

# Disability Dismissals

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6 December 2016



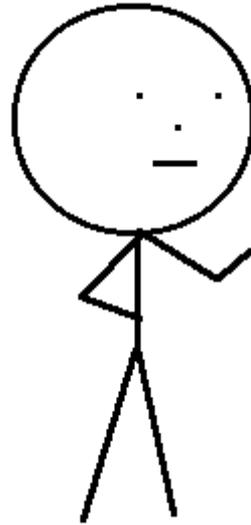
# Thorny Questions

- How do you reduce the risk of dismissing an employee with a disability (including mental health and cancer)?
- What if medical opinion is divided, the condition is fluctuating or requires a further lengthy absence or wait for an operation?
- How long do you hold back before making a reasonable decision?



## Meet John .....

- John has been working for you for 10 years
- He has been diagnosed with prostate cancer
- He needs to have treatment that will mean he needs to take 12-18 months off work



## Meet Jim .....

- Jim has been working for you for 15 years
- He is suffering from anxiety and depression following a bereavement
- He has been off work, then come back, then gone off again...



## Meet Jane .....

- Jane has been working for you for 18 months She suffers from a genetic bone condition which has a fluctuating effect
- She is waiting for surgery which may or may not help



# Understanding who is disabled?

- Deemed and excluded conditions
- The all important statutory definition

## **NB**

- Equality Act and Disability Regulations
- The Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability
- EHRC Employment Statutory Code of Practice – Appendix 1



# Deemed Conditions

- Blindness, severe sight impairment, sight impairment and partial sightedness (provided this is certified by a consultant ophthalmologist) BUT not the ordinary wearing of glasses
- Severe disfigurements, with the exception of unremoved tattoos and piercings
- Cancer
- HIV infection
- Multiple sclerosis



# Excluded Conditions

- Addiction to alcohol, nicotine or any other substance (although not where the addiction was originally the result of medically prescribed drugs or other medical treatment)
- Tendency to set fires, steal, physical or sexual abuse of other persons
- Exhibitionism
- Voyeurism
- Tattoos and body piercings
- Seasonal allergic rhinitis (aka hayfever)
  
- **BUT** beware of chickens and eggs



# The All Important Statutory Definition

- 4 key elements:
  - ♦ Physical or mental impairment
  - ♦ Does that impairment have an adverse effect on their ability to carry out “day to day” activities
  - ♦ Is the adverse effect substantial?
  - ♦ Is that effect long term?
- Past disabilities are also covered – a reference to a person who has a disability includes a reference to a person who has had a disability



# Physical or Mental Impairment

- Impairment bears “its ordinary and natural meaning”
- No need for a clinically well recognised condition or medically diagnosed cause for their impairment – effect not cause that is important
- Employer’s knowledge must be present though in order to trigger obligations (if employer knew or ought to have known)



# Adverse Effect on “Normal Day to Day” Activities

- Does that impairment have an adverse effect on their ability to carry out “day to day” activities
- No list of day to day activities
- Things people do on a regular or daily basis
- Not specialised activities – playing a musical instrument or playing sport to a high level of ability
- Not work activities as such – but can use work-related activities



# Is the Adverse Effect “Substantial”?

- More than minor or trivial
- Focus on what the employee cannot do because of their impairment rather than on what they can still do despite their impairment
- Recurring effects
  - ♦ If the effect is fluctuating, is it likely to recur at the same degree of severity?
- Progressive conditions
  - ♦ If there is some effect that at some point will become substantial
- Treatment
  - ♦ Measures are being taken to treat or correct the effect
  - ♦ BUT for the measures, the effect would be substantial

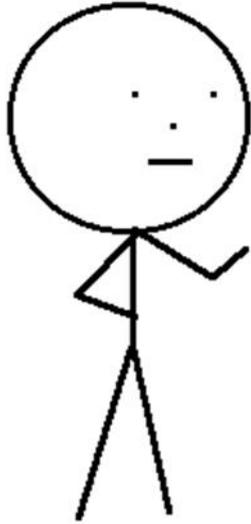


# Is the Adverse Effect Long Term?

- Long term effect only if:
  - ♦ It has lasted 12 months
  - ♦ The period for which it lasts is likely to be 12 months
  - ♦ It is likely to last for the rest of the life of the person affected
- Where the substantial adverse effect is deemed to exist because it is likely to recur, the tribunal must take into account the whole period



# Back to John, Jim and Jane ..... and the thorny questions



H | J

# Risk #1 - Unfair Dismissal Claim

- Two years' service
- Brought within 3 months (as extended by early conciliation period) of termination of employment
- Claim for compensation:
  - ♦ Basic Award
  - ♦ Compensatory award – based on actual losses (which may be limited if the person cannot work) and capped at 52 weeks basic pay or £78,962



# Risk #1 - Unfair Dismissal Claim

- Lack of capability (due to ill-health) is a fair reason to dismiss
- Fairness depends:
  - ♦ whether in all the circumstances (including the size and administrative resources) the employer acts reasonably in treating the medical condition as a sufficient reason for dismissal at the point in time of the dismissal
- Need to be guided by medical advice
- Consultation meetings with the employee
- Alternatives to dismissal considered and reasonably rejected



## Risk # 2 - Disability Discrimination Claim

- Available from day one
- Only applies if the employee is “disabled”
- Claim
  - ♦ Financial losses – uncapped, but as before may be limited if the person cannot work
  - ♦ Injury to feelings
  - ♦ Personal injury compensation –if we have aggravated the condition / or created a psychiatric injury this could be significant
  - ♦ Aggravated damages



## Risk # 2 - Disability Discrimination Claim

- Direct Discrimination
  - ◆ “Because of” disability
- Discrimination arising from disability
  - ◆ If dismissal is because of something arising in consequence of employee’s disability; and
  - ◆ Employer cannot objectively justify
- Failure to make reasonable adjustments
  - ◆ Where employer applies a PCP
  - ◆ Puts people with a disability at a substantial disadvantage
  - ◆ Duty to make adjustments
  - ◆ But limited to where it is reasonable



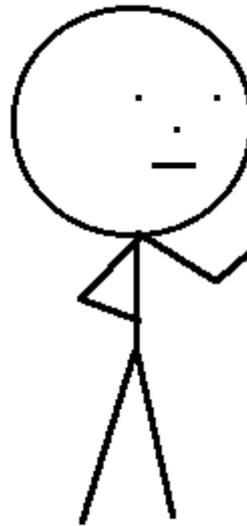
## Risk # 3 – Contractual Claim

- Available from day one
- Claim for compensation
  - ♦ Notice pay – wrongful dismissal
  - ♦ Unpaid sick pay
- BUT consider:
  - ♦ PHI – *Aspden v Webb* claim



# John .....

- John is deemed to be disabled
- Do we need to dismiss or can we keep his job open?
- Depend on what he does, how big we are?
- Consider his sick pay entitlement
- What if he can do some work?
- What does John want?



# Jim .....

- Not clear if Jim is disabled?
- Treat as if he is disabled
- Can we tolerate the unpredictability of his attendance?
- Depends on what he does, how big we are?
- How long term is the problem? Can we find out?



## Meet Jane .....

- Jane is likely to be disabled because her conditions fluctuates and may be progressive
- Can we wait for the surgery?
- Depends when it is, what she does, how big we are?
- Can she do some work in the meantime?



# Reducing Risks

- Be mindful of the potential claims
- If in doubt treat as covered by Equality Act 2010
- Don't make assumptions
- Get medical advice, but don't treat it as all important – be prepared to question it
- Keep talking to the employee involved, but beware of harassment
- Be mindful of length of sick pay entitlement, but not determinative
- Settlement agreements





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