

Capability and performance

If someone cannot do their job because of their disability, or they're not meeting their employer's standards, their employer should follow a capability or performance procedure to investigate.

Before doing this, the employer must make sure they have done all they reasonably can to [support the disabled person](#).

By law (Equality Act 2010), an employer:

- must not make someone redundant, dismiss them or discipline them just because they're disabled
- must not force someone to retire or resign because of their disability

If the employer does not follow the law, it would be [disability discrimination](#).

Any formal procedures – for example dismissal or demotion – should be a last resort. But in some circumstances an employer might need to consider ending someone's employment or taking other action.

Managing performance

If an employer thinks there's an issue with someone's work performance, they should talk with the person about:

- how they're currently performing
- what the employer expects
- what support and [reasonable adjustments](#) might help

An employer should:

- keep a record of what's been discussed and agree that with the person
- keep an open mind – some people might be able to do a task but in a different way to others
- never assume someone is not capable of doing their job, or why someone is behaving in a certain way

Example of managing performance

Eden had a performance review because of a sudden drop in work quality. During the meeting Eden explained that they had been in severe pain because of the symptoms of their disability.

Eden's manager agreed how they could offer support at times when Eden was struggling. They also agreed a small reduction in Eden's targets so they can maintain the quality of their work.

If someone does not want to discuss reasonable adjustments to help their performance

Some people may not want to talk with their employer about their disability. If the employer thinks a reasonable adjustment would help with a performance issue but the person does not agree or does not want to talk about it, the employer should:

- try to talk with the person to see if they can find a way forward together

- explain why they believe a reasonable adjustment would help
- be sensitive and take the person's lead in how much they want to share about their disability
- follow a capability or performance procedure if they cannot get a better understanding of the issue by talking with the person

[Find out more about talking about disability](#)

Carrying out a capability or performance procedure

Every situation will be different. The employer must consider the specific needs of the person and the organisation.

The employer should be clear on what the law says, including:

- [who is considered to have a disability by law](#)
- [how an employer should support disabled people](#)

The employer must carry out a full and fair capability or performance procedure before deciding if any further action is needed. This includes:

- talking with the person about their disability, how it affects them, and their capability to do the job
- gathering relevant evidence about the person's capability and any support that's been put in place

Examples of evidence include:

- notes of meetings and conversations with the person and their representative if they have one, for example a trade union representative
- information about reasonable adjustments the employer has made
- information about how reasonable adjustments have been reviewed and if the adjustments have helped
- details of other support that's been considered, including what has not been done and why
- medical evidence, for example an [occupational health report](#)
- if someone is off work, their opinion on how long they might be unable to work or how much time off they might need in the future because of their disability

If an employer takes disciplinary action against someone who later makes an employment tribunal claim, the tribunal will ask the employer about the evidence they gathered.

When a dismissal might be justified

An employer might be able to justify dismissing someone if they show evidence that proves all of these things:

- the person cannot do their job after everything has been tried to remove all barriers, including all possible support and [reasonable adjustments](#)
- there are no other suitable roles the employer can offer as a reasonable adjustment
- there is no other way the work can be done, for example distributing the work differently within a team
- the decision to dismiss is reasonable, when all the circumstances have been considered

Depending on the circumstances, the employer might also need to prove that:

- the person no longer meets the health requirements for the role, because of the progressive nature of their disability
- the person has reached the agreed maximum number of absences, including any [adjustments for disability-related absences](#)
- medical evidence shows the person is not likely to return to work within a reasonable timescale, and the person agrees with this

- the employer cannot reasonably continue to support such a high rate of absence
- the person's absence is having a significant impact on the organisation

This can be a complex area. Before considering any dismissal, the employer should [get legal advice](#).

If you think you're being treated unfairly

If you think you've been treated unfairly or discriminated against, you could make an informal or formal complaint to your employer.

If the problem is not resolved, you could consider making a claim to an employment tribunal.

If you think you've been unfairly dismissed you could make an employment tribunal claim for both disability discrimination and unfair dismissal. For discrimination claims, you do not need to have worked for your employer for 2 years. For most unfair dismissal claims you will need 2 years' service.

Find out more about:

- [reporting disability discrimination](#)
- [unfair dismissal](#)

Get more advice and support

Find out about:

- [more support for managing disability at work](#)
- [performance, conduct and capability for neurodivergent employees](#)

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