

White Paper conference

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How do you amend trigger points and progress warnings for frequent short-term absences due to an underlying mental health condition?

1 Introduction [SLIDE 1]

- Mental health disorders are one of the main causes of sickness absence.
- At least 1 in 6 workers experience mental health issues such as anxiety and depression (and 1 in 4 people during their lives).
- Poor mental health costs employers up to £56 billion a year, a 25% increase since 2019.
- It's not uncommon for mental ill health to be caused by underlying work issues, such as unmanageable workloads or demands, poorly defined job roles, organisational change or poor relationships with colleagues.
- Common mental health issues can include depression and anxiety, whilst less common ones include conditions such as bipolar disorder and schizophrenia.
- These could manifest in frequent short-term absences which may then become an issue for the business, and it's important that instances are managed **sensitively** and **fairly**. Mental health should also be treated equally as important as physical health.
- There is a **duty** on employers to provide a safe place of work and prevent a reasonably foreseeable risk of physical or mental injury to the employee.

2 Initial short-term absences [SLIDE 2]

- Most absence issues can be managed without the need for escalating matters before formal meetings and formal warnings become necessary.
- An employer's approach to absence and sickness is usually dictated by a **combination of contractual terms and workplace rules and policies**, so the **starting point** when dealing with sickness is to check these to make sure the correct procedure is followed.
- Initially, employers might hold informal **return-to-work interviews** to investigate the reasons for the absence. Where an employee is regularly taking periods of short-term absence, interviews can be an opportunity for management to raise any concerns with them and to explore whether there are any underlying reasons for the employee's absence that they should be aware of or which may require consideration of adjustments to their job or working environment.
- Employers should carefully consider **who is going to attend** the meeting – it is meant to be informal and taking a heavy-handed approach with various managers/ HR representatives in attendance risks looking like it is a formal process and could overwhelm the individual. Employers should also consider **where** they meet (i.e. it could be as simple as an informal chat over coffee).

- **Maintaining regular contact** is vital, and dealing with mental health issues may require a greater degree of sensitivity from managers. Some managers might need **additional training** on this to guide them in how to have these types of conversations.
- There might also be **assistance programmes** that employees can be signposted to for additional support with their mental health.

3 **Formal management of absence [SLIDE 3]**

- However, an employer should deal with matters formally when the absence levels present an **unacceptable level of disruption to the business**, even if that is caused by a mental health condition.
- The difficulty with short-term absences is that sometimes it can be easy to overlook the fact that there is a pattern emerging, so the employer may be slow to realise that the matter needs to be dealt with formally.
- Some employers have absence management policies with a so-called '**trigger point**'. This usually means that once an employee exceeds a certain number of absences over a particular period, formal action under the policy, such as a warning, will follow.
- Even when an employer does not have a policy in place, it should still hold **formal meetings** with the employee when it starts to become an issue.
- In a **first formal meeting** to discuss short-term absence, an employer should explore:
 - The **reason** for absence and whether it is genuine. This might involve referring the employee to **occupational health**.
 - The **effect** of the pattern of absences on the employee's colleagues, department and the employer's business.
 - The **standards of performance** expected of them.
 - The **likelihood of continuing absences** and when the employee is likely to show **improved attendance** patterns.
 - Whether there are **changes to the employee's job or redeployment opportunities** that would assist in attendance, or reduce the effect on colleagues or the employer's business. This is likely to be helpful where the mental health condition stems from a problem with a colleague or workload, like stress.
 - Whether it is appropriate to give the employee a **formal warning** that their attendance levels need to improve.
 - Whether the employee has a **disability** and, if so, whether there are **any reasonable adjustments** that could be made.
- It is important that the individual is given the chance to make representations in response.

Mental health as a disability [SLIDE 4]

- Employers must be alive to the possibility that mental health conditions could entitle the employee to **extra protection under disability legislation**, so they must **exercise caution** when handling sickness absence.

- Under the Equality Act 2010, disability is defined as ‘a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities’. Mental health conditions like depression are capable of meeting this definition.
- Employers are under a positive obligation to make **reasonable adjustments** if they know (or ought to know) that an employee has a disability. The difficulty with mental health is that it is not always visible so employers will need to **look out for symptoms or changes in behaviour** that might indicate that someone is suffering with their mental health. Of course, not everyone who experiences mental ill health will exhibit obvious signs. So, it is important for a manager to regularly ask team members how they are doing and create an environment where staff feel able to be open and honest about how they are feeling.

Reasonable adjustments

- Some employees with disabilities including mental health conditions are in practice more likely to have frequent or extended absences than other employees without those disabilities. This means that without modifying the sickness policy in some way, those employees are more likely to be subject to the absence management procedure, formal warnings etc. This creates a **risk of discriminating against disabled employees**.
- The **duty to make reasonable adjustments** should therefore be exercised in relation to the trigger points. So for example, if the employer has a policy of always instituting a procedure and issuing warnings when sickness absence crosses a particular threshold, it should **consider increasing that threshold for a disabled employee**. Meetings could take place at the **employee’s home or other convenient location**, the employee might require **more notice of meetings** than provided for by the employer’s policy or **more time to read material and prepare** for meetings.
- The key is that employers avoid applying a procedure blindly or inflexibly.
- In borderline cases, many employers simply proceed on the basis of **an assumption that the employee is disabled** by virtue of their mental health.
- The focus should always be on **encouraging and supporting the employee to return to work** and on making relevant adjustments, not imposing punishment. It might be that there are adjustments that can be made to their duties, workplace or working conditions that would facilitate their taking less time off.
- However, it doesn’t mean that employers cannot issue warnings and ultimately dismiss someone for ill-health even if they are disabled. Tribunals recognise that there comes a time when employers need to take definitive action to deal with a situation which could otherwise simply drift. Providing an employer is **reasonably flexible** it will not be expected to hold off from taking decisions indefinitely.
- They will need to make sure they follow a **fair process** throughout, including gathering medical evidence and considering alternatives. It is also important to show **sympathy, understanding and compassion**.

Medical evidence [SLIDE 5]

- When investigating short-term intermittent absence for mental illness, it is often a good idea to obtain **medical advice** to be able to understand the underlying medical position. The

onus is on the employer to take reasonable steps to ascertain the medical position, rather than on the employee to volunteer medical information.

- Many employers have **express wording in their contracts** that an employee agrees to attend a medical examination with a doctor nominated by the company. This can be beneficial in that a refusal to do so by the employee could constitute a **breach of contract**.
- Requests for a medical report should **focus on what the employee can do** in their role, the viability of redeploying them to other available positions or making reasonable adjustments to enable them to perform their existing role (rather than being requests for information about an employee's medical condition more generally).
- There are specific rules in place about accessing medical reports and data protection considerations to be aware of but these are outside the scope of this talk.
- Once an employer has obtained a medical report, it should:
 - Write to the employee **inviting them to a meeting**, setting out the nature of the meeting
 - Meet with the employee to **discuss the report and consult** with the employee before taking any action based on its recommendations. An employee may wish to challenge the medical opinion in some way or obtain a counter-report.
- If it is difficult for the employee to attend their workplace, the employer should consider holding any meeting at the employee's home or at an alternative, neutral venue.
- The employee is **unlikely to have a statutory right to be accompanied** if it's purely a meeting to investigate/ consult with them about medical evidence – although employers should still check what their policy says on this.
- However, if it is likely (or becomes clear during the course of a meeting) that a formal warning or dismissal could result, the meeting should preferably be ended and a formal hearing arranged at which the worker will have the right to be accompanied.
- Unless there is a good evidence-based reason not to do so, employers should act in accordance with any recommendations from medical professionals. This might include whether the individual is fit to return to work or any arrangements for a phased return, or if they aren't fit to return, whether they are entitled to PHI/ ill-health retirement.
- The employer should consider whether there are any **reasonable adjustments** open to them to enable the individual's absence to improve if there is a risk that the individual might have a disability.

4 **Failure to improve [SLIDE 6]**

- Most staff who experience mental ill health will recover and return to being a valuable and productive member of the team. However on some occasions, even with adjustments in place, a team member's continued absence may warrant further action. So how should employers proceed?
- Employers should consider whether the employee could take up **alternative employment** (although it is not under a duty to create a job where none exists) or whether there are **any other options that would avoid the need for dismissal**.

- Dismissal should be a **last resort**. Before taking a decision to dismiss, employers should consider surrounding circumstances, the prognosis, the need for the employer to have someone doing the work, age and length of service of the employee together with action taken in respect of similar circumstances in the past.
- Usually a **second or further meeting** would be held with the individual where dismissal for ill-health is contemplated.
- The employer should **write to the employee** inviting them to a meeting. The letter should set out **details of the employee's absence** (including why it is **unacceptable** and the steps taken to deal with them to date), inform that they are **contemplating dismissal**, and **enclose copies of any relevant documentation** (including any sickness procedure, medical evidence and correspondence with the employee).
- The employee should also be informed of their **right to be accompanied** in the letter. This is a **statutory right** when formal action or dismissal might be the outcome.
- Employers need to satisfy themselves that the reason for dismissal is ill-health and that they have adopted a **fair procedure**. In cases of short-term intermittent absence, **fairness** will mean ensuring that the employee is aware of:
 - The **standards of performance** expected of them.
 - The **impact** their absence is having on the employer's business and their colleagues.
 - The **likely consequences of formal action or dismissal** in the event of their continued absence.
- These should all have been discussed with the employee before reaching the stage of dismissal.
- There will need to be a **potentially fair reason for dismissal**. Short-term intermittent absences could give rise to a **SOSR** dismissal if they have a significant detrimental impact on the employer's business and the employee's performance. An employee might also want to rely on **capability** because of ill-health as a potentially fair reason.
- The reason should be discussed with the employee at the meeting and then confirmed in writing afterwards.
- Employers should offer the **right of appeal**. The employee should also be given the **right to be accompanied to the appeal meeting** and the employer must notify them of their final decision following the meeting.
- Where reasonably practicable, the appeal should be dealt with by a more senior manager than the person who conducted the first meeting.

5 Concluding thoughts

- It is important that employers know how to support mental health at work and take it seriously. The majority of the time employers will be able to work through it with their staff by making changes to their working arrangements or by getting them the right support.
- However, there may be occasions when it is appropriate to take formal action including dismissal because of the impact of the absence on the business.

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- The priority for employers will be to follow a fair and reasonable process including gathering medical evidence and considering alternatives to reduce the risk of legal action.
- Employers should ensure they keep a **paper trail** of all communications and discussions with the employee.

6 Questions [SLIDE 7]