



Managing Short Term and Long Term Absence

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Today's session

- 01** Some Stories
- 02** A Brief Refresher on Absence Management
- 03** Top Current Issues
- 04** Questions



Some Stories

Some Stories

- Best Fit Notes
- Best Sickness Absence Explanations
- We may have changed names, details and possibly embellished for entertainment values.

“I could not come to work as my ex-girlfriend stole all my clothes”

Reason for absence on a Fit Note:

“Indolence”

Reason for first period of absence:

“My wife found out about the affair I was having with my other partner”

Reason for second period of absence:

“Head Injury”

Reason for period of absence:

“Lethargy”



Sickness Absence A Refresher

Basics a Refresher

- Section 98(2) Employment Rights Act 1996
- Potentially fair reason for dismissal – capability
- Section 98(4) – fair process and overall fairness required.
- Expectations of a fair process different for sickness absence than for performance management, albeit both capability.
- Equality Act 2010 – Disability discrimination:
 - Section 15 – consequences of a disability
 - Section 20 – failure to make reasonable adjustments.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

...

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Basics a Refresher

- Fair Process – Unfair Dismissal Law:
 - No prescribed correct way – No ACAS Code of Practice
 - Fair warning
 - Fair opportunity to improve
 - Consistency/Clear Rules
 - Communication – Clarity and Regularity
 - Consultation with Employee
 - Adjustments
 - Alternatives – Alternatives with Adjustments
 - Early Retirement/Pensions/Permanent Health Insurance

Basics a Refresher

- Fair Process – Unfair Dismissal Law:
 - Fairness will be judged by the Tribunal against the prevailing standards and expectations of the time.

Basics a Refresher

"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'."

Basics a Refresher

'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'

Basics a Refresher

East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.

We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'.

Basics a Refresher

- Medical Evidence
 - Not purely a medical question
 - No absolute requirement to obtain medical evidence.
 - Dismissals can be fair without doing so
 - But in most cases it is recommended

Basics a Refresher

- Is dismissal fair: (Paragon Case Principles):
- A variety of factors to be weighed up in considering whether the decision to dismiss is reasonable under ERA 1996 s 98(4). These include:
 - the nature of the illness and the job;
 - the applicability and clarity of an employer ill health policy;
 - the needs and resources of the employer;
 - the effect on other employees;
 - the likely duration of the illness;
 - how the illness was caused;
 - the effect of sick-pay and permanent health insurance schemes;
 - alternative employment; and
 - length of service.
- The weight to be given to particular factors will vary from situation to situation.



Key Current Issues

Top Issues

1. Can I set an absence/attendance target?
2. What should they be?
3. Can I apply this to a disabled employee?

Top Issues

1. EAT have held that there is no rule that disability absence must not be counted: *Royal Liverpool Children's NHS Trust v Dunsby* [2006]
2. It is not a necessary adjustment to continue to pay full pay to an employee absent for a disability-related reason: *O'Hanlon v Revenue and Customs Comrs* [2007] (but be Meikle aware)
3. Absence trigger levels are a PCP - *Griffiths v Secretary of State for Work and Pensions* [2015] and *Northumberland Tyne & Wear NHS Foundation Trust v Ward* UKEAT/0013/19
4. What is 'reasonable' thereafter might or might not include disregarding some or all of the disability-related absences – this is a question of fact for the tribunal.

Top Issues

5. It may be a reasonable adjustment to alter trigger points at which disciplinary action will be considered.
6. Royal Bank of Scotland v Ashton [2011] an employer's sickness policy was (eventually) applied to the employee, leading to her receiving a warning and the withholding of sick pay, the tribunal were found to have erred in concluding that there had been a failure to make a reasonable adjustment.

1. Can I make an employee attend a medical appointment/agree to a medical report?
 - Do you have a contractual right/power?
 - If yes, refusal would be a breach – misconduct
 - But query would it be fair to dismiss?
 - Medical professionals will not release a medical report without the employee's permission.

1. What happens when a medical report says an employee is fit for work but we do not agree/have safety concerns?
 - Example:
 - Employee A has been off sick with an injured knee.
 - They are a lorry driver
 - They report back as fit for work earlier than anticipated saying they are recovered albeit walking with a suspicious and pronounced limp
 - You are concerned that they are not fit/safe to drive.
 - What is the position? Are they still sick? Can you send them home? Do you have to pay them?

Top Issues

1. What happens when an employee wishes to return to work before their current fit note has expired?
 - No legal rule that says they cannot return if they feel fit to do so.
 - No legal rule that says you can require they be signed back as fit.
 - Same issues as above arise.

1. What is reasonable when it comes to reasonable adjustments?

- Key Points:
 - Failure to make not failure to consult or consider
 - More than equal treatment
 - Applicants, employees, workers, agency workers.

Disability Test

Is the person "disabled" under the Equality Act 2010 (see Appendix A)?



Knowledge of Disability Test

Are we, the employer, aware of the disability condition or should we be aware of it?



Disadvantage Test

Is the disability condition putting the disabled person at a substantial disadvantage in the workplace as compared to a non disabled person?



Knowledge of Disadvantage Test

Are we aware that the disability condition is putting the disabled person at a substantial disadvantage or should we be aware of this?



Duty to Make Reasonable Adjustments Applies

Top 5 Issues

- Key Points:
 - The duty to make reasonable adjustments arises where a:
 - provision, criterion, or practice,
 - any physical feature of work premises; or
 - the absence of an auxiliary aid;
 - puts a disabled person at a substantial disadvantage compared with people who are not disabled.
 - The law says that a substantial disadvantage is one which is “more than minor or trivial”.

Top 5 Issues

- Key Points:
 - The duty to make adjustments requires you to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments.
 - For a physical feature this means a duty to take reasonable steps to remove the feature or alter it or provide a reasonable means of avoiding the substantial disadvantage.
 - In the case of auxiliary aid or service to take reasonable steps to provide it.
 - In the case of PCP to take reasonable steps to avoid the substantial disadvantage.

Top 5 Issues

- Key Points:
 - The law does not specify any particular factors that should be taken into account in assessing the reasonableness of any step.
 - What is a reasonable step for us to take will depend on all the circumstances of each individual case.
 - There is no onus in law on the disabled worker to suggest what adjustments should be made (although it is good practice for you to ask).
 - However, where the disabled person does so, you should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.
 - It is good practice to discuss what adjustments can be made with the disabled worker and ask for their input.

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Top 5 Issues

- The following are some of the factors which might be taken into account:
 - whether taking any particular steps would be effective in preventing the substantial disadvantage;
 - the practicability of the step;
 - the financial and other costs of making the adjustment and the extent of any disruption caused;
 - the extent of your financial or other resources;
 - the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
 - the type and size of the employer.

Miller v Rentokil 2024 – Failure to make reasonable adjustments

- Did an employer make reasonable adjustments when it dismissed a disabled employee rather than placing him in an alternative role on a trial basis?
- The Claimant worked as a field-based pest controller.
- After being diagnosed with multiple sclerosis he could no longer work in this role. He couldn't work at heights (which made up around 40% of his role) and could only work slowly.

The Respondent looked at other jobs in the business and the Claimant applied for an administrator role.

- He was unsuccessful following an interview process and was dismissed.
- The Claimant claimed that failing to place him in the administrator role on a trial basis amounted to a failure to make reasonable adjustments under Equality Act 2010.

Top 5 Issues

- The tribunal upheld his claim.
- The EAT agreed with the tribunal.
- The Claimant was placed at a substantial disadvantage because of his disability - he could no longer carry out his duties in his field-based role.
- Moving the Claimant to an alternative role was potentially a reasonable adjustment which would remove that disadvantage.
- The Claimant had shown that the alternative role was potentially appropriate and suitable.
- The burden then passed to the Respondent to show that it was not reasonable to have put the employee into that role, or to have done so at least on a trial basis.
- The tribunal had been entitled to conclude that the Respondent had not discharged this burden.
- Whilst the Tribunal should and did take the Respondent's assessment into account they did not have to agree with it. They had permissibly reached their own objective position taking account of the suitability of the role, whether the employee met its essential requirements and the likelihood of a successful trial.

Top 5 Issues

AECOM Limited v Mallon 2024

- Does an employer need to know the specifics of a disabled person's substantial disadvantage before being required to make reasonable adjustments?
- The Claimant applied for employment at the Respondent (where he had previously worked and been dismissed during probation).
- He sought a telephone interview to supplement his online application as a reasonable adjustment, having informed the Respondent of unspecific disability-related difficulties with making an online application, which he did not explain when requested by email.
- The Respondent did not agree to a telephone interview.
- The tribunal upheld a complaint of a failure to make reasonable adjustments.

Top 5 Issues

- The Respondent's appeal against the findings that it had been under a duty to make reasonable adjustments also failed.
- The tribunal was entitled to find that they had constructive knowledge of disability in the circumstances, as it had failed to make reasonable enquiries of the Claimant, e.g. by phoning him.

McQueen v The General Optical Council 2023

- If a Claimant's disabilities (here dyslexia, Asperger's, neurodiversity and hearing loss) had no effect on the aggressive behaviours for which he was disciplined, was a tribunal entitled to dismiss detriment claims for something arising from disability under s15 Equality Act?
- The Claimant was subjected to disciplinary action after incidents of aggressive behaviour.
- The tribunal found that the Claimant's conduct was not because of his disabilities, but from a short temper and resenting being told what to do.
- The Claimant argued that the tribunal should have considered a dual or multi-factor causation test, whether any disabilities had been a factor in the Claimant's conduct, meaning disciplinary action was due to something arising because of disability.
- The EAT rejected this, the tribunal found that the effects of the disabilities did not play any part in the Claimant's conduct, so there was no need to consider if the treatment was partly because of disabilities.

McQueen v The General Optical Council 2023

- The EAT gave guidance on two ways to structure decisions in section 15 cases:
 1. What are the disabilities;
 2. What are their effects;
 3. What unfavourable treatment is alleged in time and proved; and
 4. Was that unfavourable treatment “because of” an effect or effects of the disabilities

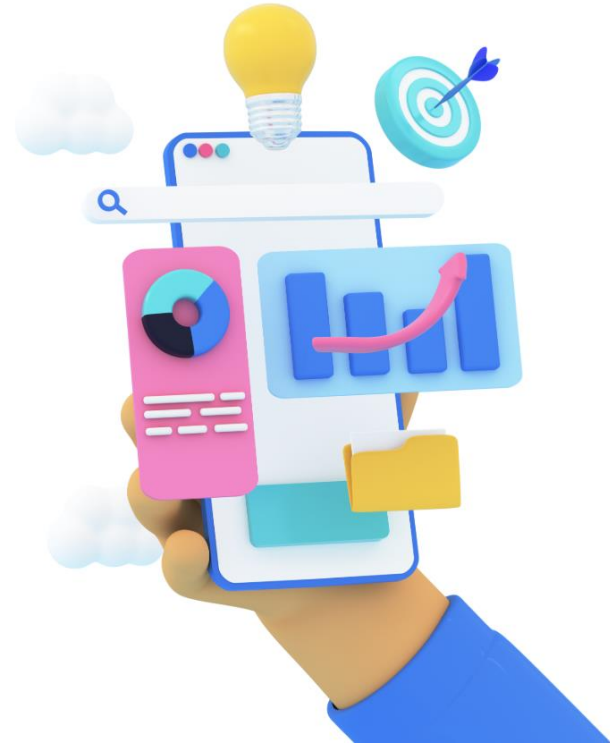


Questions

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