



**Topics covered:** Capability

## Capability

Capability comes under two main headings; poor performance and ill health. It is essential for the employer to have policies and procedures for managing employee capability. This will limit the potential for costly Employment and Discrimination Tribunal claims. Where the employee lacks competence or skill, the employer is required to follow a capability procedure. This involves appraising the employee, discussing any concerns, giving the employee an opportunity to improve and offering training and supervision where required. In cases of sickness-related absence, the employer should follow a capability procedure. This will differ depending whether the illness is short term or long term. Warnings are inappropriate in such situations.

The Jersey case of *Mr Agostinho Gouveia v N S Cooke & Son Ltd* is an example of how the employer may leave itself open to a claim for unfair dismissal in a botched capability dismissal. Mr Gouveia, who had been employed by N S Cook & Son Ltd for almost 34 years, was on sick leave for 15 months, during which time there was little communication between the parties. After a year of sickness the employer wrote to Mr Gouveia in December 2009 asking him to provide a medical report. Mr Gouveia did not comply with the request and in March 2010 the employer wrote to him informing him that as he has not complied with the request he was dismissed. The Tribunal held that these were not the actions of a reasonable employer. Mr Gouveia should have been given the opportunity to respond to the decision that his long term sickness may lose him his job.

This case illustrates the need for an employer to have a policy in place to deal with such situations.

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