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S O L I C I T O R S



CIPD Seminar
Managing Ill Health at Work
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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.

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.

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 important?



Important facts on sickness absence

- Average number of sickness absence days has almost halved since 1993
- 4.1 days absence per employee in 2017 (7.2 days per worker in 1993)

(Office for National Statistics Sickness absence falls to the lowest rate on record 2018)

- 137.3 million days were lost due to sickness absence in 2016
- Workers in organisations with 500+ employees - 2.5% versus 1.6% for organisations with 25 or less employees

(Office for National Statistics Sickness absence in the UK labour market 2016)

- Employers face a yearly bill of around £9 billion for sick pay

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

- Overall median cost of absence per employee: £522-private sector; £835-public sector

(CIPD Absence Management Report 2016)

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.



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

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.

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.

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.

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.

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.

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).

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).

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).

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.

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.

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”.

The Bradford Factor

The Bradford Factor (BF) is a tool for measuring sickness absence and assigning a score to different patterns of absence.

BF = number of unrelated absence periods² x days absent

Higher scores for multiple shorter absences than one long absence:

1 absence of 10 days: $(1 \times 1) \times 10 = 10$

5 absences of 2 days each: $(5 \times 5) \times 10 = 250$

- Deter workers from taking numerous 1 or 2 day absences which are arguably more disruptive than 1 x 2 week absence;
- Evidence supports that sickness rates are reduced when BF is used;
- Identify employees that may need some support from HR/ OH / Union;
- Could result in unwell employees attending the workplace and spreading illness.

Recent developments

Dismissed for “pulling a sickie”

Ajaj v Metroline West Ltd 2016 (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).

Recent developments

Warnings for disability related absence might not be proportionate in the circumstances.

DL Insurance Services Ltd v S O'Connor 2018 (EAT)

A disabled employee whose absence was 6 x the trigger point for action, who was issued with a written warning which removed future sick pay, won her claim for discrimination arising in consequence of her disability. It was held that although the employer had a legitimate aim of ensuring attendance levels, the issuance of a written warning was not proportionate in the circumstances.

The employer had failed to: (1) follow their own policies; (2) consider the effect of her absence on her team and the impact of the warning on her; and (3) explain how the warning would improve her attendance.

DL Insurance Services Ltd v S O'Connor

“The ET specifically asked the employer’s witnesses to explain how their aim would be achieved by giving the Claimant a written warning. They were unable to give that explanation, other than by appealing to the “generalisations” to which I have referred; generalisations which did not satisfy the ET that the warning would have the effect for which the employer contended in the Claimant’s specific case, given, as the ET said, that she had a disability, and that her absences were related to the disability and were genuine.”

Recent developments

HMRC have published a Statutory Sick Pay Guide online which is a useful tool when managing sickness absence and associated payments. Information provided:

- Who can get SSP?
- Calculating and paying SSP
- Not entitled to SSP?
- Company sick pay
- SSP and holidays
- Managing sickness absence
- Keeping records

http://www.hmrc.gov.uk/courses/syob4/ssp_guide/?utm_source=HMRC-DSBA-Jul-SSP&utm_campaign=DSBA-Campaign&utm_medium=Email

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;

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.

Employment law and HR services from Rahman Lowe

- Review of employment contracts and handbooks;
- Drafting bespoke contracts, policies and procedures;
- Advice on all aspects of employment law;
- Day to day HR support and assistance with litigation;
- Managing exits and reputational risk management;
- Regular updates and training on employment law.



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