

WELCOME TO CLARITY

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BUSINESS
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PUBLIC SECTOR



Question

- **Stress and Anxiety**

In a grievance, disciplinary or under-performance situation, what can you do - practically and legally - if the employee responds by taking long-term sickness leave, for reasons of stress or anxiety?

Practical or legal answer?

- Not mutually exclusive!
 - Primary question for both
 - “what do you want to do?”
 - Answer for both
 - Make progress, don’t be paralysed by Fit notes!
 - How?
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The basics -What is stress?

- “the adverse reaction people have to excessive pressure or other types of demand placed on them”.
 - Where demands (or perceived demands) exceed ability to cope
 - Not a medical condition as such but can be caused by medical conditions or lead to medical conditions
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The basics –what is Anxiety?

- a feeling of worry, nervousness, or unease about something with an uncertain outcome
 - strong desire or concern to do something or for something to happen
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Circumstances differ in each case

Issues likely to differ depending on context

- Grievance – employee may be more open to matters progressing if the Complainer
 - Disciplinary – concerns may arise more quickly regarding genuine nature of illness
 - Performance – monitoring improvement will require attendance at work so may be more difficult to progress
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Stress/Anxiety

- Consider if stress/anxiety could have been a factor in either alleged misconduct/grievance or performance?
 - Should a stress risk assessment be carried out prior to progressing proceedings?
 - HSE Stress Management Standards at <http://www.hse.gov.uk/stress/standards/index.htm>
 - Remind Employee of independent 24/7 helpline if available
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HSE Management Standards

- **Demands** – workload, work patterns and the work environment
 - **Control** – how much say the person has in the way they do their work, how is work allocated.
 - **Support** – encouragement, sponsorship and resources provided by the organisation, line management and colleagues
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HSE Management Standards

- **Relationships** – promoting positive working to avoid conflict and dealing with unacceptable behaviour
 - **Role** – whether people understand their role within the organisation and whether the organisation ensures that they do not have conflicting roles
 - **Change** – how organisational/sectoral change is managed and communicated in the organisation
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Long Term Absence—a Disability?

- A physical or mental impairment which has a substantial long term adverse effect on person's ability to carry out their day to day activities –
 - “Long term” is or could be more than one year or less than one year if terminal illness
 - “Substantial” more than minor or trivial
 - The impact of medication is discounted when considering the adverse effects
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Request a Medical Report

- Employee consent to GP records/ examination/report
 - If GP- Access to Medical Records Act 1988
 - Often better to use OH- with no previous clinical input
 - Instruct medical report in writing
 - Ask for prognosis and likely return date
 - Use the definition of “Disability” to ask questions
 - Ask if absent employee can participate in procedure
 - Ask if alternative methods of progressing procedure can be used
 - Ask what can be done to support an early return to work
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Fit to attend?

- DWP Health and Work Handbook states the “effects of an unresolved dispute on an employees health may be greater if the proceedings are postponed. An employee may be unfit for work but fit to engage with the management process”
 - Criteria set out in Handbook for postponing disciplinary is similar to that used to determine if a defendant is fit to plead in a criminal trial
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Fit to attend? DWP Questions

- Is attendance “likely to cause serious deterioration in the employee’s mental or physical health”

Questions could include

- Does the employee have the ability to understand the allegations ?
 - Does the employee have the ability to distinguish right from wrong?
 - Is the employee able to instruct a friend or representative to represent their interests ?
 - Does the employee have the ability to understand and follow the proceedings, if necessary with extra time and a written explanation ?
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The Medical Report

- Do not accept brief /poorly reasoned OH/GP report at face value
 - **Gallop v Newport City Council**
 - If that occurs seek clarification
 - Take into account own experience of employee and any surrounding information, not just the medical report
 - **Donelien v Liberata UK Limited**
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Difficult issue

- Employee's condition is not physical
 - The medical analysis is often based solely on what the Employee tells OH/GP
 - GP's record but in particular non medical information can be important
 - As the absence is "long term" you may need several reports to keep employee under review if condition changes
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Stress –A Disability ?

- Very often not
 - It might be if it is related to some other underlying condition
 - **Herry v Dudley Metropolitan Council & Anr**
 - Employment Appeal Tribunal
 - Employee absent more than 3 years
 - Did not satisfy the definition of “disability”
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Herry v Dudley Metropolitan

“there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression”.

Anxiety or worse ?

- Might be a mental impairment
 - Which might be a disability
 - But not every mental impairment is a disability
 - In a minority of cases an employee may argue they have a disability to benefit from the protective shield the Equality Act provides.
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And if Employee has a disability

- Should consider adjustments to help progress the process (if that is feasible) when still off work
 - Need to consider reasonable adjustments if that will help a return to work and speed up the ability to deal with the outstanding issues if they cannot be resolved whilst absent
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How to make progress

- In all cases, consider what impact the ill health has on progressing the procedure
 - Is a short delay a significant problem? - rushing on where there is little or no detriment to the employer could be both discriminatory and unfair/unreasonable
 - Can parts of the procedure be progressed fairly easily despite the absence?
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How to make progress-2

- Steps not directly involving the employee could be progressed
 - Witness statements in both disciplinary and grievance procedures could be taken
 - Disciplinary and grievance investigations could be progressed to an advanced stage
 - Information relevant to performance could be collated and appropriate targets considered
 - Be fully prepared on employees return to work
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Performance procedure

- Consult with employee
 - Workplace performance procedure unlikely to be progressed during absence
 - Absence management procedure may be required instead
 - Workplace performance procedure would restart on return but may be subject to reasonable adjustments, or
 - Absence management procedure could end in dismissal
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Disciplinary/Grievance

- Consult with employee on medical advice and options for progression
 - Try to agree on way forward
 - Any decision taken in the absence of an employee increases risk of unfairness or discrimination
 - Do a risk/benefit analysis of proceeding – other employees may be affected by procedure/outcome
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Alternative ways to progress

- Arrange meetings at a neutral location or closer to the employee's home
 - Conduct the hearing by phone
 - Conduct whole hearing in writing
 - Have employee attend hearing but invite submissions in writing
 - Broaden the category of individual who can accompany the employee (but not usually a solicitor)
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Case Study

- Alleged fraud
 - Employee submitted regular sick lines
 - Agreed that disciplinary could proceed by way of written questions/answers.
 - Worked because matter could be properly assessed based on paperwork/answers
 - Not appropriate if credibility a major issue requiring employee to be interviewed and medical evidence said unfit for interview
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Disciplinary/Grievance

- Additional considerations
 - Use of adjournment to allow additional questions to be put to employee
 - Give employee time to comment on any additional investigations made following the hearing
 - Remember to offer an appeal
 - Consider using an appeal as a full re-hearing if employee can attend by that stage
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Difficult employee

- Ill health is considered not to be genuine
 - Employee doesn't comply with absence procedure
 - Employee doesn't respond to attempts to communicate
 - Employee refuses to release medical information/attend OH assessment
 - Employee unreasonably refuses to attend disciplinary/grievance hearing or performance meeting
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Difficult employee-2

- May need to progress matter on the basis of the available information
 - May need to consider disciplining employee for failure to follow a reasonable instruction or similar after a clear warning of potential consequences
 - Don't get frustrated and rush a final decision
 - If potentially discriminatory decision may be made then ensure it can be justified –
 - what is the specific impact of the absence/inability to progress a procedure on the organisation
 - Are there less discriminatory ways of achieving the same outcome
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Alternative Solutions

- Settlement Agreement
 - If there is a genuine dispute could consider use of “without prejudice” discussions
 - But Beware-Employee may argue “no dispute” and protection does not apply
 - Or “Protected Conversation”. Pre-termination negotiations not admissible in unfair dismissal claims but are in discrimination/breach of contract proceedings
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In summary

- Ask focused questions to maximise prospect of getting a good medical report
 - Explore all options to try and make progress
 - Keep good records
 - If process drags out keep under review and obtain medical update(s)
 - Try and agree a way forward with employee
 - Don't allow "out of sight out of mind" syndrome to develop!
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Questions?



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