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CIPD Seminar
Ill Health Dismissals

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Learning objectives

- Develop confidence in dealing with ill health dismissals.
- Effectively manage sickness absence to secure a resolution and minimise the risk of claims.
- Insight into the duty to make reasonable adjustments under the Equality Act 2010 ("EQA 2010").
- Practical tips.

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Introduction

Whether it is persistent short periods off work or long term sickness, absence that is not managed robustly has a huge impact on the day to day running of a business.

<u>Important facts on sickness absence</u>

- 131 million days were lost due to sickness absence in 2013
- Employers face a yearly bill of around £9 billion for sick pay

(*Office for National Statistics Labour Market report 25/02/2014*)

- 6.3 days absence per employee per year;
- Overall median cost of absence per employee (£522-private sector), £835-public sector)

(*CIPD Annual Absence Management Report 2016*)

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What is absence management?

"Effective absence management involves finding a balance between providing support to help employees with health problems stay in and return to work, and taking consistent and firm action against employees who try to take advantage of organisations' occupational sick pay schemes".

(CIPD factsheet 'absence measurement and management' 2015)

Why is managing absence so important?

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Capability dismissal – Employment Rights Act 1996

- Capability is one of 5 potentially fair reasons for dismissal under s.98 Employment Rights Act 1996 ("**ERA 1996**")

- Capability is assessed "*by reference to skill, aptitude, health or any other physical or mental quality*" s.98(3)(a) ERA 1996.

- In practice, capability dismissals fall into 2 broad areas:
  - Performance/competence;
  - Ill-health.

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Ill health dismissals

Dismissal on the grounds of ill health fall into 2 categories:

- Long term sickness absence; and
- Short term persistent absences.

Long term absence

Steps to take to ensure decision to dismiss is fair and reasonable

- Establish true medical position
- Consult with employee
- Consider alternatives to dismissal

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BS v Dundee City Council [2013] CSIH 91

Court of Session set out three main questions that an ET should consider when determining the fairness of dismissal:

i. Whether reasonable steps had been taken to discover the true medical condition and likely prognosis;

ii. Whether employee had been properly consulted and his/her views taken into account and balanced against the views of any medical professional;

iii. Whether employer could have been expected to wait any longer before dismissing and, if so, for how much longer.

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What should the employer do before dismissing?

1. Establish the true medical position

Employers should find out the true medical position before dismissing for ill health (*East Lindsey District Council v Daubney [1977] ICR 566*).

Obtain a medical report from the employee's GP, Occupational Health and/or a specialist. The report should cover:

a) the nature of the illness and prognosis;

b) the likely duration of sickness absence and when the employee is likely to return to work;

c) duties employee will be able to do on return/recommendations;

d) opinion regarding relevance of EQA 2010.

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Conflicting reports?

- Reasonable employer would be expected to seek further clarification, including but not limited to obtaining a third report.

- There may be cases where an employer is entitled to prefer the opinion of one expert over another, although it must be able to show that it acted reasonably in doing so (*DB Schenker Rail (UK) v Doolan UKEAT 0053/09*).

- *Doolan 2009*: employer was entitled to prefer the evidence of the occupational psychologist to the worker's GP on grounds that they had a better understanding of the employee's job.

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2. Consult with the Employee

There should be discussions (eg, sickness absence meetings) so that the situation can be weighed up.

Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 (EAT).

Consultation should include a discussion on:

- Reason for absence and impact on business;
- Likely return to work date;
- GP/OH recommendations;
- Ability to return to work/perform job;
- Risk of dismissal if employee is unable to return to work;
- Any reasonable adjustments.

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3. Can the employer wait any longer before deciding to dismiss

Purpose is to weigh up position of employers need for work to be done and employees need for time to recover.

This will involve a balancing act and consideration of:

- Nature of illness and likely length of absence;
- Business need for work to be done;
- Availability of temporary cover (including its cost);
- Occupational health costs that might be incurred; and
- Size and resources of the employer.

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4. Alternatives to Dismissal

- Employers should always consider alternative employment in cases of ill health dismissal (*McCann v Clydebank College*). However, no obligation to create a new role (*Merseyside Electricity Board v Taylor [1975] ICR 185*)

- Modifications of the job/reasonable adjustments such as removal of requirement for heavy lifting, phased return, reduction in hours etc (*Garricks (Caterers) Ltd v Nolan [1980] IRLR 259*).

- Failure to consider alternatives is likely to render dismissal unfair (although ET is unlikely to award any loss of earnings if no alternative positions available).

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Persistent short term absence

ET will consider if employer has:

- Carried out a fair review of attendance record and reasons for absence;
- Given the employee an opportunity to make representations;
- Given appropriate warnings of dismissal;
- Disruption caused to the business.

- Return to work interview – employee should be told what improvement in attendance is expected and likely consequences (eg, warnings/dismissal).

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Disability Discrimination

- Employers contemplating dismissing an employee for ill health should always consider the effects of the EQA 2010. Unlike unfair dismissal, there is no qualifying service requirement and compensation is uncapped.

Reasonable adjustments

- Employers should consider reasonable adjustments before dismissing an employee on long term sickness absence. Failure to do so will almost always result in a claim for disability discrimination (provided the employee satisfies the definition of disability under the EQA 2010).

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Reasonable adjustments – when is the duty triggered?

Home Office v Collins [2005] EWCA Civ 598

Employer did not fail to make reasonable adjustments when it dismissed a disabled employee for long periods of sick leave without considering the option of part-time work because the employee was neither ready nor able to return to work. There was also no evidence to suggest that the adjustment proposed would have enabled the employee to return to work.

London Underground v Vuoto UKEAT/0123/09 – failing to adjust shift patterns, permitting a trial period and tolerating a higher level of sickness absence for an employee with MS constituted a breach of the duty to make reasonable adjustments.

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Recent developments

Dismissed for “pulling a sickie”

Ajaj v Metroline West Ltd (EAT)

An employee who claimed sick pay by fraudulently representing to be sick (when he was not); misrepresented his ability to attend review meetings; attempted to defraud the company with a false claim for personal injury, was fairly dismissed on the grounds of gross misconduct.

“*If that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of trust and confidence*” (HHJ Simler).

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Recent developments

Pay protection as a reasonable adjustment?

G4S Cash Solutions (UK) Ltd v Powell UKEAT/0243/15/RN

An employer was required, as a reasonable adjustment, to continue employing a disabled employee in a more junior role involving less physical activity at his existing rate of pay.

Dismissal following the employee's refusal to accept a 10% pay cut constituted a breach of the duty to make reasonable adjustments.

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G4S Cash Solutions v Powell

"I see no reason in principle why pay protection, which is no more than another potential form of cost for an employer, should be excluded as a "step". Suppose, for example, that there is a choice between keeping an employee in an existing role, paying for support and assistance, or transferring the employee to a new role where no support or assistance is required but the pay is lower, such that an Employment Tribunal considers it reasonable for the employer to have to protect the employee's pay. I see no reason in principle why the one should be a "step" within section 20(3) but the other should not be. The latter may indeed sometimes be less costly for the employer than the former".

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Practical tips – effective ways to reduce absence

- Maintain an up to date sickness absence policy and procedure;
- Process to follow to report sickness absence (call to report absence, email/text unacceptable);
- Restrict sick pay – limit to SSP (exclude contractual entitlement if absence occurs during disciplinary process);
- Return to work interviews;
- Sickness absence meetings;

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Practical tips – effective ways to reduce absence

- Evidence of incapacity/when fit note required;
- Disciplinary action: unauthorised absence, taking absence when not unwell and failure to comply with procedures;
- Covert recordings;
- Right to require employee to attend OH;
- Trigger mechanisms;
- Attendance incentives and stress counselling.

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- Managing exits and reputational risk management;
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