

Disability-Related Absence

When is “enough enough” in disability-related absence cases - frequent intermittent absences, a refusal to engage with HR or OH, and prolonged absence?

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Agenda



- What is a disability?
- Rights of an employee and duties of an employer
- The risks of taking action
- Dismissal
- Frequent intermittent absences
- Refusal to engage with HR or OH
- Prolonged absence
- Alternatives
- When is enough, enough?
- Questions

What is a disability?

- A physical or mental impairment which has a substantial and long-term adverse effect on an individual's ability to carry out normal day-to-day activities.
- Certain conditions are automatically deemed to be a disability
- Some conditions are excluded

Rights of an employee

Statutory

- Right not to be discriminated against
- Right not to be unfairly dismissed

Contractual

- Entitlement to sick pay
- Policies and procedures
- Entitlement to benefits

Implied

- Mutual trust and confidence

Duties of an employer

Statutory

- Duty to make reasonable adjustments

Contractual

- Payment of sick pay
- Policies and procedures
- Provision of benefits

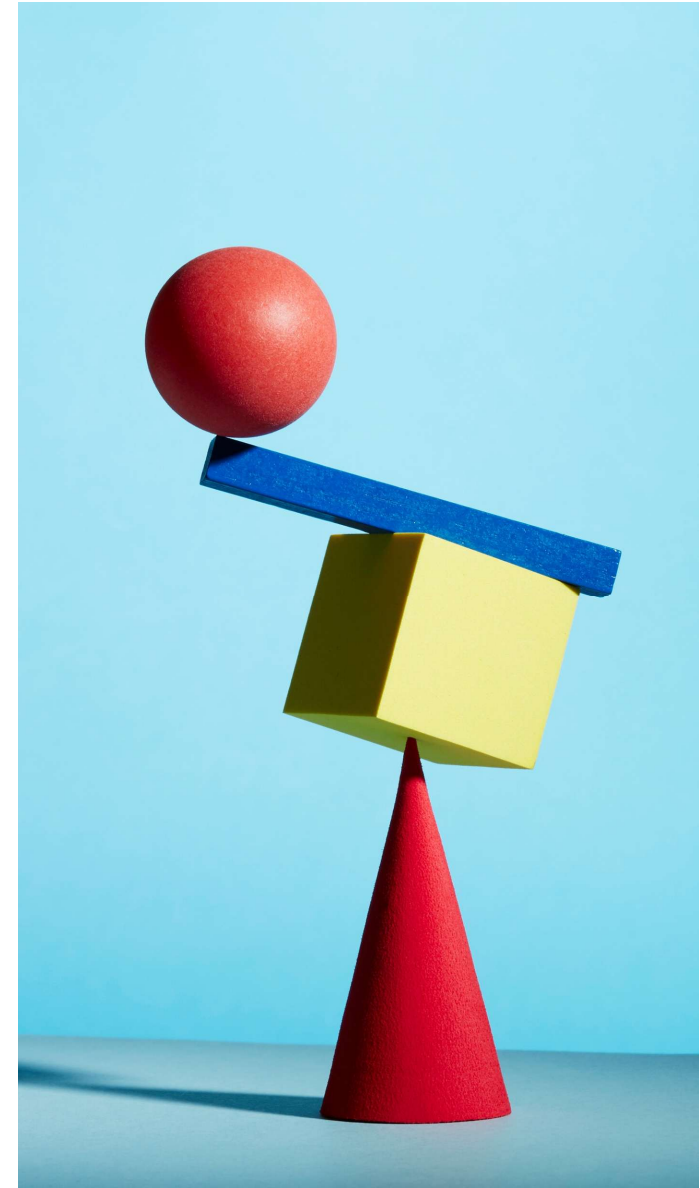
Implied

- Trust and confidence

The risks of taking action

Taking action in relation to disability-related absence can lead to claims of:

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability
- Failure to make reasonable adjustments
- Harassment related to disability
- Unfair dismissal

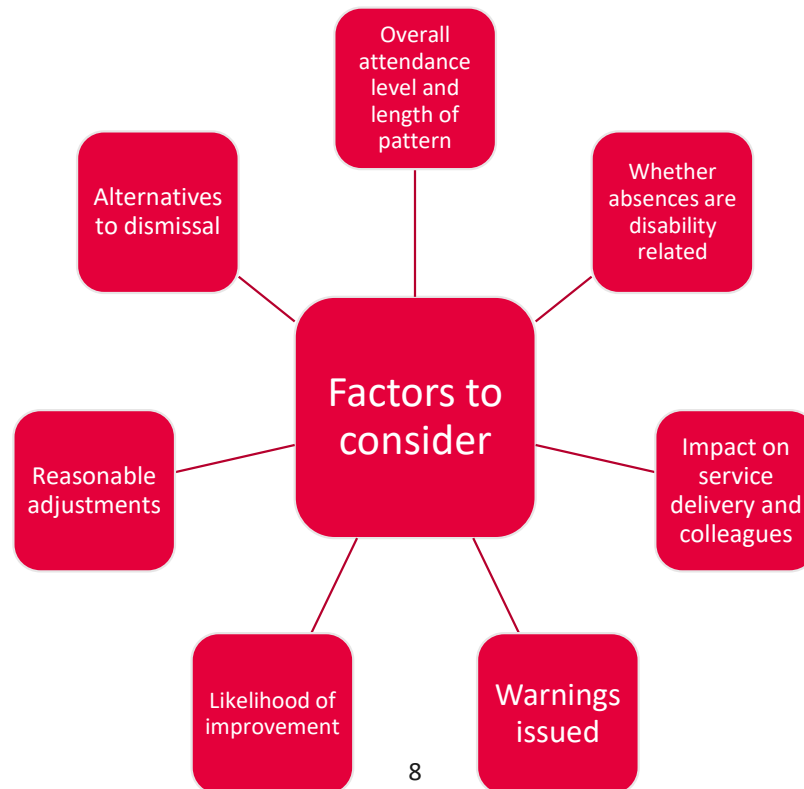




Dismissal

- Potentially fair reasons for dismissal:
 - Capability dismissal – if the employee is not able to do the job.
 - Conduct dismissal – absences where no valid reason is given or sickness reporting procedure is breached.
 - More rarely Dismissal for some other substantial reason (SOSR) – if short term intermittent absences are having a detrimental impact on business and employee performance.

Frequent intermittent absences – when does it become enough?



Refusal to engage with HR or OH – how long to keep chasing?

- Explore the reason for lack of engagement
 - The employee is still obliged to comply with lawful and reasonable instructions unless incapacity makes this impossible
 - Explain why engagement is necessary and how you may need to respond to a failure to engage
 - Consider whether any reasonable adjustments need to be made
- Document:
 - Meeting invitations
 - Welfare contact attempts
 - OH referrals
 - Requests for evidence
 - Warnings/improvement notices given
- If there is still refusal to engage – act reasonably and proportionately:
 - Potential dismissal on capability grounds
 - Potential dismissal for misconduct – risky!

Prolonged absence – how long must we hold the job open?

- Follow any sickness absence policies
- Keep in regular contact with the employee
- Ascertain the up-to-date medical position and obtain medical evidence
- Consider any reasonable adjustments which may allow them to return
- Keep a paper trail
- Consider how long is reasonable to keep the employee's job open – this is fact sensitive!
- Keep the employee informed of any risk of dismissal
- Consider alternative employment

Considering alternatives

Alternative role

- Consider any suitable alternative roles which the employee may be able to do

Permanent health insurance (PHI)

- Consider any entitlement to PHI

Ill-health retirement

- Check if ill-health retirement is an option

Proportionality

- Is there a less discriminatory option to achieve the aim?

When is enough, enough?

- Frequent intermittent absence
 - Employers can dismiss, but only after meaningful consideration of adjustments and attendance management measures.
- Refusal to engage
 - Employers should make sustained efforts to obtain evidence but are not required to wait indefinitely when cooperation is absent.
- Prolonged absence
 - There is no requirement to hold a role open forever. Prognosis and operational impact become increasingly important.
- The key question is: “Has the employer acted reasonably, fairly and proportionately before deciding that enough is enough?”

Questions?

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