

3.3 Potentially fair reasons for dismissal

3.3.1 Capability or qualifications

According to section 98(3) ERA 1996, capability is to be assessed by reference to skill, aptitude, health or any other physical or mental quality', and it has been held that an employee's inflexibility or lack of adaptability came within his or her aptitude and mental qualities.³⁴ 'Qualifications' means 'any degree, diploma, or other academic, technical or professional qualification relevant to the position which the employee held'. In *Blue Star Ltd v Williams*,³⁵ it was held that a mere licence, permit or authorisation is not such a qualification unless it is substantially concerned with aptitude or ability of the person to do the job.

Poor performance

Paragraph 1 of the Acas Code of Practice on Disciplinary and Grievance Procedures 15 observes that poor performance may be regarded as a disciplinary matter and comments that, 'If employers have a separate capability procedure, they may prefer to address performance issues under this procedure.'

Dealing with absence

Appendix 4 of the Acas Guide on Discipline and Grievances at Work discusses how to handle absence problems. It provides information under the following headings:

- How should frequent and persistent short-term absence be handled?

- How should longer-term absence through ill health be handled?

- Specific health problems

- Failure to return from extended leave on the agreed date.

Issues of ill health

In cases of intermittent absences owing to ill health, there is no obligation on an employer to call medical evidence.

CASE STUDY 13.1

Cereal Packaging Ltd v Lynock

In *Cereal Packaging Ltd v Lynock*,³⁶ the EAT affirmed that an employer has to have regard to the whole history of employment and to take into account a range of factors including: the nature of the illness and the likelihood of its recurrence; the lengths of absences compared with the intervals of good health; the employer's

need for that particular employee; the impact of the absences on the rest of the workforce; and the extent to which the employee was made aware of his or her position. There is no principle that the mere fact that the employee is fit at the time of dismissal makes that dismissal unfair.