

White Paper Conference Disability Dismissals 23 November 2016

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In the News

- Consultation on Work, Health and Disability
 - 48% of disabled people in employment – compared to 80% of non-disabled people
 - 1 in 3 working age people in the UK have long-term health conditions
 - Consultation runs until 17 February 2017
- 18% of people diagnosed with cancer face discrimination at work

What are the Risks?

- Unfair Dismissal
 - Do you have a fair reason. Capability?
 - Have you followed a fair process?
- Disability Discrimination
 - Direct Discrimination
 - Indirect Discrimination
 - Failure to make Reasonable Adjustments
 - Discrimination arising from Disability – *Risby v London Borough of Waltham Forest 2016*
 - Victimisation
 - Harassment

What are the Risks?

- Contractual Rights
 - Sick Pay
 - PHI/Pensions
- Personal Injury claim

Reducing the Risks - Process

- Reason for Dismissal – Capability or Performance
- No requirement to follow ACAS Code – *Holmes v Qinetiq 2016*
- Process
 - Obtain medical evidence
 - Consult with employee
 - Give the right to be accompanied
 - Warn of potential dismissal
 - Consider Reasonable Adjustments – including alternative employment
 - Consider ill-health early retirement – Pension
 - Consider permanent health insurance
 - Right of Appeal

Reducing the Risks – Medical Advice

- Conflicting Medical advice – employer may prefer one opinion over another. *DB Schenker Rail (UK) Limited v Doolan 2011*
 - Not a medical decision
 - Tribunal must not substitute its view
 - Reasonable investigation
 - Genuine belief
 - Reasonable grounds for belief
- Critical Appraisal of Medical advice – *BS v Dundee City Council 2013*



Reducing the Risks – Medical Advice

- Framing the Question – *Gallop v Newport City Council 2013*
 - Does X have a physical or mental impairment?
 - Does that impairment have a substantial and adverse long term effect?
 - Does impairment effect ability to carry out day to day activities?



Reducing the Risks – How long?

- How long does an Employer wait for? *BS v Dundee City Council 2013*
 - Relevant Factors:-
 - Nature of illness
 - Likely length of absence
 - Cost of continuing to employ
 - Nature of job they do
 - Impact on other colleagues
 - Size and resource of employer
 - Fact sick pay has or has not been exhausted
 - Availability of temporary cover



Reducing the Risks - Adjustments

Reasonable Adjustments

- Duty to make reasonable adjustments where an employer knows or ought reasonably to know that a person has a disability and there is a provision, criterion or practice which places the disabled person at a substantial disadvantage compared to those who are not disabled.
- Type of Adjustments – see EHRC Employment Statutory Code of Practice – non-exhaustive list of reasonable adjustments
- Particular adjustments
 - Transfer to a different role
 - Phased Return
 - Changing Hours or place of work
 - Adjustments to equipment, premises
 - Sick Pay – *O’Hanlon v HMRC 2007*
 - Pay protection – *G4S Cash Solutions (UK) Ltd v Powell 2016*

Reducing the Risks – Top Tips

Top Tips

1. Medical Advice – up-to-date and specific
2. Consult employee – do they consider themselves fit?
3. Document meetings/follow-up with letters
4. Document consideration of reasonable adjustments
5. Challenge the timescales
6. Alternatives – pension, permanent health?
7. Clearly document any changes – get agreement!
8. Settlement Agreement?





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