

Short-term absences

When is it reasonable to draw the line under frequent short-term sickness absences due to an underlying mental health condition?

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Introduction

Short-term sickness absences can be a significant issue for employers, and the statistics around them go some way to showing why that is. According to Acas, short-term sick leave accounts for 80% of UK workplace absences¹. The CIPD's most recent absence management survey (from 2016) made the following findings from data relating to 2015/16:

- on average, an employee took 6.3 days' absence at an average cost to employers of £522 per employee;
- two-fifths of organisations reported an increase in mental health problems within their workforces; and
- stress is the second most common reason for short-term sickness absence, and mental ill health is within the top five.

Clearly, frequent short-term sickness absences can pose a problem for employers and it is not uncommon for such absences to be caused by mental health issues. It is understandable (and, indeed, advisable) for employers to take steps to do something about frequent absences once a pattern has emerged.

Keeping records and spotting patterns

Once an employer notices that an employee's attendance has been erratic or that sickness absences have been happening often, an important preliminary step is to analyse the figures to understand how frequent the absences are. All employers should be keeping clear and complete absence records as a matter of course, so this should not be too difficult to achieve.

Analysing the absence data will not simply allow an employer to identify how many days' sickness absence an employee has taken, but will also reveal whether there are any trends to the reasons given (i.e. is it a number of disparate reasons, or do the same reasons crop up repeatedly?) or any patterns to when the sickness absence happens (i.e. whether the employee tends to take sick days on Mondays).

¹ Acas – "Managing attendance and employee turnover", page 4

Having all of the facts as to the patterns of sickness absence will allow an employer to investigate those absences more intelligently.

Recording sickness absence data diligently can allow the use of particular absence management features, such as the 'trigger point' approach (i.e. an absence review procedure is triggered after an employee's absence levels exceed a particular threshold number). Likewise, some management features can help to ensure that complete data is obtained in relation to every period of sickness absence, such as compulsory use of self-certification forms or holding return-to-work interviews after even short periods of absence.

Is it a disability?

Once a pattern of short-term sickness absences has been identified, and provided that the individual falls within the extended definition of employment under the Equality Act 2010 (encompassing employees, workers and some self-employed persons), the first question which should be in a manager's mind is whether that pattern is caused by a disability. If the employee is disabled, then the courses of action open to the employer are limited by discrimination law pursuant to the Equality Act 2010.

Naturally, penalising or dismissing someone *because* they are suffering from a mental health condition amounting to a disability would certainly amount to direct disability discrimination, and is unlawful.

Therefore, the focus of this paper is on what an employer is expected to do to understand whether (a) frequent short term sickness absences are caused by a disability, and (b) what steps it is expected to take and what latitude it has to manage the situation if that proves to be the case.

The process of identifying disability will be tackled partly by taking an in-depth look at two recent cases: *Gallop v Newport City Council*² and *Donelien v Liberata UK Ltd*³.

The employer's obligations and freedoms in the event the employee is disabled will be considered principally through the lens of the duty to make reasonable adjustments and not to discriminate against individuals for a reason related to disability without justification.

Defining and investigating disability

The definition of disability can be found in section 6 of the Equality Act 2010, and it states as follows:

"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 his ability to carry out normal day-to-day activities"

For the purposes of this definition:

- *"normal day-to-day activities"* can include work-related activities⁴;

² [2013] EWCA Civ 1583

³ [2018] EWCA Civ 129

- “substantial” means “more than minor or trivial”⁵, which case law has confirmed amounts to a fairly low hurdle to surmount⁶; and
- “long-term” means that the impairment (a) has lasted for at least 12 months already; (b) is likely to last for a period of at least 12 months; or (c) is likely to last for the rest of the person’s life⁷.

Mental ill-health may or may not satisfy the definition of disability depending on the features of the illness. “Stress” in and of itself is not viewed as a disability, but reports of clinical depression or anxiety disorder are much more likely to meet the test.

The law expects an employer to undertake a reasonable investigation to uncover whether or not any of the employee’s impairments amount to a disability. It is advisable to conduct such an investigation for multiple reasons:

- if disability is suspected but not known, a reasonable investigation can prevent the employer from having constructive knowledge of disability were it to transpire that the employee is indeed disabled;
- if disability is established, an investigation will enable the employer to make reasonable adjustments appropriate to the disabled employee’s needs or beware the limitations on its freedoms to manage the situation as it would otherwise prefer; or
- if the employee is not disabled, conducting a reasonable investigation will bolster the employer’s case that a subsequent dismissal is fair in all the circumstances.

We know from *Donelien* that an employer is not expected to do everything in its power to establish whether an employee is disabled – all that is required is a reasonable enquiry. Naturally, what amounts to a reasonable investigation will depend on the circumstances. As mental ill health can carry no outward symptoms, arguably a higher degree of investigation may be necessary to get a full picture of the employee’s health.

Some of the factors in the reasonableness of an investigation in this context are likely to be common to investigations in a grievance or disciplinary context; an example is the size, resources and sophistication of the employer, as a large multinational with a dedicated HR department is likely to be held to a higher standard. The extent to which an employee is willing to comply with the investigation is also potentially relevant to how much is expected from the employer⁸.

Consultation

Consultation with employees is among the most crucial aspects of an investigation into their ill health, and can be arranged by employers of all sizes and means.

⁴ See for example *Law Hospital Trust v Rush* [2001] IRLR 611; *Cruickshank v VAW Motorcast* [2002] IRLR 24; *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706; *HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab and another C-335/11*

⁵ section 212 Equality Act 2010

⁶ See for example *Vicary v BT* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19

⁷ Paragraph 2(1), Schedule 1, Equality Act 2010

⁸ See *Donelien v Liberata (ibid)* as an example.

If an employee has sporadically been absent from work, then that, in itself, may warrant an employer beginning to consult the employee as to whether anything is wrong. If the cause of the absences relates to mental illness, however, there are likely to be other signs which an employer would be remiss to ignore. The EHRC Code gives the following examples of red flags that an employee is suffering with depression:

- sudden deterioration in time-keeping and performance, particularly where accompanied with a change in demeanour⁹; and
- crying at work and having difficulty dealing with customer enquiries¹⁰.

Both Acas and Mind strongly recommend that line managers have a conversation with any members of staff they suspect are experiencing mental ill health.

Acas¹¹ suggests that a confidential meeting should be arranged as soon as possible in order for the line manager to do the following:

- allow the employee as much time as they need to talk things through;
- attempt to identify what the cause of concern is;
- think about potential solutions; and
- monitor the situation as it progresses.

Mind¹² reported a finding that 30% of staff disagreed with the statement *“I would feel able to talk openly with my line manager if I was feeling stressed”*. It recognises that managers will sometimes need to make the first move in initiating a dialogue about an employee’s mental health and it recommends raising any concerns around performance or frequent absence at an early stage. Mind states that managers should avoid directly asking the employee if he/she is ill, and instead focus on open, non-judgemental questions which allow the employee to disclose whatever he/she feels comfortable with disclosing.

If the employee does feel comfortable enough to discuss his/her condition, he/she may be able to give the employer more detail about the symptoms and how they correspond with their pattern of short-term sickness absences. He/she may also be able to suggest measures which could help to improve the situation and reduce the numbers of absences. Regardless of whether the employee can shed any additional light on their health, the employer will be obliged to undertake some further enquiries, normally involving medical evidence.

Referral to Occupational Health

Often, an employer will need to obtain medical evidence in order to help it to understand the nature and impact of the employee’s impairment(s).

Having consulted with the employee, it may be that he/she is willing and able to provide medical evidence from a GP and/or a specialist as to his/her diagnosis and prognosis. Evidence from the employee’s treating medical practitioners is likely to be useful to the employer’s assessment of the

⁹ Paragraph 5.15 EHRC Code

¹⁰ Paragraph 6.19 EHRC Code

¹¹ Acas: “Managing staff experiencing mental ill health”

¹² Mind: “Supporting staff with mental health problems”

situation, as those practitioners will have had ongoing, repeated contact with the employee as opposed to a one-off consultation.

That said, most employers will still want to refer the employee to occupational health to understand how the employee's mental condition impacts on his/her ability to perform contractual duties. Occupational health will often be in a better position to make a practical assessment of the impact of the employee's condition relative to the workplace, and to suggest reasonable adjustments where it considers them to be necessary.

Although a referral to occupational health is advantageous, there are many pitfalls an employer can experience if they approach OH in the incorrect way.

The overriding principle an employer must bear in mind when dealing with medical evidence is clearly stated by the EAT in *East Lindsey District Council v Daubney*¹³ as follows:

*"While employers cannot be expected to be, nor is it desirable they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by the employers in the light of the available medical advice. It is important therefore that when seeking advice employers should do so in terms suitably adjusted to the circumstances. Merely to be told... that an employee 'is unfit to carry out the duties of his post and should be retired on grounds of permanent ill health', is verging on the inadequate, because the employer may well need more detailed information before being able to make a rational and informed decision whether to dismiss."*¹⁴

Subsequent cases have shown that a similar principle applies in the post-Equality Act 2010 world in relation to an employer's determination as to whether or not an employee is disabled. The leading case on this is *Gallop*. Although *Gallop* was decided on the basis of the Disability Discrimination Act 1995 ("DDA"), predecessor legislation to the Equality Act 2010, the EAT confirmed that its decision was also relevant to the disability discrimination provisions of the Equality Act 2010.

Mr Gallop worked for Newport City Council from 1997 in various landscaping roles. In May 2004, Mr Gallop emailed the council to complain that he was suffering from stress accompanied by a lack of sleep and loss of appetite, nausea, headaches, eye strain, tearfulness, comfort eating and an inability to concentrate and deal with simple tasks. The council therefore referred Mr Gallop to occupational health for an assessment. OH concluded that Mr Gallop had "*stress related symptoms*" but that there was no sign of clinical depression; they therefore referred him for stress counselling.

In August 2005, Mr Gallop went off sick and following an assessment in September, OH again reported that he had a "*stress related illness*" but that it did not consider that he had a "*depressive illness*". OH recommended further counselling.

Mr Gallop returned to work in October 2005 having agreed a phased 'return to work' plan with OH and the council. He returned to his normal role in July 2006.

¹³ [1977] IRLR 181

¹⁴ *ibid.* at paragraph 17

As of 15 August 2006, Mr Gallop was signed off sick again. On 21 August 2006, he lodged a grievance stating that he had been diagnosed by his GP as suffering with depression, and that the council had failed to take sufficient steps to protect his health and safety at work.

A letter from Dr Riley in OH on 11 September 2006 stated that Mr Gallop was steadily recovering but that he was not yet fit to return to work, so his condition would be kept under review. A GP's certificate dated 20 September 2006 diagnosed Mr Gallop as suffering from 'reactive depression'. The grievance hearing was held on 21 September 2006, at which the council did not uphold Mr Gallop's complaints. By a further GP's certificate of 18 October 2006, Mr Gallop was signed off work for five more weeks on the basis of the same diagnosis.

On the following day (19 October 2006), the Council wrote to another OH doctor, Dr Crosbie, stating that the council:

"...would like to know –

- (i) is there any improvement in his condition since you last saw him?*
- (ii) is he able to carry out day to day activities?*
- (iii) is he fit to attend an investigatory hearing and possibly a Disciplinary Hearing?*
- (iv) Would you consider him to be disabled under the DDA? If so, are there any reasonable adjustments which should be made to his current range of duties?*

By way of background, I can confirm that [Mr Gallop] has had time off work previously on grounds of stress and that on the last occasion this was because a Disciplinary Investigation [was] underway at that time. As a result of this, an Action Plan was written which gave [him] a reduced workload. We were still working within this Action Plan when [he] went off again sick, recently as a result of his alleged stress."

A further report from Dr Riley in OH arrived on 23 October and stated, among other things:

"I understand his GP is questioning a various number of diagnoses which may be accounting for some of his symptoms including symptoms of chest discomfort. I have taken the chance to request a report from his GP with regards to what this diagnosis might be but also to help engage in his longer term prognosis. ...While he reports symptoms of stress I did not find him to be specifically depressed today although I will request that his GP comments with regard to this also."

On 22 November, a further GP's certificate was issued, again stating a diagnosis of 'reactive depression'. On 4 December, Dr Riley issued another report on the basis of a further consultation with Mr Gallop and the review of a report from his GP. Dr Riley stated his hope that Mr Gallop could return to work in January 2007, and went on to add:

"I have taken the opportunity to refer him for counselling in order to assist with any ongoing stress and I would confirm that the provisions of [the DDA] do not apply in this case in my view."

On 15 January 2007, OH reported that Mr Gallop had recovered well from his “stress related illness” and could return to work on a phased basis from 24 January. In the event, Mr Gallop did not return to work until 19 February 2007, and was signed off sick again from 11 April.

Mr Gallop was again referred to OH, who on 30 April reported that his symptoms had “relapsed” and that he had depression of moderate severity as a reaction to events at work. Following a further consultation on 11 June, OH stated that Mr Gallop’s condition had not improved and that he was reporting symptoms of moderate to severe anxiety. Mr Gallop’s GP wrote to OH on 4 July stating:

“It appears that his anxiety and depression has been as a result of stress experienced at his work place. ... I am unable to comment on whether he will be permanently incapable of returning to any work in the future, but... I doubt he will successfully return to work in his current job.”

On 25 July, in response to the GP’s letter of 4 July, Dr Crosbie wrote to OH noting the GP’s advice that Mr Gallop was being treated for anxiety and depression and that the GP doubted Mr Gallop could successfully return to his job. Dr Crosbie stated that, whilst Mr Gallop’s condition had improved slightly, his own consultation with him confirmed that he continued to show symptoms of anxiety and depression. However, without further explanation, Dr Crosbie concluded that *“I do not feel that this gentleman is covered under [the DDA].”* In a follow-up report on 14 December 2007, Dr Crosbie stated that Mr Gallop was likely to remain unfit for the foreseeable future, but *“he is not covered under [the DDA]”*.

In January 2008, the council wrote to Mr Gallop regarding OH’s most recent report. Mr Gallop disputed aspects of the report and questioned OH’s ability on the information they had to opine on his fitness to return to work. He exhibited a positive attitude regarding return to work, and was certified fit to do so by his GP and OH towards the end of the month.

Mr Gallop went back to work on 25 February 2008 but was promptly suspended on the basis of allegations of bullying made by colleagues going back to 2005. Mr Gallop was dismissed on the basis of those allegations in May 2008.

Gallop – claims.

Mr Gallop asserted that he was disabled within the DDA definition and brought various discrimination claims on that basis. In its defence, the council stated that OH had only ever advised it that Mr Gallop was suffering from work-related stress and had at no stage diagnosed him as suffering from a mental impairment which had a substantial and long-term adverse effect on his ability to perform day-to-day activities.

The Employment Tribunal found that Mr Gallop was disabled from July 2006 until the termination of his employment in May 2008. However, it concluded that because the council *“was in receipt of continuous unequivocal advice from its Medical Advisors, who were its external Occupational Health Advisors, that [Mr Gallop] was not disabled for the purposes of the [DDA]”*, it did not know and could not reasonably be expected to know that Mr Gallop was disabled. It further held that the council *“unless it has good reason to consider otherwise, is entitled thereafter to rely on the advice that is being given by its Medical Advisors.”* The EAT upheld the ET’s judgment.

The Court of Appeal unanimously disagreed with the ET and EAT's conclusions on the value of the advice from OH. It held as follows:

"Their opinions amounted to no more than assertions of their view that the DDA did not apply to Mr Gallop, or that he was not 'covered' by it or words to that effect. No supporting reasoning was provided. As the opinions were those of doctors, not lawyers, one might expect them to have been focused on whether, from the medical perspective, the three elements of section 1 were or were not satisfied. Since, however, OH made no reference to such elements, neither Newport nor the ET could have any idea whether OH considered (i) that Mr Gallop had no relevant physical or mental impairment at all; or (ii) that he did, but its adverse effect on his ability to carry out normal day-to-day duties was neither substantial nor long-term, or (iii) that he did, but it had no effect on his ability to carry out such duties. OH's opinion was, with respect, worthless."

The Court of Appeal went on to clarify that the ultimate decision-maker had to be the council in its capacity as Mr Gallop's employer. Where an employer has received medical advice stating that the employee is disabled, then the Court of Appeal stated that the employer would ordinarily accept that opinion unless they had good reason to disagree. However, where OH has advised that the employee is not disabled, the Court of Appeal held that the employer must view that advice with a critical eye – they are not permitted to *"simply rubber stamp the adviser's opinion"*.

The Court of Appeal added that:

"this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether an employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability."

Therefore, it is even clearer post-Gallop that whilst obtaining medical evidence is an important part of the investigation into an employee's potential disability, it is certainly not the only step expected of an employer, and the medical advice itself must be fit for purpose.

As the Court of Appeal advised, employers in all cases should ask OH clear, focused questions as to the nature and severity of the employee's condition, how it affects the employee's day-to-day life (including his/her employment duties), how long it is expected to last, and whether any adjustments would assist the employee.

In cases involving sporadic, short-term absences, an employer may need to ask some additional questions, such as whether the absences were all caused by the employee's condition, or (taking it back a step further if no condition is known yet) whether there is any condition which could explain the pattern of absences in the first place.

Once a referral is made to OH, it will usually be difficult for an employer to make a fair decision about how to deal with the frequent sickness absences of an employee suspected of suffering from mental ill health without OH's cogent answers to those questions.

Constructive knowledge of disability

If an employer has failed to undertake an appropriate investigation and the employee is later found to be disabled, the employer may be found to have constructive knowledge of that disability.

The concept of constructive knowledge arises from statute – specifically, paragraph 20 of Schedule 8 of the Equality Act 2010 (and before that, section 4A(3)(b) DDA). Paragraph 20 states that an employer will not be under a duty to make reasonable adjustments if it could not know, and could not be reasonably expected to know, that the employee has a disability and that he/she is likely to be at a substantial disadvantage compared with persons who are not disabled. The underlined section is “constructive knowledge”, i.e. that the employer is fixed with knowledge on the basis that it was reasonably expected to have known from the circumstances that the employee was disabled.

This removes from an employer the defence that it did not know the employee was disabled because it had not put its mind to it whatsoever – burying one’s head in the sand bears a significant risk of a finding of constructive knowledge on the basis that some degree of investigation would have revealed the disability.

However, as discussed above, the employer is not required to go too far in order to uncover the truth of the employee’s condition. *Donelien* shows us that all an employer must do to avoid being fitted with knowledge of disability is to undertake a reasonable investigation and take into account all of the circumstances.

Whilst every case turns in large part on its facts, *Liberata’s* approach in *Donelien* is a nonetheless a useful illustration of the steps an Employment Tribunal may expect an employer to have taken.

Donelien – facts.

Ms Donelien was employed by Liberata from 1999 as a Court Officer. From mid-2008 onwards, Ms Donelien’s punctuality and attendance took a turn for the worse, and she began taking numerous short-term sickness absences. The reasons given for those sickness absences were varied and included: tiredness and fatigue; hypertension (i.e. high blood pressure); dizziness; difficulty breathing; work-related stress; and viral illness.

On 15 January 2009, after a further period of absence, Ms Donelien’s GP wrote to Liberata. The letter stated that the GP had been treating Ms Donelien for uncontrolled hypertension, stress, low energy levels and tiredness since September 2008, and that the hypertension issue was continuing. The GP requested that Ms Donelien be permitted to return to work on a phased basis of 3 days per week. Liberata agreed to this suggestion, and from then on Ms Donelien was working Tuesdays to Thursdays each week.

Despite the revised working pattern, Ms Donelien’s absences continued and in February 2009 Liberata suggested making a referral to an external OH specialist. Ms Donelien was resistant, stating that her GP’s letter told Liberata everything it needed to know.

Following a further period of absence, Ms Donelien’s GP wrote to Liberata on 20 April 2009 stating that she had been suffering with an upset stomach, a feeling of being “generally unwell” and right wrist pain. The GP stated that Ms Donelien was fit to return to work.

An absence interview was held on 14 May 2009 (having initially been postponed due to Ms Donelien’s sick leave) between Ms Donelien, her line manager (Ms Banjo) and the responsible HR

Manager (Ms Prendergast). The ET went on to find that Ms Donelien had been uncooperative during this meeting and had refused to confirm Liberata's records of her absence. During this meeting, Ms Donelien was asked to certify her absences properly and call in by 10am if she was going to be absent on a particular day. The ET found Ms Donelien's response was as follows:

"The Claimant explained that she was not ringing in by 10 a.m. as required by the policy and she was not prepared to put herself under that pressure and in any event her manager was not always in at 10 a.m. either."

The next day, the GP wrote a letter stating that Ms Donelien was still suffering with hypertension and stress and requesting that Liberata continued to support her by allowing her to continue working a 3 day week. Ms Donelien sent this letter to Ms Prendergast with a note from herself saying: *"If you are not happy with the information contained in this letter, please detail your concerns in writing addressed to my GP and provide me with a copy"*.

Instead of liaising with Ms Donelien's GP, Ms Prendergast instead referred her to OH consultants who could contact her GP if necessary. Ms Prendergast posed a list of questions to OH, including how long Ms Donelien's condition was likely to last, whether she had a *"condition which would be recognised as a disability under the DDA"* and, if so, whether they recommended any adjustments. A consultation was scheduled for 11 June 2009.

The OH specialist, Dr Bellamy, issued his report on 18 June 2009. As Ms Donelien had refused permission for him to contact her GP, his report was based largely on what Ms Donelien had told him during their consultation. It stated that work-related issues were contributing to her high blood pressure and that her work concerns had not been adequately addressed by HR.

The report did not answer some of Ms Prendergast's questions, so she contacted OH again seeking a fuller opinion. Dr Brennan, who had spoken to Dr Bellamy, issued a follow-up report which essentially stated that Ms Donelien's problem was *"managerial rather than medical"*. He said that hypertension *"was an extremely unlikely cause of long term certification"*, that there was *"no evidence of any underlying psychiatric condition"* and that there was no reason to conclude that Ms Donelien was suffering from a *"DDA qualifying (mental and nervous) problem"*.

Ms Donelien was off sick again between 14 July and 3 August 2009, with a stated reason of epigastric pain and dyspepsia (i.e. a stomach ache and indigestion). She was invited to a further return-to-work meeting with Ms Prendergast and Ms Banjo on 5 August. The ET's findings as to what happened during this meeting are as follows:

"The Claimant asserted that her medical problems were caused by the Company. She was very critical of the HR team and said that using the Company's procedures was detrimental to her health. She said she was going to speak to the CEO and that they (Ms Prendergast and Ms Banjo) would find out what her concerns were from him, which was expressed as a threat. Although the Claimant stated that the Respondent had not respected the DDA, she did not directly challenge the Occupational Health conclusion that she was not disabled and did not elaborate further on her symptoms beyond saying that she could not ring up before 10.00 am when she was going to be late since it caused her stress that made her ill. She reiterated that she was willing only to work three days a

week starting at 1.00pm and that a leeway should be given in case of travel disruptions, so she might not be able to arrive exactly at 1.00pm but would be later sometimes. She said that she would not be working on Mondays and Fridays. Ms Banjo with the support of Ms Prendergast had already explained that the Respondent would not be able to support a three day working [week] going forward and the Claimant will be expected to work her normal contractual hours and to arrive by 10.00 am. In the event of her not being able to arrive by 10.00 am she must notify in accordance with the absence and attendance policy and procedure. The claimant appeared to have taken no notice of what Ms Banjo and Ms Prendergast had said to her, nor the contents of their previous letters."

Ms Donelien was off sick again from the following day until on 18 August 2009, at which point she had another return-to-work meeting with Ms Banjo. This meeting was, the ET found, "unproductive", and Liberata consequently decided to institute disciplinary proceedings. Ms Donelien was invited to attend a disciplinary hearing on 24 August 2009 to discuss allegations of unsatisfactory attendance and failures to comply with absence notification procedures. Ms Donelien did not attend the hearing and remained off sick for the rest of August and September 2009.

During September 2009, reports from an OH nurse and Ms Donelien's GP both stated that her problems were caused by work-related stress. A letter from Dr Brennan on 8 October 2009 said:

"Put simply this lady has had very high levels of sporadic short term absences over the last year, most recently now linked to 'stress'. Obviously it is impossible for me to comment directly upon what she believes that 'work related' stress is... I am equally not sure whether Ms Donelien is attributing all her prior absence, multiple short term, to 'work related stress'. Certainly the reasons have been quite different."

A rescheduled disciplinary hearing was conducted on 22 September 2009, following which Ms Donelien was dismissed for failures to work her contracted hours and to comply with the sickness absence notification procedures.

Donelien – claims.

Aside from claiming she had been unfairly dismissed, Ms Donelien claimed that (i) she was disabled within the meaning of the DDA, (ii) Liberata had actual or constructive knowledge of that disability, and (iii) Liberata had a duty to make reasonable adjustments, but had failed to do so.

The ET found that Ms Donelien had been disabled from late August 2009 on the basis of the "symptoms/conditions of hypertension; asthma; stress; tiredness and, possibly, depression".

However, the ET dismissed the reasonable adjustments claim for the following reasons:

"Is the Respondent able to plead ignorance now based on their OH advice coupled with their own knowledge of the reasons for the Claimant's absences? The advice they were getting from Occupational Health, chimed with their own experience and impression and the two letters that they had received from the GP, were all consistent in saying although the Claimant had a number of health difficulties, and stress and anxiety, it fell short of coming under the definition of disability. We consider that the Respondent did all they

could reasonably be expected to have done to find out about the true nature of the health problems the Claimant was experiencing by their referral to Occupational Health, their return to work meetings and discussions with her and by looking at the letters that the Claimant asked her GP to write to them and they could not reasonably be expected to have done more. On the facts known to the Respondent, it was not likely that the health problems and symptoms would extend to 12 months bringing the Claimant within the ambit of the DDA 1995. Furthermore many of the absences were not for the impairments which gave rise to disability, but the surprisingly high number of bouts of flu and debilitating colds, and very generalised references to stress and anxiety, which would not ordinarily lead an employer to think an employee is disabled. The Respondent was not assisted by the Claimant's attitude of confrontation and lack of co-operation with them and her refusal to allow the OH providers to contact her GP."

Both the EAT and the Court of Appeal agreed with this decision and held that Liberata had done all that it reasonably had to do to avoid having constructive knowledge of Ms Donelien's disability. The Court of Appeal distinguished this case from *Gallop*, stating that *"this was clearly not a 'rubber stamp' case"*. In summary, the factors which contributed to this decision were as follows:

- that Liberata had:
 - held regular consultation meetings with Ms Donelien;
 - considered correspondence from Ms Donelien's GP as and when she provided it;
 - given OH appropriate summaries of all relevant information before seeking advice;
 - asked appropriate questions of OH; and
 - followed up with OH to clarify when the first report failed adequately to answer the questions posed;
- the finding that it was reasonable for Liberata to decide to leave contacting Ms Donelien's GP to OH on a doctor-to-doctor basis;
- the difficulty in resolving the wide array of reasons which had been given for Ms Donelien's considerable number of short term sickness absences (which apparently amounted to 128 days' absence in the last year of her employment);
- Ms Donelien's uncooperative and somewhat confrontational attitude, including her denial of permission for OH to contact her GP (the EAT and Court of Appeal noted that *"the ET had to disentangle what the Appellant could not do from what she would not do. This is not an easy exercise"*); and
- the firm opinions of OH to the effect that Ms Donelien did not suffer with a condition which was expected to be long term and which qualified as a disability under the DDA.

The employee's uncooperativeness being a factor in favour of the reasonableness of the employer's investigation is not unique to *Donelien*. The EAT in two previous cases (*Wilcox v Birmingham CAB Services Ltd*¹⁵ and *Cox v Essex County Fire and Rescue Service*¹⁶) also placed significant weight on the fact that the employees had stood in the way of their employers obtaining coherent medical advice on their mental ill health. The point seems to be that the employer can only be expected do so much if an employee resists its attempts to investigate properly.

¹⁵ UKEAT/0293/10

¹⁶ UKEAT/0162/13

In the light of *Donelien*,¹⁷ an employer faced with a pattern of frequent short-term absences should commit to consulting the employee, obtaining relevant medical evidence, looking at all of the available evidence critically, and keeping an open mind. If, having done so, it reaches the conclusion that its employee is not disabled within the statutory definition, then it ought to have done all that is expected of it to avoid having constructive knowledge of any disability later found by a Tribunal to have existed.

Knowledge/constructive knowledge of substantial disadvantage

As mentioned above, knowledge or constructive knowledge of the employee's disability is only half of the story. As was held in *Wilcox*, the duty to make reasonable adjustments will not arise unless the employer knows (actually or constructively) that the employee is disabled AND that the employee is likely to be placed at a substantial disadvantage as a result of one of three categories of situation specified in section 20 Equality Act 2010.

The category most relevant where the employee's disability pertains to mental ill health is the situation where the substantial disadvantage is being caused by a provision, criterion or practice ("PCP") the employer is applying. In such a situation, the obligation is on the employer to take such steps as are reasonable to alleviate that disadvantage¹⁷.

What is the PCP?

Given that the substantial disadvantage has to be caused by a PCP operating on the disabled person, it is important to understand what the PCP is in a given case. Whilst the legislation does not define "PCP", the EAT in *Lamb v The Business Academy Bexley*¹⁸ stated that it is a concept to be construed broadly, and could include formal or informal arrangements, rules, practices, arrangements, policies. One-off decisions can also potentially qualify as PCPs¹⁹.

An expectation to work long hours was held to amount to a PCP in *United First Partners Research v Carreras*²⁰ despite there being no strict requirement to that effect, demonstrating that a PCP need not be set in stone.

There are some limits to what can amount to a PCP, however. It seems a PCP must be work-related in some way²¹, and cannot relate solely to the employer's ineptitude or mistakes²².

Where an employee's short term sickness absences are the employer's primary concern, the appropriate PCP will likely relate to the employer's expectations on attendance. Case law has established that an employer's requirement for consistent attendance²³ or attendance at a certain level²⁴ amount to PCPs.

¹⁷ section 20(3) Equality Act 2010

¹⁸ UKEAT/0226/15

¹⁹ *British Airways Plc v Stamer* [2005] IRLR 862

²⁰ [2018] EWCA Civ 323

²¹ *Kenny v Hampshire Constabulary* [1998] ICR 27

²² See *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* UKEAT/0417/11, *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12 or *Carphone Warehouse Group plc v Martin* UKEAT/0371/12, for example.

²³ *General Dynamics Information Technology Ltd v Carranza* UKEAT/0107/14

²⁴ *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265

Substantial disadvantage

Whether there is a substantial disadvantage is assessed objectively²⁵ and by comparing the employee to persons who are not disabled. Unlike in direct and indirect discrimination, the comparison for these purposes does not have to be 'like for like' – i.e. there is no need to identify a real or hypothetical person whose circumstances are identical to the employee barring his/her disability²⁶.

In the abstract it may be difficult to see where the distinction lies between the two limbs of the knowledge test, given that the test for disability already contains examination of the impairment experienced by the individual on their ability to perform day-to-day activities.

A good illustration of how the distinction works in practice is provided by *Thomson v Newsquest (Herald & Times) Ltd*²⁷. The employer conceded knowledge of disability, as it was aware that Ms Thomson had been diagnosed with, and was receiving medical treatment for, depression.

However, it transpired that a symptom of Ms Thomson's depression was that she labelled all activities as either 'safe' or 'unsafe'; in particular, she labelled opening post as 'unsafe' with the consequence that she was not opening important letters from her employer regarding her sickness absence.

The EAT held that the employer could not reasonably have been expected to know that Ms Thomson's disability caused her to fear opening post, or that corresponding with her via post would place her at a substantial disadvantage. The employer had not been provided with medical evidence on this point and its attempts to arrange an appointment with OH were met with silence given that the letters were not being opened. The post was also not being returned to sender, so the employer did not know anything was amiss. Therefore, the second limb of the knowledge requirement was not satisfied and the duty to make reasonable adjustments to the requirement that she respond to postal correspondence did not arise.

Therefore, even if an employer is aware that the employee who has taken frequent short-term sickness absences is suffering with a disability, it may not have to make reasonable adjustments to the employee's duties, working arrangements, environment, etc or be confined by the Equality Act in how it should respond. unless it knows (or could be reasonably expected to know) that something about the employee's mental illness is putting him/her at a substantial disadvantage compared to those without a disability.

In reality, the substantial disadvantage being suffered by Ms Thomson was fairly unusual, which contributed to the finding that her employer could not reasonably have been expected to know about it. In a number of cases, the disadvantage caused by the disability is likely to be more obvious, such as the employee struggling to face working full days or to travel into the office every day of the week. This will often become apparent from consulting with the employee regarding their reasons for taking so many sickness absences, and/or from a medical advisor's opinions on the impact of the

²⁵ *Copal Castings Ltd v Hinton* UKEAT/0903/04

²⁶ *Archibald v Fife Council* [2004] ICR 954; *Fareham College Corporation v Walters* [2009] IRLR 991

²⁷ ET/121509/09

disability and whether any adjustments would be appropriate. In those cases, the employer will most likely have the requisite knowledge to trigger their duty to make reasonable adjustments, rendering “drawing a line” under the sickness absences an inappropriate course of action.

Making reasonable adjustments

If an employer’s investigation into an employee’s sporadic sickness absences has led to the conclusion that the employee is disabled and experiencing a substantial disadvantage as a result of a PCP it has applied, then the next question on the employer’s mind must be whether it is appropriate to make any reasonable adjustments to eradicate that disadvantage.

Steps to be taken

There are a large number of different adjustments an employer could make, and not all of them (possibly none of them) will be reasonable in the circumstances. As ever, a wise place to start is by consulting the employee on what adjustments they think will assist them and/or obtaining a medical opinion on what steps it is appropriate for the employer to take.

The EHRC Code and Acas both set out lists of adjustments which it may be reasonable for an employer to take. Where the disability relates to mental health, the following suggestions from the list may be suitable:

- allowing additional/longer breaks;
- changing or truncating working hours;
- reassigning duties which the employee is struggling with;
- allowing the employee to work from home part of the time;
- providing a private space for the employee to use if they need privacy;
- assigning a mentor or buddy to support the employee; or
- arranging regular catch-ups with management.

The EHRC Code points out that sometimes more than one adjustment will be reasonable in order to remove the employee’s disadvantage²⁸.

Both Acas and the EHRC Code also note that an appropriate adjustment in some cases may be to move the employee to a vacant role with more suitable duties (provided, of course, that the disabled employee consents to the change to their terms and conditions²⁹).

Case law on this adjustment shows how extensive this duty can be; as held in *Kent County Council v Mingo*³⁰, it may include giving the disabled person priority over other applicants, including those at risk of redundancy who are seeking redeployment. In *Archibald*, the House of Lords held that an employer might be required to appoint a disabled employee to an alternative, vacant post, even if he/she is not the best candidate for that role. However, the EAT in *Wade v Sheffield Hallam*

²⁸ Paragraph 6.32 EHRC Code

²⁹ *G4S Cash Solutions (UK) Ltd v Powell* UKEAT/0243/15

³⁰ [2000] IRLR 90

*University*³¹ made it clear that this does not equate to giving the disabled person a role they are not suitable to perform.

The requirement that there be an existing vacancy is not hard-and-fast, either. An employer in the middle of a total restructure was required to create a new post from scratch for its disabled employee³², and a police force was required to facilitate a job swap between a disabled police officer and a colleague who was happy in his job³³. Steps like these will not always be appropriate, but they should be considered where circumstances permit.

What is 'reasonable'?

As the name implies, the benchmark for whether an adjustment needs to be made is whether it is reasonable for the employer to make it.

The impact on the employer is relevant to the assessment of reasonableness, as can be seen in the contrast between the cases of *Job Centre Plus v Wilson*³⁴ and *Caen v RBS*³⁵.

In *Wilson*, an agoraphobic employee's request to work from home did not amount to a reasonable adjustment because the employee's job centred around holding face-to-face interviews with clients and working from confidential files which could not leave the office. The inconvenience to the employer would therefore be considerable.

In contrast, the ET in *Caen* found that the request from a disabled employee (who suffered with agoraphobia and depression) to change her working hours to 6:30am to 2pm in order to avoid traffic on the roads during her commute was a reasonable adjustment. The employer was prepared to let her start at 7:30am and no earlier. The ET held that the employer's insistence on an hour's difference had no logical basis or advantage to the employer and it was therefore unreasonable for it not to agree to make the employee's requested adjustment.

Where the proposed amendment would require positive steps from the employer, the extent to which it would be logistically difficult for the employer would also be relevant to reasonableness. In *McCarthy v Jaguar Cars Ltd*³⁶, it was held to be a reasonable adjustment to amend the redundancy scoring for the disabled employee because it would be straightforward enough for particular criteria not to be applied to one employee. Contrast this with *Dominique v Toll Global Forwarding Ltd*³⁷, where the EAT suggested that it would be more difficult to apply discounts to redundancy criteria to account for disability.

In a case involving frequent sickness absence, the employer is likely to have to consider whether it would be reasonable to make an adjustment to any absence thresholds in its attendance management policy (or equivalent). This is because applying a cut-off point for absences is very likely

³¹ *UKEAT/0194/12*

³² *Southampton City College v Randall* [2006] IRLR 18

³³ *Chief Constable of South Yorkshire Police v Jelic* *UKEAT/0491/09*

³⁴ *Secretary of State for Work and Pensions (Job Centre Plus) and others v Wilson* *UKEAT/0289/09*

³⁵ *Caen v RBS Insurance Services Ltd* *ET/1801133/09*

³⁶ *UKEAT/0320/13*

³⁷ *UKEAT/0308/13*

to place a disabled person at a substantial disadvantage if their disability means they need to take additional sick days. This could be the case where the disability pertains to mental ill health.

It will not always be the case that adjusting the threshold or discounting sick days taken due to disability will be reasonable. As always, it is a case-by-case assessment. In *Griffiths*, above, it was held not to be reasonable to expect the employer to (a) disregard a period of disability-related sickness absence so that a warning would not be issued under the attendance management policy, and/or (b) extend the trigger point by 12 days so that the employee would only be considered for disciplinary action after 20 days' absence. This is because the employee's condition (fibromyalgia) was, on evidence from medical advisors, likely to give rise to further, lengthy periods of sickness absence in future, such that a relatively short extension to the threshold would have limited value.

What if the adjustments are not reasonable?

It is feasible (as it was in *Griffiths*) that the proposed adjustments are found not to be reasonable once the employer has explored them.

The Court of Appeal in *Griffiths* was, however, clear that this does not allow employers free reign to discipline a disabled employee for their absences. Lord Justice Elias gave the following note of caution:

*"...the positive duty to make reasonable adjustments is only part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under section 15 [of the Equality Act 2010] to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were a result of the disability and it was not proportionate in all the circumstances to effect the dismissal."*³⁸

Section 15 of the Equality Act 2010 is, if described in short-hand, discrimination arising from disability. In an abridged sense, the EAT has stated³⁹ that this means asking the following two questions:

- Is there a "something" which is caused by or arises from the Claimant's disability?
- Did the employer's treatment of the employee amount to unfavourable treatment because of that "something"?

One can imagine how dismissing (or disciplining) an employee for their poor attendance record when that poor attendance record is caused by a disability relating to their mental ill health. This must be borne in mind when considering whether to "draw a line" under the absences.

An employer's primary line of defence in resisting a section 15 claim is to show that the treatment is a proportionate means of achieving a legitimate aim. If the employee's attendance is significantly

³⁸ [2015] EWCA Civ 1265 at paragraph 79

³⁹ In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14

problematic for the employer, no reasonable adjustments can be identified, no improvements are expected by medical advisors and the requirements of the employer's applicable processes have been followed, then it could be proportionate to dismiss the employee despite their disability with the aim of (for example) ensuring adequate resourcing. However, the section 15 test is notoriously difficult to apply, so an employer facing this prospect should take detailed legal advice before taking decisive action.

All in all, it will be difficult for an employer to dismiss an employee on the basis of their persistent short-term sickness absences if those absences are caused by a disability. There is a more stringent expectation in disability cases for the employer to accommodate the employee, and the employer must take care to avoid subjecting the employee to less favourable treatment on grounds of his/her disability or something arising from it. Whilst it is conceivably possible to dismiss a disabled employee, the margin for error is significant and detailed legal advice should be sought at all stages of the process.

What does your sickness absence policy say?

Even if the member of staff in question's mental health condition does not amount to a disability, an employer will be obliged to follow any processes set out in its sickness absence policy. A failure to do so could render a subsequent dismissal unfair (provided, of course, that the member of staff is an employee and has the necessary 2 years' continuous employment to bring an unfair dismissal claim).

Even if the employee lacks unfair dismissal rights, it is possible for an employer to be in breach of contract by responding to an ill employee in a way which disregards its prescribed procedures.

From the unfair dismissal perspective, frequent but genuine short-term sickness absences will probably fall within either 'capability' or 'some other substantial reason' ("SOSR"), both of which are potentially fair reasons for dismissal under section 98 of the Employment Rights Act 1996.

Whether to rely on capability or SOSR will depend on what aspect of the situation is at the forefront of the employer's mind when it decides to take steps to dismiss⁴⁰. Where the employer's concern is the employee's fitness to continue doing his/her job as a result of their mental health, capability is probably the best fit. If the employer's concern is more that the employee is failing to meet attendance targets and/or not complying with an attendance policy, then (following *Wilson v Post Office*⁴¹) SOSR is a better description. In many cases, there will be an element of both concerns at play, so relying on capability and SOSR in the alternative is a good catch-all.

For the purposes of this paper, we assume that the absences have indeed been caused by mental ill health and are genuine. If there is any query over the genuineness of the absences, however, 'conduct' may be the potentially fair reason relied on, and a disciplinary process would need to be followed in accordance with the Acas Code of Practice on Disciplinary and Grievances.

Most businesses will have an absence policy, a capability policy or something equivalent to state how the employer will approach cases of persistent absence. In order to conduct a fair procedure, the employer will be expected to follow the procedure it has prescribed for itself.

⁴⁰ *Ridge v HM Land Registry* [2014] UKEAT/0485/12

⁴¹ [2000] EWCA Civ 3036

Generally speaking, a well-drafted absence/capability policy will have something to say on the following points:

- what the threshold number of absences is before an employer will contemplate taking action;
- how the employer will consult the employee on the situation, including holding return-to-work meetings;
- the arrangement of return-to-work meetings;
- whether and under what circumstances any adjustments will be made to accommodate the employee's illness despite it not amounting to a disability; and
- at what point warnings will be issued and dismissal will be contemplated.

Each of those aspects will be considered below.

Absence thresholds

A policy should state the point at which an employer will take steps to address an employee's absences. As discussed earlier in this paper, this will normally be expressed as a number of days within a set period of time, but could be calculated as a percentage of the available working time within a reference period. That threshold may be worked into an employer's HR computer systems to flag particular employees once it has been reached.

All employees should be made aware of what the employer's trigger point is generally, and what the consequences of reaching it are. In individual cases, the employee should be notified once their absences have reached the threshold and be informed of what the next steps will be.

Generally speaking, the next step will be for the employer to commence the first stage of an investigation into the absences. It should collate its sickness data and the reasons and/or evidence provided for each absence, then prepare to discuss them with the employee.

First Consultation

As discussed above in relation to disability, consultation with the employee is a crucial first step in the employer's investigation. This remains the case whether or not the employee's mental ill health amounts to a disability, partly because consultation will help the employer understand whether there is a disability in the first place.

All consultations held in relation to the absence policy should be documented and notes should be taken.

The initial consultation is likely to be informal and may take the form of a return-to-work meeting, as was the case in *Donelien*. This is likely to be the case where the timing of a consultation coincides with a period when the employee is on sick leave. If so, a larger focus may be placed on the most recent period of absence, the reasons for it, and what needs to be done in the immediate term to reintegrate the employee. This may mean that the employer decides to leave it slightly longer to see how the reintegration goes before arranging a formal capability/absence consultation.

The first formal consultation may broach the following issues:

- the overall number of absences and whether there is any pattern to them (including whether there is an underlying disability);
- the impact the employee's absences are having at work, such as an increased workload for colleagues, uncertainty in resourcing, a decrease in profits, or disadvantage to clients;
- an indication of whether any future short-term absences are expected or likely;
- the impact future absences are likely to have;
- whether the employer can take any steps to help the employee improve his/her attendance; and
- at what point a formal warning may be appropriate, and what the consequences would be.

Medical evidence

Whether or not the employee expresses a view on their health during this meeting, the employer should try to obtain meaningful medical evidence by asking the employee's permission to contact their GP and/or refer him/her for OH assessment. As discussed above, from a discrimination perspective this is important if the employee is later judged to be disabled.

However, even if there is no disability, it will be wise to seek medical input in order to understand the circumstances of the employee's absences and the likelihood of the situation improving. It can be difficult for a medical advisor to give meaningful advice where the absences are truly unpredictable and sporadic (as was suggested some time ago in *Lynock v Cereal Packaging Ltd*⁴²), but in most cases – especially where the employee has stated that they are suffering with a mental health condition – it will be possible for a doctor to give some insight into the employee's diagnosis and prognosis.

The EAT put it this way in *Daubney*:

*“Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.”*⁴³

Evidence from the medical advisor as to the cause of the mental ill health would also be useful. This is because, generally speaking, an employer will be expected to give the employee additional leeway and time to improve if his/her condition was caused by the employer and a personal injury claim is more likely to succeed if they do not.

In *McAdie v Royal Bank of Scotland*⁴⁴, the Court of Appeal (agreeing with the EAT's decision) held that the employer's responsibility for the employee's ill health is relevant to whether and when it is reasonable to dismiss the employee by reason of that ill health. The EAT in this case had previously clarified that this would not mean that there could never be a fair dismissal where the employer had caused the illness, but it could mean that the employer has to go the “*extra mile*” in giving the employee additional time to improve or making more effort to find alternative employment instead of dismissing them.

⁴² [1988] ICR 670

⁴³ [1977] IRLR 184 at paragraph 18

⁴⁴ [2007] EWCA Civ 806 at paragraph 37

At some point during the consultation process, the employee should be given the opportunity to comment on the medical evidence the employer has amassed on their condition. He/she may be able to contextualise or explain the evidence presented, identify problems within it, or provide medical evidence of their own. If the employee wishes to provide a counter-report but is denied the opportunity to do so, a consequent dismissal runs the risk of being unfair⁴⁵.

Making adjustments

Having held an initial consultation and obtained medical evidence, it may be possible to identify ways in which the employer can make adjustments in order to help the employee improve their sickness absence record taking into account their mental ill health.

As was implied by *McAdie*, an employer is generally expected to consider whether it is possible to put the employee in an alternative role instead of dismissing them (albeit more effort is required where the employer caused the ill health). Failing to put one's mind to alternative roles could render a dismissal unfair even if the rest of the process was fair⁴⁶. That said, the employer will only have to look at existing vacancies – it is under no duty to create a job especially⁴⁷.

Short of giving the employee another job, the employer should also put its mind to whether any other modifications could be made to the employee's role to help them improve their attendance. It may be possible to tweak the employee's duties or environment to make coming to work consistently a more comfortable experience; if it is, the employee will most likely be expected to take them before contemplating dismissal. See for example *Garricks (Caterers) Ltd v Nolan*⁴⁸, where the EAT held that the employer ought to have considered whether the aspect of the job Mr Nolan struggled with, namely carrying heavy boxes, could have been removed from his job description permanently rather than dismissing him. As heavy lifting was only a small part of his job and could easily have been reallocated to a colleague, resorting to dismissal was unfair.

If adjustments have been made, sufficient time should be allocated to a "trial period" of sorts in order to see if they make a positive impact. Employers should avoid making any rash decisions to progress to dismissal before the employee has been given a fair chance to adapt to the change of circumstances.

Formal written warning

If the employee has been consulted over their absences, medical evidence has been sought, any appropriate adjustments have been made and allowed the time to bed in, but no improvements have been made to their attendance, then the employer will be entitled to take matters further.

The most appropriate next step in most cases is to issue a written warning formally putting the employee on notice of the need to improve. The terms of the warning should clearly state what degree of improvement is expected, and within what timeframe. It should also state in terms what the consequences will be of those targets not being met. In some circumstances, it will be

⁴⁵ *Liverpool Area Health Authority (Teaching) Central & Southern District v Edwards* [1977] IRLR 471

⁴⁶ *Scottish and Southern Energy plc v Mackay* [2007] UKEAT/0075/06

⁴⁷ *Merseyside v Taylor* [1975] ICR 185

⁴⁸ [1980] IRLR 259

appropriate for more than one warning to be issued, and in others it may be acceptable to proceed straight to a final written warning.

What an employer cannot do is progress to a dismissal before giving the employee adequate notice to improve. This was the problem faced by the employer in *Connorton v British Steel plc*⁴⁹. Mr Connorton had taken frequent sickness absences for a number of years, but the employer had shown a high degree of tolerance; whilst a string of performance targets had been set for him, Mr Connorton had never been issued with a final written warning or suspended. Therefore, the Tribunal held that the decision to progress from that state of affairs to dismissal was unfair “*in the circumstances, particularly in view of the background of its dealings with [Mr Connorton] without some proper warning*”. In essence, an employer must let the employee know that they are on their last chance to improve before decisive action is taken.

Second Consultation and Dismissal

If an employee’s attendance has not improved despite the issuing of a final written warning, and the employer has warned him/her that a possible consequence of that is dismissal, then the employer will probably be considering dismissal. At least one further consultation should be held with the employee before the decision to dismiss is made.

It is good practice to write to the employee in advance of this meeting setting out its basis, the factors the employer intends to take into account, what evidence it is relying on and what steps have led to the contemplation of dismissal. This enables the employee to understand fully the situation and puts them in a better position to state their case. Failing to do so runs the risk that the employee turns up, says that they have not been afforded a sufficient opportunity to prepare, and requests that the meeting be postponed.

Section 13 of the Employment Relations Act 1999 gives a right for an employee to be accompanied by a union representative or a colleague to any “disciplinary meeting”, which it defines as any meeting which could result in a formal warning being issued or the employee being dismissed. Therefore, even though an ill health or SOSR process is not a disciplinary procedure, it is best for an employer to offer proactively the right to be accompanied. In any event, it is likely to be a reasonable adjustment (whether on disability or fairness grounds) to permit an employee with mental health concerns to have someone with them for support.

The purpose of a further consultation meeting is to ensure that the employee has had sufficient opportunity to make representations about their situation and make any suggestions they wish to make as to alternatives to dismissal. The employee may be able to explain why they were unable to comply with the attendance requirement set by a final written warning and be able to make the case for additional time to be afforded to them. They may also be able to raise mitigating factors in their favour, such as a long period of service unaffected by absence concerns⁵⁰.

⁴⁹ 2502634/99

⁵⁰ See *Alexander v Downland Retirement Management Ltd* ET/3103380/03

The employee may also be able to cast doubt on the validity of prior warnings; an employer dismissing on the basis of a series of prior warnings is under a duty to ensure the previous warnings were⁵¹ validly issued in order for the dismissal to be fair.

If, taking all information before it in the round, the employer considers it is appropriate to dismiss, then it may do so. As long as it has approached the situation with compassion and understanding throughout, including giving the employee sufficient time to improve their attendance, taking into account the medical position and making any adjustments as are reasonable, a resulting dismissal is likely to be found to be within the range of reasonable responses open to it.

Once a dismissal decision has been communicated, the employee ought to be given the right to appeal that decision within a reasonable timeframe giving their grounds for doing so in full. Best practice is to appoint a more senior manager than the dismissing officer to conduct the appeal, and arrange for it to be conducted in person. Any appeal outcome should be communicated in writing in order to put the reasons on the record.

Conclusions

If an employee has taken a number of short-term sickness absences due to mental ill health, an employer should take steps to address it.

It will rarely be open to an employer to 'draw a line' under the absences (i.e. dismiss the employee) immediately, regardless of whether the employee's mental health condition amounts to a disability. A reasonable process is required, and the best thing to do in the first instance is to talk to the employee. Whilst conversations of this nature are difficult, a manager should initially hold an informal meeting with the employee to understand what the situation is and what the employer can do to assist.

A crucial factor in these situations will naturally be whether the absences are caused by a disability or not, and an employer is obliged to conduct a reasonable investigation in order to ascertain that. Medical evidence will be important to this enquiry, but the employer cannot follow a doctor's opinion blindly.

If the employee is disabled, they are protected under the Equality Act 2010 from unfavourable treatment on the basis of their disability, and an employer is obliged to make whatever adjustments are reasonable to prevent him/her experiencing a disadvantage. Moreover, dismissal cannot occur if it is not a proportionate means of achieving a legitimate aim.

If the employee has unfair dismissal rights then, even if he/she is not disabled, he/she cannot be dismissed lawfully without due process. At least two consultation meetings should be held, efforts should be made to obtain the employee's side of the story and the employer should consider whether it can do anything to help the employee to improve their attendance. The employee should always be given an opportunity to improve and sufficient warning should always be given if the matter progresses to a stage where dismissal is being contemplated.

⁵¹ *Sakharkar v Northern Foods Grocery Group Ltd (t/a Fox's Biscuits)* [2011] UKEAT/0442/10

Ultimately, whilst the law does not require an employer to turn a blind eye to disruptive sickness absence, it does require the employer to act reasonably in the circumstances when deciding how to deal with them. So long as the employer treats the employee with compassion and patience throughout, and takes legal advice from an early stage, it should be possible resolve the situation in a way which works for the employer.

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