

What should you do if you suspect an employee is taking fraudulent sick leave, i.e. pulling a sickie?

- When should you take disciplinary action?
- Can you rely on a Facebook screen-shot of an employee actively partying or playing sport as evidence of misconduct and grounds for dismissal?

Phil Allen

Partner, Weightmans LLP

0161 214 0504

Phil.allen@weightmans.com

The case of the bus driver pulling a sickie

- Bus driver slipped at work – injured & not fit to drive
- Sickness review meetings held, and surveillance used
- Was marked contrast between level of disability he reported & level of activity in the surveillance footage
- Employee dismissed for: falsely claiming sick pay; misrepresenting ability to attend work (exaggerating injury); false claim of injury at work

Metroline West Limited – v– Ajaj

Focusing on honesty, is the best policy

“An employee “pulls a sickie” is representing that he is unable to attend work by reason of sickness. If that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of the trust and confidence that is at the heart of the employer/employee relationship”

EAT in Metroline West Limited -v- Ajaj

The test for a fair dismissal

Always remember the test

- Do you believe the employee is guilty of misconduct?
(here possibly fraud, or misrepresenting injury, or exaggerating the extent of the injury – but don't overstate the allegation)
- Do you have genuine reasons for that belief?
- Have you carried out as much investigation as is reasonable in the circumstances?
- Is your decision within the band of reasonable responses of a reasonable employer?

BHS –v– Burchell

Is it genuinely dishonesty?

- In *Ajaj* the dishonesty dismissal didn't require a focus on the role – but on the exaggeration/misrepresentation of the injury/illness
- However usually the decision will focus on whether the employee can do the job for which they are employed and whether they have misled you about that
- Remember an employee with depression/stress may well be able to do many things except work (and sometimes except work for you)

Without dishonesty, dismissal is high risk

- Job 1 – community midwife who conducted home visits (by bike and incl. to flats with broken lifts)
- Job 2 – also had job (in other hours of the week) as family planning nurse in a clinic
- When off sick from job one with sick pay, was still doing job 2 (& didn't tell employer in job 1)
- Dismissal from job 1 based upon allegations of fraud/deception were outside range of reasonable responses and unfair (as she was not dishonest)

Perry -v- Imperial College Healthcare NHS Trust

ICO employment practices code on covert monitoring

- It is rare that covert monitoring is justified and must only be used in exceptional circumstances
- It does require a data protection impact assessment
- It should only be used when there are grounds for suspecting criminal activity or equivalent malpractice
- You should (contractually) require the private investigator to collect information in a way which complies with the data protection act (so use a reputable organisation)

The problem with surveillance

- Do you have reasonable grounds for arranging the surveillance?
- Will the GDPR make it harder?
- Are human rights engaged and infringed? – although it is possible to undertake surveillance in public places without infringing rights and/or rendering the dismissal unfair (*City and County of Swansea v Gayle*, *McGowan v Scottish Water*)
- But what if you're wrong and/or the surveillance is seen?

What to do with the Facebook screen-shot

- What does the post actually prove?
- Is what it shows actually contrary to the reason for absence or the account of injury/illness given?
- Can you identify other corroborative or supporting evidence?
- What is the employee's account?
- Remember the test is balance of probabilities, but you must have grounds for reaching the view and dismissal must be within the range of reasonable responses

And always remember the ICO and data protection

What can you do to tighten up procedures?

- Hold meetings with absent employees and talk in some detail about why they are absent and the extent of injury/illness
- Occupational health advice is often preferable
- Record and confirm what was said – in notes, letters and emails
- Have clear policies and procedures (especially about other jobs and about informing you about them)
- Think carefully about: investigations; wording of allegations; and what can be proved
- Keep absence management (capability) decisions separate from misconduct (although they inevitably interrelate)



Contact Details

Phil Allen

Partner

0161 214 0504

Phil.allen@weightmans.com

Follow the Weightmans Employment Team on Social Media:



@Weightmans_Empl



Weightmans Employment