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White Paper Conferences Ltd

Disability dismissals

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Questions

- How do you dismiss a disabled employee fairly and without discriminating against him or her?
 - What factors typically impact upon the reasonableness of a decision to dismiss for a disability-related reason?
 - Do the relevant considerations differ as between mental (e.g. severe depression) and physical (e.g. cancer) disabilities?
 - What if the medical opinion in a particular case is uncertain or contradictory?
 - What if the impact of the disability fluctuates?
 - What if the employee requires a lengthy absence or operation?

Key principles in disability cases

- Decisions about how best to handle disabled employees, including whether & when to dismiss them, ultimately rest with management
- However, management must make (and be able to evidence) well-informed decisions involving a fair and reasonable process...
 - ‘Band of reasonable responses’ approach
 - Potential contributors → HR, OHA, Disability expert, H&S assessor

Disability & the reason for dismissal

- Is the reason for the dismissal in fact disability-related?
- If so, how and to what extent does the disability impact upon a potential dismissal by reason of...
 - Conduct?
 - Poor performance?
 - Short or long-term sickness absence?
 - Health & safety?
 - SOSR?
- Arguably the most common dismissal scenario relates to disability-related sickness absence...

Disability dismissals – legal considerations

- Fair dismissal principles, notably adopting a fair procedure throughout...
- Disability discrimination:
 - Discrimination arising from disability) ...both include the concept of
 - Indirect disability discrimination) justification...which in turn depends upon the employer fulfilling...
 - The Duty to make reasonable adjustments → cornerstone of disability law
- n.b. potential impact of **Age discrimination** / **Health & safety legislation** / **Personal injury legislation**

Disability dismissals – legal considerations

The duty to make reasonable adjustments – comprises three elements...

- Where a provision, criterion or practice applied by or on behalf of the employer; or
- Where a physical feature of the employer's premises; or
- Where the non-provision of an auxiliary aid or service...

puts a disabled person at a substantial disadvantage in comparison with non-disabled people, the employer must make reasonable adjustments to prevent that disadvantage

- Crucial factor in handling sick absence management

Disability dismissals – legal considerations

- Factors when considering what is ‘reasonable’:
 - the effectiveness of an adjustment – may need expert guidance
 - the practicability of an adjustment (& remember Health & Safety)
 - the cost of an adjustment (the employer must bear all the cost)
 - the employer’s financial or other resources
 - the availability of financial or other assistance
 - the type and size of employer

- The ultimate decision re reasonableness rests with the Employment Tribunal

Disability dismissals – legal considerations

Reasonable adjustments may include...

- Re-allocating duties
- Transferring the disabled person to an existing vacancy (n.b. evolving case law)
- Altering working hours
- Assigning to a different place of work or training, or arranging homeworking
- Time off for rehabilitation, assessment or treatment
- Arranging training / mentoring for the disabled person & others
- Acquiring or modifying equipment, instructions, etc.
- Permitting flexible working

Disability dismissals – recent case law

Discrimination arising from disability:

- Hall v Chief Constable of West Yorkshire Police [2015] EAT
- Risby v LB Waltham Forest [2016] EAT
 - Need only be a "loose" causal link between the disability and any unfavourable treatment
 - Employers have an opportunity to defend a claim by showing that either the unfavourable treatment was justified or else that they did not know / could not reasonably have known that the employee was disabled

Disability dismissals – recent case law

Reasonable adjustments and absence management:

- Griffiths v Secretary of State for Work and Pensions [2015] CA
 - PCP = the requirement to maintain a certain level of attendance at work, rather than the attendance policy – this requirement would substantially disadvantage disabled employees with disability-related sick absences
 - The reasonable adjustments duty was engaged, even though the absence management policy was applied equally to everyone – duty is activated once there is evidence that a PCP places a disabled person at a substantial disadvantage because of their disability

Disability dismissals – practical Issues

- Maintain accurate records & a robust paper trail
- Adopt a partnership approach with the employee (and Rep.)
- Address any management concerns proactively and early...
 - Will informal action avoid the need for a more formal approach?
 - If required, implement formal procedures properly and promptly (e.g. return to work interviews)
 - Be sure to explain the commercial impact of any disability-related concerns from the outset

Disability dismissals – practical Issues

- Seek medical and other relevant expert input proactively and early...
 - OH referrals
 - Joined up medical advice
 - Does the medical report make sense or do you require clarification / need to await outstanding test results or treatment, etc?
 - Is the diagnosis and prognosis certain?
 - Conflicting medical reports

Disability dismissals – practical Issues

- In cases of longer -term sickness absence, be sure to maintain regular contact with the absent employee – key aspect of ‘acting reasonably’ should an employee ultimately be dismissed
- Review considerations re rehabilitation, reasonable adjustments and suitable alternative employment on an ongoing basis...
 - knowing what vacancies exist within the Business (e.g. at other sites)
 - persuading another manager to take on ‘lame duck’
 - maintaining adequate paper trail to evidence when no alternative duties exist

Disability dismissals – practical Issues

Short-term sickness absence – consideration of dismissal considerations:

- nature of illness(es) and likelihood of recurrence
- no. & length of absences / periods of interim good health
- no. of warnings previously given
- impact of absences on the Business / colleagues
- consistency of treatment re other employees with similar records
- employee's length of service and overall absence history
- mitigating circumstances
- whether in all the circumstances it would be reasonable to give the employee another chance

(Employee should have a right of appeal)

Disability dismissals – practical Issues

Long-term sickness absence – consideration of dismissal considerations:

- nature, length and effect of illness on business / colleagues
- prospects and timescale for recovery
- nature of employment and ability to cover absence
- employee's length of service
- How illness was caused
- Whether contractual sick pay has expired (& PHI position)
- Requirements of disability legislation
- Requirements of H&S legislation

(Employee should have a right of appeal)

Q & A

- Any questions?