nature of the job in question (**Alidair Ltd v Taylor [1978] IRLR 82**).

To dismiss an employee who is not capable of performing his job properly will be fair provided the employer acts reasonably in the circumstances. When dealing with an incompetent worker, the reasonable employer will enquire into the matter to find out why the employee cannot do the job adequately:

1. Has he been trained properly so that he knows how the job should be done?
2. Has he been properly supervised?
3. Been given an adequate job description?
4. Does he have proper equipment, sufficient support staff and facilities?

In other words, the employer's first task is to find out the reason for the alleged incompetence, and, so far as it is possible, do something about it from the employer's point of view.

(**Selwyn's Law of Employment Chap 17.81**)

Alternatives

The reasonable employer will also consider alternatives before he dismisses the employee.

- Is there some other work which can be offered within the level of competence of the employee?
- Would he accept it if it was offered?
- Would he make a success of it?

(**Selwyn's Law of Employment Chap 17.84**)

The employer is not bound to create a vacancy if none exists; but he should at least consider the possibility, and consider if the employee would make a success of it (**Brush Electrical Machines v Guest EAT/382/76**).

In **Bevan Harris Ltd v Gair**, the claimant, who had been employed as a foreman, was dismissed after 11 years' service for poor performance, about which he had been warned on four occasions. The employment tribunal held the dismissal to be unfair, because a reasonable employer would have demoted him rather than resort to dismissal. The decision was reversed by the EAT. The employer had given serious consideration to offering the claimant another job, but had decided against it. The small scale of the business, and the loss of confidence in the

employee's abilities, meant that the decision to dismiss fell within the band of reasonableness and, in the circumstances, the dismissal was fair.

Therefore, in most cases, for an employee to establish that he has an honest & reasonable belief that the worker is incompetent/incapable, the employer should first:

1. Make sure the worker has a clear understanding of what is required- The worker must be provided with an adequate job description with his objectives clearly mapped out. The employer must ensure that the worker understands the expectations, the standards of performance and targets that are required of him.
2. Properly train the worker in how to perform his job. The worker should be given a proper onboarding & orientation when he begins. He should be provided with the necessary training and supervision to ensure that he knows how to perform his job. And he should be given any additional support, coaching or mentorship that may be needed. After the initial orientation & training, the employer should evaluate the worker to ensure that he is capable of performing his job independently.
3. Provide the worker with the proper equipment, sufficient support staff and facilities that he needs to perform his job.
4. (If the employer is not satisfied with the worker's performance) Inform the worker of the areas of his performance that are unsatisfactory and warn the worker of the need to improve his performance if he wishes to continue in the job.
5. Give the worker advice, guidance and further training, coaching & mentorship to help him improve his performance.
6. Give the worker sufficient time and opportunity to improve (this will depend on the nature of the job. Some jobs can't even afford one mistake- surgeons, pilots, etc)
7. (If the worker is still performing unsatisfactorily) Warn the worker again that if he does not improve he will be dismissed.
8. Give the worker accurate performance appraisals that highlight the areas that require improvement.
9. (If the worker has been given sufficient time & opportunity, but still hasn't improved) Issue a final warning to the worker. And if the worker still does not improve, consider placing him in another position that is more suitable. If no such position exists, it may be fair & reasonable to dismiss the worker.

If the employer takes all these steps and the employee is still performing below par, then the employer can show that he has an honest & reasonably held belief that the employee is not competent, and that there are reasonable grounds for that belief. And if the employee is dismissed as a result, the dismissal may be deemed to be fair.

But if the employer simply claims that he is dissatisfied with a worker's performance and fails to take these steps, a subsequent dismissal may be deemed unfair.

Lack of Qualifications

A worker may become incapable of performing his job if he ceases to hold the necessary qualifications.

In **TD No. 227 of 2012 Communication Workers' Union v Mr. Cooper, Permanent Secretary to the Prime Minister, Officer of the Prime Minister**, the Worker was dismissed for failing a security vetting. It was held that:

“...The Court is unable to disregard the evidence before it that forms the basis for the Worker's failure of the security vetting. In fact, it is this information that is the premise of the Employer's decision not to offer the Worker a new contract and not his performance...We are therefore of the view that the Worker's termination was neither harsh nor oppressive or contrary to good industrial relations practice. His termination occurred with the expiration of his contract and was not based on his performance as intimated by the Union. His failure to secure a new contract had everything to do with the results of a new security vetting system that was introduced by the Employer.”

In **Blackman v Post Office [1974] ICR 151**, a telegraph officer was required to pass an aptitude test, but he failed after a maximum number of attempts. It was held that his dismissal was fair on the ground of lack of qualifications.

But there must be a contractual obligation (express or implied) to hold the relevant qualification.

In **Litster v M Thom & Sons Ltd [1975] IRLR 47**, the applicant was employed as a foreman fitter/driver. Government regulations required that special driving licences had to be obtained for drivers of heavy goods vehicles, and the claimant failed the necessary test. Nonetheless he continued in employment as a fitter. His contract of employment contained no reference to the necessity of having an HGV licence. Following a dispute, he was told that unless he obtained such a licence, he would be dismissed. It was held that since his contract did not require him to hold that particular licence, a dismissal based on his lack of qualifications would be unfair.

In **Tayside Regional Council v McIntosh [1982] IRLR 272, EAT**, the employers advertised for a vehicle mechanic, an essential requirement being that the successful applicant should have a driving licence. The claimant was appointed to the job, but his contract of employment made no mention of the need to hold a driving licence. He was subsequently disqualified from driving, and as there was no other suitable employment for him, he was dismissed. The EAT held that he had been fairly dismissed. The nature of the job clearly required the holding of a valid driving licence.

But even though it can be shown that the employee lacks the necessary qualification for the job, the employer must still act reasonably in treating the reason as a sufficient ground for dismissal. In **Sutcliffe & Eaton Ltd v Pinney [1977] IRLR 349, EAT**, the claimant was dismissed from his job as a trainee hearing aid dispenser after he failed to pass the necessary examinations. It was held that the employers should have applied for an extension of his training period so that he could take the examination again. In other words, as always, the reasonable employer will look around for alternatives to dismissal.

Key principles regarding incapability due to lack of qualifications:

1. If the worker's employment contract states that he must have a specific qualification, or at the time he was hired, he understood that this position required a specific qualification, or there has been a change in law/policy that requires a specific qualification for his position, and
2. The worker loses his qualification or fails to get the new mandatory qualification, and
3. The employer has given the worker sufficient time & opportunity (and assistance) to attain the qualification, and
4. There is no suitable alternative position for the worker that does not require this qualification, then
5. It may be fair for the employer to dismiss the worker on the basis that the worker can no longer perform the job due to lack of qualifications.

Questions to ask your client concerning his dismissal for lack of qualifications:

1. What position was the Worker hired in?
2. Does the Worker require a specific qualification to perform the job?
3. Was this requirement expressly included in the contract?
4. If it wasn't in the contract, was it understood, at the time the Worker was hired, that this requirement was essential for the job to be performed?
5. Has the Worker lost the qualification?
6. Is it possible for him to get it back?
7. How long would it take for him to do so?
8. Would it be reasonable for the employer to wait for the Worker to get the opportunity to regain the qualification?
9. * Has there been a change in the law that has made this qualification mandatory?
10. * Can the worker obtain this qualification? How long would it take for him to do so? Has the employer made any reasonable effort to help the Worker obtain this new qualification?
11. Are there any alternative positions available for the Worker that do not require the qualification?

Genuine Incapability vs Negligent or Willful Poor Performance

Incapability must be distinguished from negligent, reckless, careless or intentionally poor performance.

Incapability is when the worker genuinely lacks the skill or ability to perform the job, despite the worker giving his best effort & the employer taking all reasonable steps to help the worker perform at the required standard.

But where a worker has the capability to perform the job at the required level, but he is failing to do so through his negligence, recklessness, laziness or intentional lack of effort, this is a disciplinary issue and must be dealt with through the disciplinary process.

In **Taylor v Alidair Ltd [1978] IRLR 82**, an airline pilot landed his aeroplane in a manner which caused some concern among the passengers and crew. After a proper investigation, it was decided that he had been negligent, and he was dismissed.

Incapability vs Serious Illness

If an employee has an illness/injury that is preventing him from performing his job at the required level, this is technically a form of incapability.

But when the incapability is as a result of sickness/injury, there are different industrial relations practices that must be followed (which will be covered in depth in another document).

'As it relates to the issue of health-related incapability, an employer's approach to ill-health absence which could lead to dismissal should be treated with much more flexibility, compassion and common sense than may be required in other areas of the employment relationship.

East Lindsey District Council v Daubney [1977] IRLR 181 -The adjudicatory body must examine whether it was reasonable for the employer to wait any longer before dismissing the employee, in light of the nature of the illness, the actual and potential length of the absence, the circumstances of the individual employee, the urgency of the need to fill the employee's job, and the size and nature of the employer's business.'

Therefore, if the worker was capable of performing his job properly but due to an illness/injury, he is not currently performing at the same level, the sickness procedure should be applied.

For all other employees whose alleged incapability is not caused by sickness/injury, the procedure outlined above should be applied.

Questions to ask your client to determine if his dismissal for incapability/poor performance may have been unfair:

1. What was your position at the company?
2. What were your responsibilities?
3. Did you get a Job Description?
4. Were you asked to perform tasks outside of your Job Description? Were those the tasks that you were accused of performing poorly?
5. Did you receive training on how to perform your responsibilities?
6. Did you receive supervision or mentorship when you started the role?
7. Did your boss tell you that he was dissatisfied with your performance?
8. Did he tell you specifically what he was dissatisfied with?
9. Did you have the proper equipment and sufficient support staff & facilities to perform your job?
10. Did your boss give you any guidance, training or advice on how to improve?

11. Did he warn you that you needed to improve your performance?
12. Did he set a date to reevaluate your performance after he told you that he was dissatisfied/gave you the warning?
13. Did he give you more feedback on your performance? Did he tell you if your performance had improved to a satisfactory level? Or did he tell you if more improvement was needed?
14. When did you start the job? When did he first raise the issue of your performance being unsatisfactory? How soon after that were you dismissed? How much advice or training did you get between the issue first being raised and you being dismissed? Do you feel like you were given enough time to improve your performance?
15. Did you previously have experience in the field?
16. Did you receive any performance appraisals? Were they negative?
17. If you really performed poorly, was it caused by an illness or injury?
18. Were you sincerely giving your best effort in your job or were you negligent, reckless, careless or lazy?
19. Did your performance lead to any losses or damage in the company?
20. Is this one of those rare jobs that employees can't afford even one mistake? (eg. Pilot, surgeon) Or is it one of those jobs that employees can be afforded some time to improve?
21. How many times were you warned about your performance?
22. How much time passed between each warning?
23. After each warning, did your boss make sure to clearly communicate what was expected of you? Indicate the areas to be improved? Provide advice, training & support to help you to improve those areas? Give you prompt feedback on if you were improving and what, if any, changes you could make? Set a date for re-evaluation and then re-evaluated your overall performance? And if your performance was still unsatisfactory, did he give you a further warning and then repeat this process to try to help you improve?
24. Did you receive a final warning that if your performance didn't improve by a specific date, you would be dismissed?
25. Were there any other available jobs in the company that might have been suitable for you? Did your boss offer you any of these jobs before dismissing you?

Conclusion

If an employer is dissatisfied with a worker's performance (and it is not a case of illness, misconduct or lack of qualifications), the employer must first bring the issue of poor performance to the worker, try to understand why the worker is performing poorly, make all reasonable efforts to help the worker improve, and warn him of the need to improve.

If the employer has:

- made all reasonable efforts to help the worker improve
- given him multiple warnings about the need to improve

- given him sufficient time & opportunity to improve

And the worker is still underperforming, and the employer genuinely believes that the worker is incapable of performing the job, the employer should consider placing the worker in an alternative position that he believes will be suitable for the worker.

If there is no such position, then it may be reasonable for the employer to dismiss the worker.

On the other hand, if an employer dismisses a worker because he is dissatisfied with the worker's performance, but he fails to follow this process (and it is not one of those rare jobs where workers cannot afford to make even one mistake), that dismissal may be deemed unfair.

Sources:

1. Case Law

2. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Hoper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir