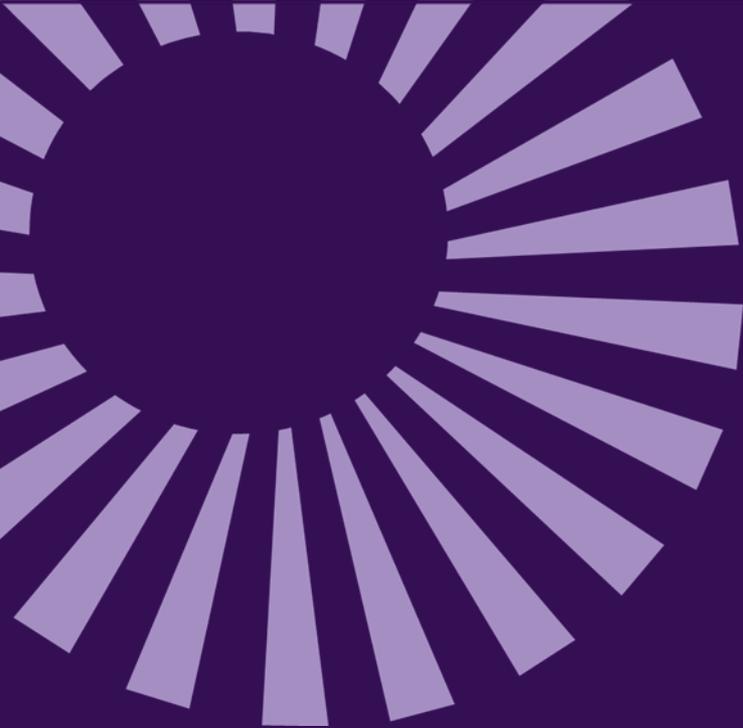


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Redundancy and Dismissal

White Paper Conference Cardiff

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Redundancy and Dismissal

- How do you justify capability management when stress - related absence is frequent rather than over a long period?
- What if you think the stress is not caused by work?
- When does absence become a matter of capability?

- Published on 2 November 2016
- The good news - average level of employee absence has fallen from 6.9 days to 6.3 days per employee per year
- The good news - this is the lowest level for 7 years
- The bad news - a third of respondents report an increase in stress-related absence (increasing to half of public sector organisations)
- The bad news - two fifths reported an increase in mental health problems such as anxiety and depression

CIPD Absence Management Survey 2016

- Stress is the second most common cause of short-term absence and the biggest cause of long-term absence and what are the most common causes?
- 55% cite workloads
- 33% non-work factors such as relationships/family
- 32% management style
- 27% non-work factors such as illness/health issue
- 26% organisational change/restructuring

CIPD Absence Management Survey 2016

- Methods to identify and reduce stress in the workplace include staff surveys, flexible working options and improved work-life balance
- Methods of supporting employees with mental health problems include the above as well as employee assistance programmes and counselling
- Employers should also address the long hours' culture and increase the focus on well-being

CIPD Absence Management Survey 2016

- The average cost of absence per employee is £522 a year but this is higher in the public sector at £835
- Consistent with the findings from other years, larger organisations tend to have higher levels of absence than smaller ones regardless of sector
- In relation to private services the average level of employee absence is:
 - Transport, distribution and storage 7 days
 - Retail and wholesale 6.5 days
 - Professional services 4.4 days

CIPD Absence Management Survey 2016

- In relation to public services:
 - Local government 9.9 days
 - Central government 9.6 days
 - Health 8.9 days
 - Education 7.4 days
- For the non-profit sector:
 - Care services 10.8 days
 - Housing associations 7.8 days
 - Charity services 6.3 days

What is stress?

- The Health and Safety Executive (HSE) defines stress as *“the adverse reaction people have to excessive pressures or other types of demand placed upon them.”*
- The HSE has developed a model of good practice, called the “Management Standards” and identified six main risk factors for work-related stress

What is stress?

- What are the risk factors?
- Demands placed on the employee, such as workload
- Control the employee has over their work/workload
- Support available to the employee
- Relationships in the workplace
- Role the person has
- Organisational change and how this is managed

Capability

- Under section 98 Employment Rights Act 1996 (ERA) capability is a potentially fair reason for dismissal
- Capability is defined in ERA by reference to the skill, aptitude, health or any other physical or mental quality of the employee
- Employees can be dismissed if they cannot do the job they were employed to do
- Employers must adopt a fair procedure before taking the decision to dismiss
- Don't forget the ACAS Code on Practice on Disciplinary and Grievance procedures and Guidance

Capability

- Do you manage short - term sickness absence?
- Of course!
- Frequent absences may indicate, general ill health, lack of capability or interest in the job or personal problems impacting on someone's ability to do their job
- Consequently, if there are frequent short - term absences which may or may not be stress related, capability proceedings can be justified
- If the issue is of unsatisfactory attendance then “conduct” is likely to be the issue of concern rather than capability

ACAS Guidance Appendix 4

- Guidance on persistent short-term absence:
 - Unexpected absences should be investigated promptly and the employee asked for an explanation at a return to work interview
 - Subject to the explanation, the matter may be treated as a conduct issue
 - Where there is no medical certificate to support the absences the employee should be asked to see a doctor to establish whether treatment is necessary
 - The employee should be told what improvement in attendance is expected and warned of the consequences of failure to do so and the appropriate action taken

ACAS Code of Practice

- The Code applies to “disciplinary situations” which includes misconduct and poor performance
- The Code does not apply to capability ill - health dismissals
- Confirmed in *Holmes v Qiniteq Ltd* (EAT April 2016)
- Mr Holmes was dismissed in 2014 after a number of periods of absence on the grounds of ill-health on the basis he was no longer capable of doing his job
- Dismissal was held to be unfair because of the lack of up to date medical evidence

ACAS Code of Practice

- The Employment Tribunal awarded compensation for unfair dismissal and unlawful discrimination but held that there should be no uplift under the Code because the Code did not apply to ill - health dismissals
- This was a capability dismissal relating to genuine ill-health which had no disciplinary component and there was no culpability by Mr Holmes in either his conduct or performance
- The EAT agreed and held that where poor performance is a consequence of genuine illness or injury it is difficult to see how culpability would be involved

ACAS Code of Practice

- Distinctions should be drawn where disciplinary action is instigated as a result of a failure to comply with sickness absence procedures, or to deal with an allegation that the ill-health is not genuine or where there is malingering
- Misconduct cases relating to ill-health will give rise to a disciplinary situation and involve culpability and the ACAS Code will apply
- In *Metroline West v Ajaj* (EAT December 2015) exaggerating the effects of an injury to fraudulently take sick leave had fundamentally breached the implied term of trust and confidence and constituted gross misconduct

Practical issues - the cause of the stress

- Identifying the cause of the stress is essential
- If it is work-related employers will be under many different legal obligations including :
 - Health and Safety at Work Act 1974 and the duty to ensure the health, safety and welfare at work of staff
 - Working Time Regulations 1998 and the requirements about rest breaks and working week limits
 - Breach of contract /constructive dismissal claims relating to the implied term of trust and confidence if health issues are handled badly
 - Negligence claims for personal injury for work-related stress

Practical issues - the cause of the stress

- If the stress is work-related employers should ensure they are aware of (and meet) their legal obligations and take steps to reduce workplace stress for example:
 - Carry out risk assessments
 - Ensure that annual leave is taken
 - Investigate allegations of bullying/harassment that may be causing an individual stress
 - Consult regularly about organisational change
 - Avoid unreasonable workloads, hours and deadlines
 - Have sickness absence policy and provide training on it

Practical issues - the cause of the stress

- Don't forget the Equality Act 2010
- Disability is a protected characteristic under the Act
- A person has a disability for the purposes of the Act if he has:
 - A physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities (section 6(1))
- No qualifying period of service necessary to bring a claim and unlike unfair dismissal, compensation is unlimited

Practical issues - the cause of the stress

- What if the stress is not work-related?
- This is quite possible bearing in mind the CIPD statistics whereby 33% of respondents cite non-work factors such as relationships/family and 27% illness/health issues
- Employers can promote employee well-being initiatives:
 - Access to counselling services
 - Health screening
 - Private medical insurance
 - Flexible working
 - Training for managers

Practical issues - the cause of the stress

- The mental health charity Mind recommends creating a more open culture where people feel able to talk about their condition and Mind's recommendations include:
 - Lead by example and demonstrate that staff well-being and work-life balance are important, work sensible hours, take lunch breaks and annual leave
 - Exercise control on accessing work-related devices out of hours
 - Promote positive work relationships to support a culture of teamwork, collaboration and information sharing
- These measures would help in either scenario where the stress was or was not work-related

Practical issues - health information

- Remember that information about an individual's health amounts to sensitive personal data under the Data Protection Act 1998
- Any medical information or documentation relating to an employee's sickness should be stored securely
- Obtaining a medical report will amount to "processing" and the employee's specific consent will be needed for this
- The Information Commissioner's Employment Practices Code (part 4) contains useful guidance on dealing with information about workers' health

Practical issues - communication

- Communication with employees who are on sick leave can be tricky for HR and line managers
- How often should they contact the employee?
- Should they contact them at all if they are off with workplace stress?
- What if the employee feels that the employer is just checking up on him or is not convinced about the genuineness of the employee's illness?

Practical issues - communication

- *Private Medicine Intermediaries Ltd v Hodgkinson* (EAT March 2016) illustrates the problems that can arise
- The EAT upheld the Employment Tribunal's decision that writing to an employee to raise non-urgent concerns whilst she was off sick with work-related stress (arising from alleged bullying at work) constituted constructive dismissal and breached the implied term of mutual trust and confidence

Practical issues - communication

- There is consistent advice from ACAS, the Fit for Work Service and Mind that employees should be encouraged to keep in touch regularly when on sick leave
- They should also agree with their employers the frequency of contact and how contact should be made, for instance by text, telephone or e mail
- The *PMI* decision may be difficult to reconcile with this but continue to communicate in relation to the employee's treatment, return to work plans and any adjustments to their working arrangements and avoid if possible communicating about non - urgent matters

Practical issues - further information

- There is a wealth of information and advice available for employers
- Good practice model in the Health and Safety Executive's "*Management Standards for work related stress*"
- ACAS guidance "*Promoting Positive Mental Health at Work*"
- Mind guidance, "*How to support staff who are experiencing a mental health problem.*"