



Long-term Sickness

How do you de-risk capability dismissals in long-term sickness absence cases, where (1) OH is sitting on the fence, but a return to work seems unrealistic, and (2) the employee insists on returning but repeatedly and quickly falls sick again?

White Paper conference – 26 June 2024
Emma Burrows
Trowers & Hamlins LLP

Background

- Sickness at highest level since 2013
- 87% of respondents observed presenteeism

CIPD Health and Wellbeing Survey 2023

- Consultation on fit note ongoing



How to derisk a capability dismissal when OH is sitting on the fence but a return to work seems unrealistic?

- You need medical evidence that the employee can't return to work in the reasonably foreseeable future
- Take **reasonable** steps to ascertain medical position
- Make sure the medical position is up to date
 - *East Lindsey DV v Daubney 1977*
 - *S v Dundee City Council 2014*
 - *Hampson v Cheshire East Community Health 2010*
 - *Mehmood v BT plc 2012*
- Is it worth asking the GP or a specialist?

What to do when OH is sitting on the fence but a return to work seems unrealistic?

- A medical opinion can be taken at face value
 - *Liverpool Area Health Authority v Edwards* 1977
 - *BS v Dundee* 2013
- Don't jump to assumptions – what's the diagnosis?
 - *House v Greene Kind Services Ltd* 2007
 - *O'Brien v Bolton St Catherine's Academy* 2017
- Consult with the employee
- The decision to dismiss is a managerial one
 - *DB Schenker Rail UK Ltd v Doolan* 2011
 - *Grant-Ryder v the Governing Body of the Maelor School* 2020

How to derisk a capability dismissal when the employee insists on returning but repeatedly and quickly falls sick again?

- Make good use of return to work meetings
 - *ACAS guidance on Managing Sickness absences*
- Carry out a risk assessment
- Any disability and reasonable adjustments?
- Don't let an employee come back if they are not fit enough to do so
- Consider a referral back to OHD
- Dismiss where medical evidence supports it and following consultation

Presenteeism

CIPD Health and Wellbeing Survey 2023

- Increase from 46% to 53% of employees worked when sick
- Line managers manage sickness
- Challenge to employee wellbeing and management style

So, train manager to support your wellbeing policy



Contact



Emma Burrows
Partner

eburrows@towers.com
+44 (0)7966 487742
Linkedin: EmmaBurrows

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@towers



Towers & Hamlin



@towers_law