

WHITE PAPER CONFERENCE: REDUNDANCY AND DISMISSAL

CAPABILITY AND ABSENCE

BACKGROUND:

1. This paper is aimed at addressing the following areas:
 - (i) **When does absence become a matter of capability?** I will consider the distinction between non-genuine and genuine ill-health absences, and the difference in approach to short-term and long-term genuine ill-health absences. I will also consider whether the Acas Code of Practice on Disciplinary and Grievances Procedures applies to capability dismissals.
 - (ii) **Stress-specific issues:** I will consider how to identify whether stress-related absences are work-related and why this is important. I will also consider how a capability management process applies to frequent, short-term, stress-related absences which have been caused by work factors and non-work factors.
2. To start, it is worth examining some of the current statistics on absence within the workplace. All employees can expect to be absent from work on the grounds of ill-health at some point during their working lives. The recently-published *CIPD Annual Survey Report on Absence Management 2016*⁶ (**CIPD Survey**) reports that the average level of employee absence currently stands at 6.3 days per employee. There are, of course, nuances across different types of employer. Public sector employees have, on average, 3 days more absence per year than private sector employees. Manual workers have, on average, an extra 2.1 days' absence per year than non-manual workers. Absence levels tend to be higher in larger organisations, regardless of sector. However, overall, absence levels have decreased and are at their lowest level for seven years.
3. In addition to the volume of absence, the CIPD Survey also considered the main causes of absence. For short-term absences, the most common cause is minor illnesses, such as colds, flu and migraines, with 75% of employers reporting this as the most common cause within their business. This was followed by: stress; muscular-skeletal injuries; mental ill-health; and back pain. Interestingly, 24% of organisations surveyed also reported that one of their top five causes of short-term absence was non-genuine ill-health, also known as "pulling a sickie".
4. For long-term absences (i.e. absence lasting 4 weeks or more) the most common cause is stress, with 29% of employers reporting this as the most common cause within their business. This was followed by: acute medical conditions; mental ill-health; muscular-skeletal injuries; and back pain. In contrast with short-term absence, only 7% of those surveyed reported non-genuine ill-health as a common cause of long-term absence.
5. As far as the causes of stress are concerned, the most common work-related causes are: workload; management style; organisational change / restructuring; and relationships at work. The most common non-work-related reasons given were: relationships / family; health issues; and financial concerns.

6. Two things that become clear from this brief consideration of sickness absence are that:
- (i) *Non-genuine ill-health absence is a common reason for short-term absence.* This suggests that when considering how to respond to absences from work, employers must be careful to draw a distinction between genuine ill-health absences (which should usually be treated as a capability issue) and non-genuine ill-health absences (which should be treated as a conduct issue). I return to this issue at paragraphs 7 to 10 below.
 - (ii) *Stress is cited as a common cause of both short-term and long-term absences and it can be caused by both work and non-work-related factors.* I return to this issue at paragraphs 37 to 48 below.

WHEN DOES ABSENCE BECOME A MATTER OF CAPABILITY?

a. Non-genuine ill-health absences:

7. As noted above, almost a quarter of employers surveyed for the CIPD Survey, reported that non-genuine ill-health absences were a common cause of short-term absence. In a similar vein, a poll by YouGov in 2015 revealed that 19% of British workers (about 9 million people) had "pulled a sickie" in the previous 12 months. Those in the 18-24 age bracket were the worst offenders, with 28% admitting to taking a sickie in that period. This suggests that most employers will have to grapple with this issue at some point.
8. Because absences of this nature are not genuinely on the grounds of sickness, it would not be appropriate to trigger a capability-focused process. Instead, the employee will have committed a dishonesty offence by falsely representing that they are ill in order to take absence (and potentially also receive sick pay). Dishonest behaviour is highly likely to be considered as misconduct warranting disciplinary action, up to and including dismissal.
9. This is well-illustrated by the recent case of *Metroline v Ajaj*ⁱⁱ where it was held that an employee had been fairly dismissed for dishonestly exaggerating his ill-health. Mr Ajaj went off sick following an alleged work-related accident. Metroline had concerns that Mr Ajaj was being untruthful about the nature and extent of his injuries. They decided to put in place covert surveillance at around the time he was on site to attend sickness absence review meetings. Mr Ajaj was ultimately dismissed for dishonestly taking sickness absence and claiming sick pay. Mr Ajaj brought a claim for unfair dismissal. At first instance, the Employment Tribunal accepted that Metroline had a potentially fair reason for dismissal (i.e. conduct) and that it genuinely believed that Mr Ajaj had exaggerated his injury and its effects. However, it decided that, notwithstanding the surveillance evidence, a reasonable employer would still have had regard to Mr Ajaj's capability.
10. The EAT overturned the decision on the basis that it had incorrectly applied the test for unfair dismissal by focusing on *capability* considerations, rather than conduct considerations (conduct being the reason for the dismissal). Mr Ajaj's capability was irrelevant in the context of a misconduct dismissal. The correct question was whether Metroline had reasonable grounds to

believe, based on a reasonable investigation, that Mr Ajaj had exaggerated his injury and its effects. The EAT Judge commented that: "...an employee [who] "pulls a sickie" is representing that he is unable to attend work by reason of sickness. If that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of the trust and confidence that is at the heart of the employer/employee relationship".

b. Genuine ill-health absences:

Frequent short-term absences

11. Where an employee has frequent short-term absences, an employer is entitled to move to dismiss. The dismissal may be due to the level of past absenteeism or due to the ill-health itself. The cause of the dismissal will determine which "fair reason" should be relied on by the employer to justify the dismissal.
 - Where the employee's absences result from a **series of unconnected minor ailments**, the cause of the dismissal will depend on what is at the forefront of the employer's mind at the time of dismissal. If the cause of the dismissal was the persistent absenteeism, then this would usually be understood to be for some other substantial reason (**SOSR**). By contrast, there may be odd cases where there is no underlying medical condition as such, but the cause of the dismissal is the employee's weak health and general susceptibility to illness, in which case, this would be an ill-health issue and would be by reason of **capability**.
 - Where the employee's absences resulted from an **underlying medical condition**, the cause of the dismissal will be ill-health. A dismissal for ill-health will be by reason of **capability**.

It is important for employers to grapple with this distinction as it will determine the nature of the process to be followed prior to dismissal.

Absences for minor and unconnected reasons

12. As stated in paragraph 11 above, a dismissal for persistent absenteeism alone would usually be understood to be on the grounds of SOSR, rather than capability. SOSR is one of the five potentially fair reasons for dismissal under s.98 of the Employment Rights Act 1996. SOSR is a catch-all category designed to cover dismissals for reasons which justify the dismissal of an employee holding the position which the employee held. The reason why dismissals for persistent absenteeism are best understood as SOSR dismissals is because the employer is less concerned with the employee's capability to do his job, than with his past level of absence.
13. By way of example, in the case of **Wilson v Post Office**ⁱⁱⁱ the Court of Appeal concluded that dismissal for poor attendance did not amount to capability but fell within SOSR. Further, in the case of **Ridge v HM Land Registry**^{iv} the EAT looked at whether a dismissal for persistent absenteeism should be classified as a dismissal for capability or SOSR. It concluded that, if considerations of the employee's capability assessed by reference to skill, aptitude, health or another physical or mental quality are at the front of the employer's mind when dismissing, then

the reason for dismissal will be capability. By contrast, if the recurring absences, of themselves, are the reason for the dismissal – particularly in cases of frequent short-term absences for unconnected reasons – then the better label may be SOSR.

14. However, it is important to recognise that there may be cases where the cause of the dismissal is the employee's weak state of health and susceptibility to frequent short-term absences, even though there is no identifiable underlying medical condition as such. If this is the rationale for the dismissal, then the employee's capability assessed by reference to their health would or should have been at the forefront of the employer's mind at the time of dismissal. Accordingly, this should be treated as by reason of capability.
15. The statutory label is important since it dictates the nature of the procedure to be followed in order to effect a fair dismissal. The procedure outlined in paragraphs 17 to 22 below may be sufficient in SOSR dismissals. However, it would not be sufficient for a capability dismissal, where investigation of the medical position will be required (see paragraphs 23 to 27 below). If an employer labels a dismissal for persistent absenteeism as by reason of capability, they will not be able "convert" the label to SOSR at an Employment Tribunal (unless they have pleaded alternative reasons). This would mean that, if they have not investigated the medical position sufficiently (as would be required for a fair capability dismissal) then the dismissal will be unfair, whereas if it has been correctly labelled as by reason of SOSR then this would not have been fatal to fairness.
16. Indeed, this is what occurred in the case of ***Devonshire v Trico-Folberth Ltd***^v, where an employee was dismissed for her unacceptable attendance record. However, an internal appeal panel decided, on compassionate grounds, that the reason for termination should be changed to incapability. The Employment Tribunal decided that, had the dismissal been for the original reason, then the dismissal would have been fair. However, once it had been changed to incapability: "*the whole picture changed*". The dismissal was found to be unfair because the employer had failed to carry out sufficient investigation into the employee's medical condition. The decision was upheld by the Court of Appeal.
17. As far as a fair process is concerned, where it is clear that the dismissal is not related to the state of health, there will usually be little merit in the employer seeking formal medical advice. The medical advisor will be unable to predict with certainty whether the employee's attendance will improve. In the case of ***International Sports Co Ltd v Thompson***^{vi} (**Thompson**) the EAT said that where the employer is dealing with an unacceptable level of attendance caused by unconnected minor ailments, it would place too heavy a burden on the employer to require it to carry out a formal medical investigation. The EAT noted that such an investigation would: "*...rarely be fruitful because of the transient nature of the employee's symptoms and complaints*". This approach was endorsed in the case of ***Lyncock v Cereal Packaging Ltd***^{vii} (**Lyncock**) where the EAT held that it was fair to dismiss an employee suffering from short-term, unconnected illnesses without first obtaining a medical report.
18. Both Thompson and Lyncock confirm that the correct procedure in cases of frequent short-term absence is for employers to:
 - carry out a fair review of the pattern of absences and the reasons for them;
 - provide the employee with the chance to make representations; and
 - issue the employee with warnings of dismissal if there is no improvement in attendance.

19. Most employers enshrine these principles into a written absence management policy which governs how sickness absences are managed. A well-drafted policy will specify the procedure to be followed when a formal review of absence is required. Such a review will be required where the employee has either frequent, short-term absences or a block of long-term absence. The policy should specify what level of absence will trigger the review process. This will mean specifying both: (i) the number of occasions of absences; and (ii) the total number of days of absence, which will trigger action. Where an absence review procedure is triggered, this will result in a series of meetings being held with the employee, which may lead to dismissal.
20. Case law has shown that in this scenario there comes a time when a reasonable employer is entitled to say "enough is enough" and dismiss. However, it is impossible to say at what point the employee's absence will reach that level; this will usually depend on the particular circumstances of the case. In some sectors and job roles, repeated absences might be particularly disruptive and intolerable for the employer. For example, in the case of *Patval v London Borough of Camden*^{viii} the Employment Tribunal accepted that absences within an IT support team caused severe disruption to the employer. In the case of *Davis v Tibbett and Britten Group plc*^{ix}, the EAT accepted that repeated absence was intolerable to the employer's transport business given the demands from its main customer. Where an employer has an absence management policy in place, they should stipulate the level of absence which would trigger further action and this will alert employees to what is considered an unacceptable level of absence within that particular business.
21. Provided the employer can demonstrate that it has followed a fair and consistent process and warned the employee of the potential consequences, then dismissal for persistent absenteeism will usually be reasonable. This coheres with the non-statutory Acas Guide on Disciplinary and Grievances which advises that in all cases of frequent short-term absence the employee should be told what improvement is expected and warned of the likely consequences if this does not happen.
22. By way of example, in the case of *Rolls-Royce Ltd v Walpole*^x the employee's absenteeism record averaged 40% of his working time in the previous three years of his employment. The absences were all certified, had different causes and followed no particular pattern. The employer warned the employee that the absence level was too high. They carefully followed their internal absence management policy, before dismissing the employee. The EAT decided the dismissal was fair in light of the persistent poor attendance and the absence of any underlying condition. They also agreed that there would have been no benefit to seeking a medical opinion prior to dismissal.

Absences attributable to an underlying medical condition

23. In situations of frequent short-term absence, employers need to be alive to the possibility that there may be a more serious underlying cause of apparently unrelated absences, requiring further investigation. For example, an employee has four periods of short-term absence for the following reasons: migraine, digestive problems, joint pain and dizziness. Although apparently unrelated, all are common physical symptoms of depression. If the underlying depression was (or was likely to be) long-term, then it could also mean the employee was disabled.
24. A dismissal for frequent, short-term absence which is attributable to an underlying condition should usually be by reason of capability. Also, as discussed in paragraph 14 above, dismissals for frequent, short-term absence connected to the employee's weak health and propensity to get ill, even where there is no apparent underlying condition, will be by reason of capability.

The important guidance to remember is that where considerations of the employee's capability assessed by reference to skill, aptitude, health or another physical or mental quality are at the front of the employer's mind when dismissing, then the reason for dismissal will be capability.

25. There may be cases where the employer is unhappy with the employee's past absence record and the employer is concerned about the employee's susceptibility to illness or an underlying ill-health problem affecting their future capability. In such cases, the employer may be unsure whether to label any subsequent dismissal as by reason of SOSR or capability. Where there are such doubts, it is best practice to treat the matter as one of capability as this will involve a more onerous procedure and include the need to investigate the employee's health.
26. Where the proposed reason for dismissal is capability, the employer must obtain a medical opinion on the employee's health and consult with the employee about it before deciding to dismiss. First, this will help the employer understand the employee's state of health and whether they have an underlying ill-health condition. It will also help the employer understand whether, and how soon, any treatment will bring the absence down to an acceptable level. Secondly, it will help the employer to understand whether the employee is disabled for the purposes of the Equality Act 2010. Where the employer receives advice that suggests the employee is disabled then it will need to consider whether to make reasonable adjustments for the employee (e.g. adjusting the employee's duties or redeployment).
27. Where there is an underlying condition, the employer may need to treat the situation in the same way as one of long-term ill-health absence (particularly where it emerges that there is unlikely to be any improvement in attendance levels in future). It could be viewed as unfair to treat an employee with an underlying health condition who takes lots of short-term absences less favourably than one who takes a single period of long-term absence. The more onerous approach to long-term absence is discussed, in summary, at paragraphs 28 to 33 below.

Long-term ill-health absences

28. Where an employee has a period of long-term ill-health absence (usually considered to be 4 weeks or more), an employer is entitled to move towards dismissal. Here the dismissal will usually be due to the employee's ill-health and, therefore, considered to be a dismissal for capability.
29. In order to effect a fair capability dismissal in such circumstances, there are two key steps in the process the employer must follow. First, the employer must consider whether it can be expected to wait any longer for the employee to return. In the case of ***S v Dundee City Council***^{ki} the Court of Session held that Tribunals must expressly address this question and consider all the relevant factors in the particular case such as:
 - whether other staff are able to cover for the absent employee;
 - the nature of the employee's illness;
 - the likely length of the absence;
 - the cost of continuing to employ the absent employee;
 - the size of employer; and

- the unsatisfactory situation of for the employer.
30. Second, the employer must operate a fair procedure prior to dismissal. In summary, this requires the employer to:
- consult with the employer throughout the process;
 - conduct a thorough investigation into the employee's ill-health, probing the condition and its prognosis; and
 - consider other options such as redeployment or ill-health retirement.

Unlike the procedure for dealing with persistent absenteeism, warnings are not usually considered appropriate in cases of long-term absence given the lack of fault on the part of the employee. For this reason, consultation with the employee throughout the process is of elevated importance.

31. The other crucial issue for employers to consider in long-term ill-health cases is that there will be a greater likelihood that the employee is disabled for the purposes of the Equality Act 2010. Employers should ensure the medical advice they receive addresses this issue, to help them form a view on whether the employee is disabled. On this issue, it is crucial for employers to remember that they must apply their own mind to the question of whether the employee is disabled and should not seek to outsource this responsibility to a medical adviser. This issue arose in the case of **Gallop v Newport City Council**^{xii}. In this case, the employer sought to argue that it had not been obliged to make reasonable adjustments in circumstances where it had received occupational advice that the relevant employee was not disabled. The employer said it was entitled to rely on this advice. The Court of Appeal found against the employer, holding that a reasonable employer must make its own decision on whether the employee is disabled, with the assistance of medical advice. It said that the employer has responsibility for making the final factual judgment and cannot simply "rubber stamp" external advice.
32. Where an employee *is* disabled, the employer will need to consider whether it can make any reasonable adjustments to the working environment which may assist the employee to return to work. A failure to make reasonable adjustments would amount to unlawful disability discrimination. Furthermore, a failure to make a reasonable adjustment that would have avoided the capability dismissal may make the dismissal unfair. In the case of **Nikola-Erotokritou v Hertfordshire County Council**^{xiii} the employee developed tendinitis in her hands and took a number of sickness absences. A medical opinion was obtained which indicated that she could return to work provided she had help with heavy lifting at work. The employer failed to make this adjustment and dismissed the employee on capability grounds. The Employment Tribunal found that the employer had failed to make reasonable adjustments and the dismissal was unfair as a result. The Tribunal said: "*...if and so long as it would be reasonable for the respondent to make reasonable adjustments, it must follow that the dismissal cannot lie within the range of reasonable responses. The position would only prevail once the reasonable adjustments which it was the respondent's duty to seek to apply had been tried and found to have failed*".
33. Further, where the employee is disabled, the employer will have to consider whether the capability dismissal itself would be discriminatory. It is possible for a capability dismissal to be fair (under the Employment Rights Act 1996) but discriminatory. Therefore, liability for discrimination should be considered separately from unfair dismissal.

c. Does the Acas Code apply to capability dismissals?

34. A final issue for employers to consider when moving to dismiss an employee on capability grounds, is whether the principles governing procedural fairness enshrined in the Acas Code of Practice on Disciplinary and Grievance Procedures (**Code**) will apply to the process. This will not always be clear. Whilst the Code states that it does not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry, it is silent as to whether it applies to ill-health dismissals.
35. The recent case of *Holmes v Qinetiq Ltd*^{xiv} (**Holmes**) has provided some guidance on this matter. In this case, the employee had a number of problems with his back, hips and legs which resulted in him having several lengthy absences from work. He was dismissed on the grounds of ill-health on the basis that he was no longer capable of doing his job. There were no problems with his conduct or performance. As such, the employer did not invoke a disciplinary procedure prior to dismissal. At first instance, the dismissal was found to be unfair and the Employment Tribunal awarded compensation for unfair dismissal. However, it held that the power to increase compensation for failure to comply with the requirements of the Code did *not* extend to dismissal on the grounds of ill-health because:
- the Code does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill-health or sickness absence;
 - the concept of incapability in section 98(2)(a) of the Employment Rights Act 1996 on the grounds of medical incapacity does not involve an element of culpability; and
 - apart from the effects of his illness, the employee was able to perform the job of security guard and there was no suggestion that he was culpable in relation to his conduct or performance.

Accordingly, the Tribunal held that the employer was *not* required to follow the Code and, therefore, no uplift to the compensation was awarded. The decision was upheld on appeal. The EAT concluded that the Code only applies to an ill-health situation where there is culpable behaviour at play which needed to be punished (e.g. a failure to comply with the employer's sickness reporting procedure).

36. Whilst the Holmes decision reassures employers seeking to dismiss on capability (or, equally, SOSR) grounds that the Code does not apply, it may be wise to adhere to the Code's principles in any event. This is because the employer may not always have a full picture at the outset whether there is any culpable conduct requiring sanction. Furthermore, by benchmarking the process against the Code's principles, employers will be better placed to demonstrate that they have followed a fair and reasonable procedure prior to dismissal.

STRESS-SPECIFIC ISSUES:

a. What is the cause of the stress-related absence?

37. The Health and Safety Executive (**HSE**) defines stress as: "*...the adverse reaction people have to excessive pressures or other types of demand placed on them*". Stress is a reaction, rather

than strictly an illness itself. However, it can exacerbate underlying physical ill-health problems (e.g. heart disease) and/or cause mental ill-health problems (e.g. anxiety or depression), which can lead to absences from work. Stress can be caused by:

- factors inside the workplace (e.g. workload, bullying and organisational change);
- factors outside the workplace (e.g. personal relationships, financial worries and bereavement); or
- a mixture of both.

As highlighted in paragraphs 2 to 6 above, the recent CIPD Survey indicates that stress-related ill-health is a common cause of both short-term and long-term absence and is typically caused by both work and non-work-related factors.

38. Where an employee is absent on the grounds of stress, it is important for the employer to investigate the cause of the stress to identify whether it is work-related. This is crucial since it determines the precise nature of the capability procedure to be followed prior to any dismissal. This is discussed further at paragraphs 42 to 48 below.
39. How should an employer go about investigating the cause of the stress-related absence? A good starting point is for the employer to satisfy itself that it has complied with the various health and safety obligations that it has towards the employee. First, employers have a common law duty to take reasonable care of the safety of their employees and must provide them with a safe place of work, safe tools and equipment and a safe system of working. A failure to discharge this duty could lead to the employee suing the employer for negligence. Commonly, in stress cases, it is argued that an employer has failed to discharge its duty of care by subjecting the employee to an excessive workload, excessive hours of work or bullying at work. Therefore, before commencing any capability process, the employer should undertake a thorough review of the employee's position and the circumstances surrounding their absence to try to understand whether any such issues have arisen and need addressing.
40. The common law duty of care is supplemented by a statutory duty under the Health and Safety at Work etc. Act 1974 to ensure the health, safety and welfare at work of all employees. Further, the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) require employers to:
 - undertake risk assessments of the health and safety risks facing employees at work;
 - apply the "principles of prevention" where a risk is identified. In relation to stress this means: (i) considering measures to avoid and combat the risk; (ii) developing a prevention policy; and (iii) providing employees with appropriate instructions; and
 - provide information to employees about the risks and the measures that will be implemented as a result.

The HSE has also produced the *Management Standards for Work-related Stress* which are designed to assist and encourage employers to comply with their legal obligations and to prioritise and measure their performance in managing work-related stress. A breach of these statutory health and safety protections does not generally create rights for an employee to sue

the employer directly. However, the common law duty of care is influenced by these statutory obligations and may assist an employee pursuing such a claim.

41. In addition to reviewing compliance with health and safety obligations, the employer should take the following steps to probe whether the stress is work-related:
- review the pattern of absences: e.g. do the absences fall around particularly busy times at work which could suggest the presence of stress?
 - review the reasons given for the absences: what reasons has the employee given on any self-certification form and in any return to work interviews? What is the reason stated on any GP's Fit Notes?
 - consult with the employee: throughout any absence period the employer should be in contact with the employee and should be discussing the reasons for the absence with them. Following the return to work after any period of absence, the employer should hold a return to work meeting with the employee to discuss the absence and its causes; and
 - **obtain medical advice:** where an employee is absent on stress grounds the employer should obtain medical advice to help ascertain whether the stress is work-related (and, if so, the specific causes and what remedial steps are recommended) or not.

b. Capability management for frequent, short-term stress-related absences

42. The question of whether or not frequent, short-term absence is properly a capability issue is discussed at paragraphs 11 to 27 above. Where an employee takes frequent, short-term absences on the grounds of stress, the employer should not treat this as a case of persistent absenteeism for minor and unrelated causes, justifying an SOSR-type dismissal. Instead, the employer should be alerted to the fact that the employee has either: (i) a propensity to stress-related illnesses but with no underlying condition; or (ii) an underlying condition. As discussed above, dismissals on either basis should be treated as being by reason of capability.
43. The procedure leading to any capability dismissal for stress-related absence will be broadly as outlined at paragraphs 23 to 27 above, subject to the additional requirements outlined below.

If stress is work-related

43. Where the employer identifies that the stress is work-related then it should consider whether it has discharged its health and safety obligations towards the employee. It may be the case that it has done all that is reasonably possible. However, further steps may be required. For example, if the work-related stress stems from excessive workload, the employer should consider adjusting the workload or possibly redeploying the employee. Alternatively, if the stress has been caused by alleged bullying at work, the employer should ensure this has been fully investigated and, if necessary, action taken remove the risk of further episodes of bullying.
44. Further, where the stress is work-related, it will be necessary for the employer to take extra steps before dismissing the employee. In the case of **Royal Bank of Scotland v McAdie**^{xv} the Court of Appeal confirmed that, where the employer is responsible for the illness that led to the dismissal, this may be a factor to be taken into account when considering the fairness of a capability dismissal. Where this is the case, the employer will be expected to "go the extra

mile", for example, by being more proactive in finding an alternative role for the employee, or by putting up with a longer period of sickness absence than it normally would. However, the fact that the employer is responsible for the illness does not mean that there is an absolute bar to dismissing the employee fairly on capability grounds.

45. Where an employee suffering from work-related stress is absent from work, and is dismissed as a result, they may be able to argue that the dismissal is unfair. However, it is also worth remembering that they may be entitled to bring a suite of other claims including:

- a personal injury claim (i.e. a claim that the employer has breached its common law duty of care towards the employee);
- a breach of contract claim (i.e. a common law breach of contract claim and/or a statutory claim for constructive unfair dismissal arising out of a breach of the implied term of trust and confidence);
- a disability discrimination claim (if disabled); and/or
- a claim for harassment under the Protection from Harassment Act 1997.

Accordingly, the employer should seek detailed legal advice on the specific legal risks arising in the individual case before moving to dismiss.

If stress is not work-related

46. Finally, what approach should an employer take where an employee's stress-related absences have been caused by factors unrelated to work?

47. Where an employee is absent with a stress-related illness which is not related to work, the approach to be followed will depend on whether the absences are short-term or long-term. Where the absences are short-term, the employer should follow the approach at paragraphs 23 to 27 above. Where the absences are long-term, the employer should follow the approach at paragraphs 28 to 33 above. In either case, regardless of a belief that the stress has been caused by external factors, the employer should obtain medical advice to probe whether work issues may have contributed in some way. If they have (even if they are not the sole cause), then the employer should be mindful of the obligation to "go the extra mile" before dismissing the employee on the grounds of capability.

48. As part of the capability process, the employer should also explore what specific assistance it may be able to offer to help the employee return to work. Depending on the circumstances, this could include:

- providing access to an Employee Assistance Programme (**EAP**) which enable employees to discuss their problems with professional counsellors; or
- making other modifications to the employee's work e.g. flexible hours could assist an employee suffering stress as a result of a marriage breakdown and related childcare problems.

The employer's response would be shaped by the particular situation and what was reasonable in all the circumstances. More might be expected of a larger employer, with significant resources at its disposal.

Malcolm Pike

Addleshaw Goddard LLP

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ⁱ www.cipd.co.uk/absencemanagementsurvey

ⁱⁱ [2015] UKEAT/0185/15/0312

ⁱⁱⁱ 2000 IRLR 834

^{iv} EAT 0485/12

^v 1989 ICR 747, CA

^{vi} [1980] IRLR 340

^{vii} [1988] ICR 670

^{viii} ET Case No. 2203464/07

^{ix} EAT 460/99

^x 1980 IRLR 343

^{xi} 2014 IRLR 131

^{xii} [2013] EWCA Civ 1583

^{xiii} ET Case No. 3302508/10

^{xiv} [2016] UKEAT/0206/15/2604

^{xv} 2008 ICR 1087