

EVERSHEDS
SUTHERLAND

White Paper Conference on Discrimination for HR

Disability and managing sickness
absence

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The Question

When diagnosis and time-frame for recovery are not certain, how many “false dawns” of a return to work do you allow a disabled employee who’s on long-term sick leave?



Key Principles

Dismissing for long-term sickness absence

Claims an employee may bring

- Breach of contract
- Unfair dismissal
- Disability discrimination
- Personal injury

Disability Discrimination

Types of disability discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Duty to make reasonable adjustments
- Harassment
- Victimisation

Key issues to consider

Can the employer be expected to wait any longer for the employee to return?

- nature of employee's illness
- likely length of absence
- cost of continuing to employ the employee
- size and resources of employer
- availability of other staff to cover the role
- reasonable adjustments
- sick pay/ill health benefits
- PHI benefits

Procedure

Three key elements:

- consultation with the employee
- obtaining medical evidence
- consideration of other options

Consultation

Proper consultation with should include:

- discussions at the start of absence and periodically thereafter
- informing the employee if the stage when dismissal may be considered is approaching
- personal contact with the employee
- consideration of the medical evidence with the employee
- consideration of the employee's opinion on his or her condition
- consideration of what can be done to get the employee back to work
- consideration of offering alternative employment
- consideration of an employee's entitlement to enhanced ill-health benefits

Case studies

Background

Your head of communications, Claire Johnson, went off sick in March 2018 with depression and anxiety after alleging that she was being bullied by her line manager, the COO, Sarah Hunt.

You investigated her grievance at the time and her complaint was not upheld. Her appeal against the outcome of the grievance was unsuccessful.

Sarah Hunt left in November 2018. Ms Johnson returned to work for one week in December 2018, but has been off work ever since. Her absence is supported by fit notes which simply state “depression and anxiety”.

What action would you take?

Recent events

You have been asking Ms Johnson to supply medical evidence about her prognosis, but very little information has been forthcoming.

In May 2019 Ms Johnson was seen by your own occupational health providers. You have just received their report. The report states that they cannot be certain when Ms Johnson will be fit to return to work.

A new COO has just been appointed and is very keen to appoint a permanent replacement for Ms Johnson. He has identified an ideal candidate but believes that they might be about to accept an alternative offer elsewhere.

Questions

- Are you in a position to be able to lawfully dismiss Ms Johnson?
- If not, what further steps should you be taking?
- How would you practically manage this situation?

Meeting with Ms Johnson

You write to Ms Johnson and ask her to attend a meeting with you and the new COO. You explain in your letter that, in light of her length of absence and the uncertain prognosis, you are considering terminating her employment.

At the meeting Ms Johnson produces a fit note and a letter from a consultant psychiatrist stating that she is likely to be fit to return within the next six months.

What do you do?

O'Brien v Bolton St Catherine's Academy

Summary facts

- Teacher, HoD, off work with stress reaction after assault by pupil in March 2011
- Unsuccessfully tried to return in December 2011
- Information about her prognosis not forthcoming
- Dismissed in January 2013
- Appeal heard in April 2013. At the appeal she produces a "fit for work" note and other medical evidence
- Dismissal upheld on basis that medical evidence was inconsistent and ability to return still uncertain

O'Brien v Bolton St Catherine's Academy

Decision

- ET held dismissal unfair and discriminatory. School had adduced no evidence about adverse impact of her continuing absence and should have waited “a little longer”. EAT overturned ET’s decision
- CA held:
 - proposition that it was unfair to dismiss senior employee absent for 12 months required very careful scrutiny
 - easy for employee to argue for more time but employer entitled to finality
 - case was “borderline” because of length of absence and unsatisfactory medical evidence
 - BUT no error of law by ET and by time of appeal there was evidence that she was fit to return

Fox v British Airways

Summary facts

- Mr Fox employed by BA for 22 years. Transferred to new role as a result of serious accident
- Significant absence from work due to pain in his hip. Medical evidence was that he would be unable to resume his job in foreseeable future
- Dismissed with 13 weeks' notice
- Mr Fox applied for ill-health retirement (IHR). Appealed dismissal 56 days after notice given
- IHR medical report advised that, as Mr Fox was due to have operation which would alleviate condition, he did not qualify for IHR

Fox v British Airways

Decision

- ET found that dismissal was within range of reasonable responses and that it was not unreasonable for BA to refuse to consider Mr Fox's appeal as it was submitted 56 days after notice of dismissal
- EAT overturned decision:
 - As at the date of termination position had changed. BA knew Mr Fox was due to have operation which might enable him to return
 - ET only considered fairness of initial decision. Did not consider change of circumstances following receipt of IHR report

Key points

- Essential question: can employer be expected to wait any longer?
- Range of reasonable responses/proportionality test
- Consult the employee regularly and in person
- Warn the employee when dismissal is being contemplated
- Obtain medical evidence on nature of condition/prognosis
- Do not ignore medical evidence provided by employee
- Provide evidence of impact employee's absence has on employer's business
- Bear in mind PHI/ill-health benefits

Questions?



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