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?

Thursday 5 November 2026

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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

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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

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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

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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

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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



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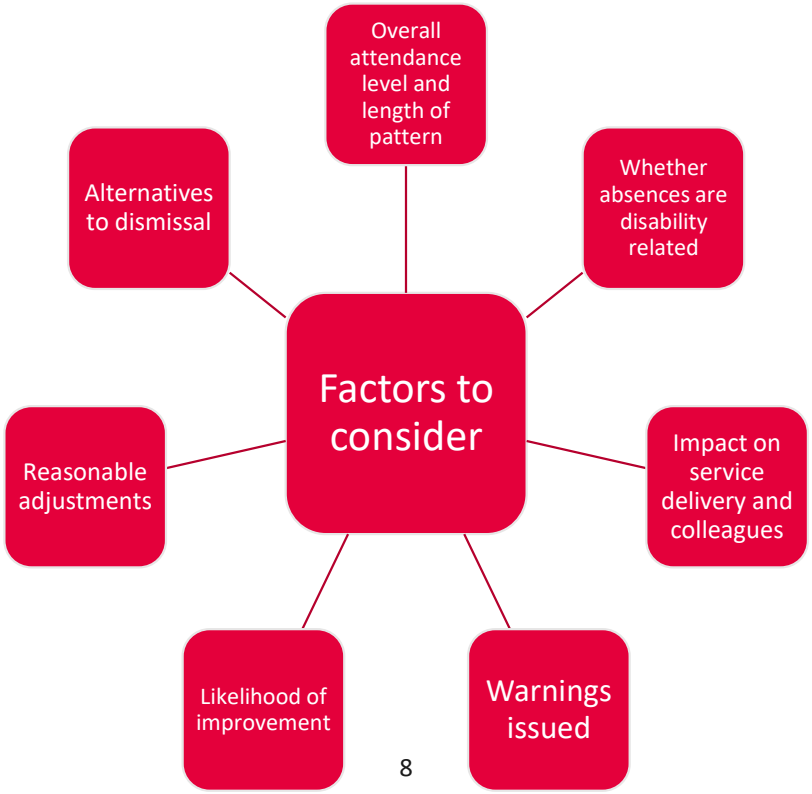
Dismissal



- 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.

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Frequent intermittent absences – when does it become enough?



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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!

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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

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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?

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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?”

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Questions?

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