

EVERSHEDS
SUTHERLAND

White Paper Conference on Discrimination for HR

Managing absence due to mental health

7 October 2020

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The Question

If you're facing short-term and sporadic absences because of mental health, how do you balance the competing considerations of support to the individual with business needs and HR objectives?

(Or at what stage can you dismiss an employee with persistent short-term absences due to mental health issues?)



Key Principles

Dismissing for sickness absence

Claims an employee may bring

- Disability discrimination
- Unfair dismissal
- Breach of contract
- Personal injury

Disability Discrimination

Types of disability discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Duty to make reasonable adjustments
- Harassment
- Victimisation

Is the employee disabled?

Definition of disability

Section 6(1) of the Equality Act 2010

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

Is the employee disabled?

Four key questions

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

Is the employee disabled?

Importance of medical evidence

- In *Morgan v Staffordshire University [2002] IRLR 190*, the EAT held that medical certificates issued by doctors which stated little more than that the employee was suffering from "depression" were not sufficient to establish disability
- In *Royal Bank of Scotland plc v Morris UKEAT/0436/10* the EAT emphasised importance of medical evidence in cases of depression or similar impairments
- In *J v DLA Piper UK LLP UKEAT/0263/09*, the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those that derived from a "medicalization of work problems" or "adverse life events"

Is the employee disabled

Can work-related stress be a disability?

Herry v Dudley Metropolitan Council UKEAT/0100/16

EAT held:

- Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, are not of themselves mental impairments: they may simply reflect a person's character or personality
- A doctor may be more likely to refer to the presentation of such an entrenched position as "stress" than as anxiety or depression
- Medical evidence supporting a diagnosis of a mental impairment must be considered with great care

Managing sickness absence due to mental health issues

Three key elements:

- consultation with the employee
- obtaining medical evidence
- consideration of other options

Consulting the employee

Consider:

- is there an underlying health condition?
- what is the effect of the absences on colleagues, the employee's department and the wider business?
- what is the likelihood of absences continuing and what impact are they likely to have?
- would changes to the employee's job/redeployment assist?
- could any other reasonable adjustments be made?
- is it appropriate to give the employee a formal warning that their attendance levels need to improve?

Consultation

Proper consultation with the employee should include:

- discussions at the start of absence and periodically thereafter
- informing the employee if the stage when dismissal may be considered is approaching
- personal contact with the employee
- consideration of the medical evidence with the employee
- consideration of the employee's opinion on his or her condition
- consideration of what can be done to get the employee back to work on a regular/sustained basis
- consideration of offering alternative employment
- consideration of an employee's entitlement to enhanced ill-health benefits

Recent Cases

Plowright v Sky-in-Home Services (2018)

Facts

- P working up ladder without safety equipment
- P explained that he was distracted by divorce and by the fact that his partner and daughter were moving out of the family home that day
- P diagnosed with reactive depression and anxiety and declared unfit for work
- P was dismissed and claimed unfair dismissal and disability discrimination

Plowright v Sky-in-Home Services (2018)

Judgment

- Employment Tribunal upheld P's claim
- Employer aware of mental health condition but had failed to take it into account when reaching decision
- Unblemished career for 11 years
- P found to be disabled because he was unable to carry out normal working activities and the condition was likely to recur beyond 12 months

A Ltd v Z (2018)

Facts

- Z worked part-time for A Ltd
- Z did not disclose her mental health issues to A Ltd
- Z had very poor attendance record during 14 months' employment
- Z eventually dismissed for poor attendance and timekeeping
- Z brought claim for discrimination arising from disability

A Ltd v Z (2018)

Judgment

- Employment Tribunal upheld Z's claim
- Overturned by EAT which dismissed the claim
- EAT held A Ltd could not reasonably have known of Z's disability
- EAT held that, when assessing whether employer had "constructive knowledge" of disability, employer must be able to show that it was unreasonable for them to be expected to know about it

Sinclair v Governors of Bishop of Llandaff Church in Wales High School (2015)

Facts

- S had bipolar disorder and was off for several months
- When she returned to work, she received complaints from several pupils
- She was told she would be formally observed while teaching
- She was then told that she could either accept a settlement or go through capability proceedings which only one in ten teachers pass
- S resigned and was then sectioned under MHA

Sinclair v Governors of Bishop of Llandaff Church in Wales High School (2015)

Judgment

- Employment Tribunal upheld S's claims for constructive dismissal and disability discrimination
- Tribunal found that had performance management been handled with assistance and sensitivity, S may well have been able to sustain a long career with performance at an adequate level
- S was awarded £346,175 in compensation

McLaughlin v Charles Hirst Limited (2016)

Facts

- M employed as customer service adviser working 47.8 hours per week
- M had suffered from mental health issues and had had several absences from work due to depression and panic attacks
- M applied to reduce her hours to 40 hours per week making specific reference to disability and impact it was having on her and her colleagues
- Request took 14 months to process

McLaughlin v Charles Hirst Limited (2016)

Judgment

- Tribunal upheld M's claim disability discrimination and awarded her £11,840
- Request had not been appropriately considered and that had exacerbated her health issues
- Request had been dealt with as an application for flexible working with an emphasis on the needs of the business
- Little or no focus on needs of M
- When the adjustments were put in place M found it easier to cope with little or no absences from work

O'Brien v Bolton St Catherine's Academy

Facts

- Teacher, HoD, off work with stress reaction after assault by pupil in March 2011
- Unsuccessfully tried to return in December 2011
- Information about her prognosis not forthcoming
- Dismissed in January 2013
- Appeal heard in April 2013. At the appeal she produced a “fit for work” note and other medical evidence
- Dismissal upheld on basis that medical evidence was inconsistent and ability to return still uncertain

O'Brien v Bolton St Catherine's Academy (2017)

Judgment

- ET held dismissal unfair and discriminatory. School had adduced no evidence about adverse impact of her continuing absence and should have waited “a little longer”. EAT overturned ET’s decision
- CA held:
 - proposition that it was unfair to dismiss senior employee absent for 12 months required very careful scrutiny
 - easy for employee to argue for more time but employer entitled to finality
 - case was “borderline” because of length of absence and unsatisfactory medical evidence
 - BUT no error of law by ET and by time of appeal there was evidence that she was fit to return

Key points

Key points

- Essential question: can employer be expected to wait any longer for attendance to improve?
- Range of reasonable responses/proportionality test
- Consult the employee regularly and in person
- Warn the employee when dismissal is being contemplated
- Obtain medical evidence on nature of condition/prognosis
- Do not ignore medical evidence provided by employee
- Provide evidence of impact employee's absence has on employer's business

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