LAWEXPRESS
Greater legal clarity

Please Note:
The Employment Rights Act 2025 is now law but the changes are planned to roll out gradually throughout 2026 and 2027. Changes will be incorporated into our documents and contracts as and when they are implemented and more detail is available. The documents reflect the law as it currently stands.

DISMISSAL SICKNESS AND CAPABILITY

Sometimes things at work don't go well and there may be performance-related issues or concerns about your illness-related absence. If matters are not resolved, your employer may decide to terminate your contract by way of dismissal. This is generally referred to as a capability dismissal as it relates to an issue with your skill, aptitude or health. A persistent or long-term illness can be a valid reason for dismissal, as can being unable to perform the role because you lack skill or expertise, but in each case your employer must follow a fair process.

Illness-related dismissals

Persistent short-term absence and long-term absence due to a medical condition can both impact on a business. Short-term absences can sometimes be dealt with as misconduct if there is no underlying medical condition. Persistent illness or potential long-term absence through illness should be the subject of monitoring and enquiry at an early stage. Your employer will probably want to investigate the reason for your absence before it becomes problematic. The investigation would generally include an interview with you, which allows you to provide a clear indication of if, and when, you will be able to return to your role.

Doctor's note

Once you have been absent for between four and six weeks, your employer may wish to approach your doctor for a medical report. Your employer will need your written consent to do this and most employers will have a standard letter for you to sign. When writing to your doctor it is usual for your employer to set out details of your role and what that involves in the workplace. Your employer will be asking the doctor to confirm the general timescale of when you will be able to return.

We often receive calls from employees concerned that their employer will have access to their entire medical history. However, this is not the case. Any information given will be limited to the nature of your current illness-related absence.

If you do not consent, your employer may consider asking you to attend a meeting with an occupational health therapist. If you fail to co-operate with either request, your employer is entitled to reach a decision on any absence-related issue on the evidence they have.

Long-term absence

The result of these enquiries may result in you being classified as disabled under the Equality Act 2010. A person is classified as disabled if they have a physical or mental impairment which has a substantial and long-term effect on their ability to carry out normal day-to-day activities. Day-to-day activities include things such as using a telephone, reading a book or using public transport. Some illnesses, such as cancer, are automatically classed as a disability.

If you are considered disabled, different considerations may apply in the workplace. There will be a requirement for your employer to consider reasonable adjustments to allow you to return to your role or to continue to be effective in it.

If your employer is satisfied you are not going to be able to return to work at all, or that you are likely to remain absent for a lengthy period, they can consider dismissal. If you have been employed for more than two years (and even if you have not) it is important that the correct disciplinary and dismissal procedure is followed.

Your employer may have policies for monitoring absence in the workplace, including how absences are recorded and the impact of such a policy in relation to pay and bonuses. One of these policies is known as the Bradford Factor. This calculates absence with reference to a score and guidance once a score reaches critical levels.
There may be a clear indication in the policy as to the type of warning that may be given if the rate of absence does not improve. It is always best to check to see if your employer has such policies and how they work.

Performance-related dismissals

If your performance at work is not of the required standard, your employer may decide dismissal is the only option.

Your employer may have their own defined plan for dealing with performance-related issues, often referred to as a Performance Improvement Plan (PIP). This is designed to take you through the issues of performance and provide support where required. If you do not improve as expected, it is then possible for the employer to use the disciplinary process to issue a suitable warning.

Even where there is no formal PIP, it would be usual (and advisable) for your employer to set out the standard of performance expected in the role and tell you if you are not reaching that standard. They may then discuss what needs to be done to improve and how they are going to measure this.

Your employer should always follow the Acas Code of Practice on Disciplinary and Grievance Procedures and may also have documented policies for performance-related issues and how they will be dealt with. See your staff handbook for more information.

Capability dismissals

For any dismissal to be fair, your employer will need to show they believed on reasonable grounds that you were not doing the job to the requisite standards and they acted fairly in handling the matter.

This generally requires your employer to:

- investigate the matter properly.
- ensure there is an up-to-date medical report where the issue relates to long-term sickness absence.
- inform you of any problems if the matter is performance-related.
- review any medical evidence with you.
- consider whether any reasonable adjustments can be made in the workplace to allow you to return if you are classed as disabled under the Equality Act (see above).
- allow you a reasonable opportunity to improve where the matter is performance-related.
- provide support and training as necessary.
- give careful consideration to treat all employees equally.

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An employee can potentially challenge the dismissal as unfair if they have qualifying service. The length of this service used to be 2 years but with effect from 1 January 2027 this is being reduced to 6 months. This change means that anyone employed prior to 30 June 2026 will have 6 months service on 1 January 2027 and anyone employed after that date with have qualifying service once they have been employed 6 months.