

Managing ill health & reasonable adjustments

24 January 2024

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*“They are just so well established.
They are a cut above the rest.”*

Chambers UK Guide

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Overview

- Guidance
- Short term absence
- Long term absence
- Avoiding unfair dismissal
- Disability discrimination
- Reasonable adjustments

- Acas : [Managing Attendance and Employee Turnover](#) (2010)
 - elements of a good procedure
 - distinction between
 - long term absence
 - short term absence
- Acas: Managing staff experiencing mental ill health superseded by:
 - [Supporting Mental Health at Work](#)
 - [Reasonable Adjustments for Mental Health](#)
- [Evidence based approaches to workforce wellbeing - NHS Employers](#)

Sickness Absence Procedures

- Deal with short-term and long-term absence
- Clear trigger points
- Cover key areas
 - medical evidence
 - return to work
 - dismissal

Short-term Absence

- Monitor for patterns
- Return to work interviews
- Warnings with timescale for improvement
- Investigate the cause
- Medical evidence – underlying condition?
- Consider reasonable adjustments and alternatives

Long-term Absence

- Obtain medical information
- Consult with employee
- Is there a disability?
- Consider reasonable adjustments and redeployment
- Phased return?

Avoiding Unfair Dismissal

- Fair Reason
 - short-term absence
 - capability
 - SOSR
 - misconduct (if unauthorised absence)
 - Long-term absence
 - capability

Avoiding Unfair Dismissal

- Fair Procedure
 - consultation with employee
 - medical information
 - alternatives?

Consultation

- Decide who will keep in touch
- Discuss medical advice
- Discuss sustainability of absence
- Keep record of contact
- May need to make adjustments for meeting
- Right to be accompanied

Medical Evidence

- Self-certification (for first 7 days)
- Fit Notes
- Occupational Health reports
- Specialist Report?
- Contractual requirement for medical examination?
- Employee refusal – base decision on what is known

Alternatives to Dismissal

- Redeployment
- Alterations to job role
- Reasonable adjustments

Dismissal

- Last resort
- Write to employee
 - invite to a meeting (location/adjustments)
 - advise outcome may be dismissal
 - enclose details of the absences and effect on business
 - summarise medical evidence
 - enclose procedures / documents
 - advise of right to be accompanied

Dismissal (continued)

- Failure to attend
- Adjourn or proceed?
 - reason for non-attendance?
 - have there been previous attempts to meet?
 - medical evidence?
 - if proceed – invite written submissions from employee
- New facts – may be necessary to adjourn
- Right of appeal

Disability Discrimination

- Disability
 - physical/mental impairment
 - substantial and long-term
 - adverse effect on day-to-day activities
- Deemed disabilities
- Excluded conditions

Disability Discrimination

- Potential claims
 - direct discrimination
 - arising from disability
 - indirect
 - victimisation
 - harassment
 - reasonable adjustments
- No qualifying service and no limit on compensation

Knowledge of disability

- *SoS for Dept of Work & Pensions v Alam (2010)*
 - did employer know employee was disabled and substantial disadvantage?
 - if not, ought they to have known?
 - if "no" to both = no duty

Disability Discrimination – Reasonable Adjustments

- Duty under Equality Act 2010
 - substantial disadvantage
 - provision, criterion or practice
 - physical feature
 - auxiliary aid
- No associative discrimination
 - *Hainsworth v Ministry of Defence [2013]*
- Post-termination discrimination

Disability Discrimination – Reasonable Adjustments

- [EHRC Code](#) – examples include
 - making adjustments to premises
 - providing information in accessible formats
 - allocating some of a disabled person's duties to another worker
 - transferring a disabled worker to fill an existing vacancy
 - altering a disabled worker's hours of working or training
 - different place of work or training, or arranging home working
 - allow absence for rehabilitation, assessment or treatment
 - giving, or arranging for, training or mentoring
 - acquiring or modifying equipment
 - modifying procedures for testing or assessment

Disability
Discrimination –
Reasonable
Adjustments

- Not a general duty to assist employee
 - *Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Bagley (2011)*
 - application for TIA/PIB handled inefficiently
 - EAT
 - HR inefficiency is not a PCP
 - *Salford NHS Primary Care Trust v Smith (2010)*
 - career break not a reasonable adjustment

Disability
Discrimination –
Reasonable
Adjustments

- Will the adjustment work?
 - may be reasonable even if does not totally remove disadvantage (*Noor v Foreign & Commonwealth Office (2010)*)
 - only requires a “prospect” of success (*Leeds Teaching Hospital NHS Trust v Foster (2010)*)

- Redundancy selection
 - *Dominique v Toll Global Forwarding Ltd (2013)*
 - adjust even if would make no difference to outcome
 - *London Borough of Southwark v Charles (2014)*
 - adjust competitive interview process

Disability Discrimination – Reasonable Adjustments

- Cost
 - *Cordell v FCO (2012)*
 - deaf employee offered post in Kazakhstan
 - costs of adjustment – just under £500,000 for 2 years
 - EAT – cost is “...one of the central concerns in considerations in the assessment of reasonableness”
 - not a reasonable adjustment

- Sickness Absence Policies
 - *Jennings v Barts (2013)*
 - likely to be substantial disadvantage but only adjust if reasonable
 - *Revenue & Customs v Whiteley [2013]*
 - EAT – Two approaches:
 - consider absence in detail; or
 - determine “reasonable” level of absence for someone with that disability

Disability Discrimination – Reasonable Adjustments

- Sick Pay
 - adjustment unlikely to be reasonable (*O'Hanlon v Revenue and Customs Comrs (2007)*)
 - will be exceptional
- Severance package
 - *Hill v Lloyds Bank PLC [2019]*
 - EAT
 - no reason in principle why not a reasonable adjustment to
 - provide a guarantee that an employee will not work with a colleague
 - promise that a payment will be made if they are required to work together and the employee feels it necessary to resign
- exceptional case – fact specific

- Redeployment
 - usually no obligation to create role but may be if “blank slate” (*Southampton City College v Randall (2006)*)
 - consider swapping roles (*Chief Constable of South Yorkshire Police v Jelic (2009)*)

Summary – Reasonable Adjustments

- Ascertain the provision, criterion or practice
- Discuss with the employee
- Consider OH and other medical evidence and advice on the proposed adjustments
- Balance relevant factors before making a decision
- Keep under review

Questions?



Contact

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