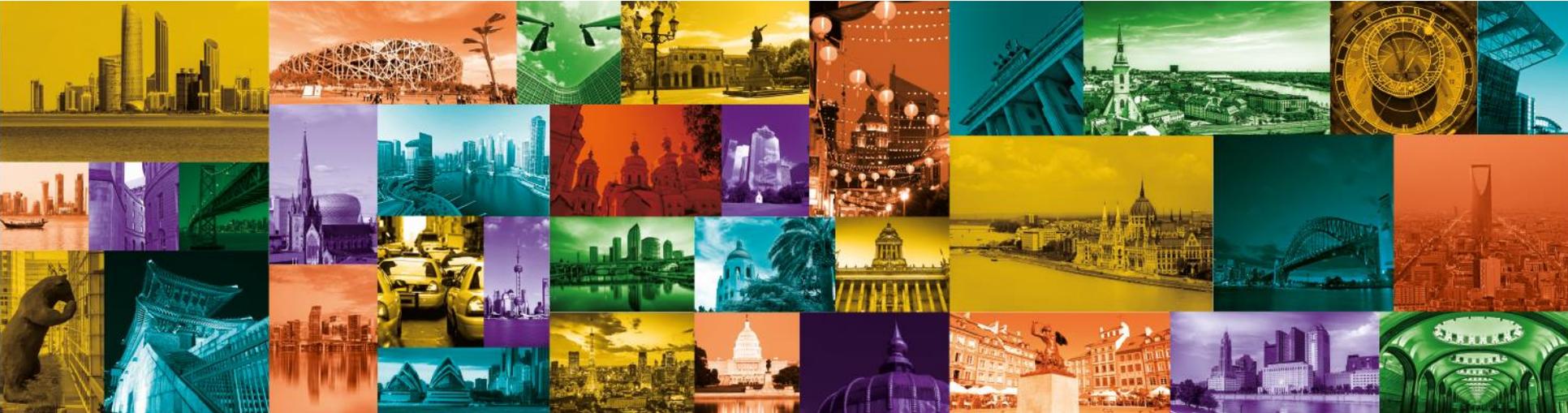


## Selective Sickness Pay

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Is it reasonable for you to keep employees on full pay through cancer, but not mental health situations?

Do policies of this type whether formal or informal leave you open to challenge?

# Potential Challenges?

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- Reasonable adjustments
- Direct discrimination
- Discrimination arising from a disability
- Indirect discrimination

If employees have the protected characteristic of disability

S.6(1) Equality Act 2010 – a person (P) has a disability if:

- P has a physical or mental impairment; and
- the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities

- S.20(2) The duty comprises the following three requirements
- S.20(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
- S.20(4) and (5) relate to physical features and auxiliary aids

# When would continuing sick pay be a reasonable adjustment?

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- When the employee's continuing absence is caused by the employer's delay in making other reasonable adjustments at work

*Nottinghamshire County Council v Meikle [2004]*

*Paragraph 7.22 EHRC Code*

- Direct disability discrimination occurs where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others

*Section 13(1) Equality Act 2010*

- Direct disability discrimination cannot be justified



- S.15(1) Equality Act 2010: A Person (A) discriminates against a disabled person (B) if:
  - A treats B unfavourably because of something arising in consequence of B's disability; and
  - A cannot show that the treatment is a proportionate means of achieving a legitimate aim
- S.15(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

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- No comparator required
  - It is "unfavourable treatment" not "less favourable treatment"
  - Because of something arising in consequence of B's disability
  - Can be justified

- Is the aim of the treatment legitimate and is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

# What is a legitimate aim?

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- Must be legal – so not discriminatory in itself
- Must represent a real objective consideration:
  - for example the health, welfare and safety of employees
  - or reasonable business needs and economic efficiency but not solely cost reduction

# What is proportionate?

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- Balancing exercise
  
  
  
  
  
  
  
  
  
  
- Between discriminatory effect of the treatment and the Employer's reasons for applying it

- A applies to B a provision, criterion or practice (PCP)
- B has a disability
- A applies (or would apply) that PCP to persons who do not have B's disability
- The PCP puts (or would put) those with B's disability at a particular disadvantage when compared to other persons
- The PCP puts (or would put) B at that disadvantage
- A cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim

*Section 19 Equality Act 2010*

- Provision, criterion or practice (PCP)
- Doesn't need to be a formal policy
- Group disadvantage
- Employer's knowledge of disability not required
- Can be objectively justified

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If you pay someone full pay whilst off sick with cancer, but not employees suffering from mental health problems:

- It is unlikely to be failure to make a reasonable adjustment, but:
- It could be direct discrimination
  - if you treat them less favourably because of the nature of their disability;

And

- It could be discrimination arising from their disability if you can't justify the difference in treatment between someone off with cancer and someone off with mental health problems

## Para 6.16

"Sickness and absence from work may be governed by contractual terms and conditions and/or may be the subject of non-contractual practices and procedures. Regardless of the nature of these policies, it is important to ensure that they are non-discriminatory in design and applied to workers who are sick or absent for whatever reason without discrimination of any kind. This is particularly important when a policy has discretionary elements such as decisions about stopping sick pay or commencing attendance management procedures".

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■ Office locations  
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