WHITE PAPER CONFERENCE

Short-term absences

Trigger points and progress warnings for frequent short-term sickness absences due to an underlying mental health condition

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Discrimination: Hints, Tips and Solution-Focused Answers for Employers
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When and how do you amend trigger points and progress warnings for frequent short-term absences due to an underlying mental health condition?

Introduction

Short-term sickness absences can be a significant issue for employers, and the statistics around them go some way to showing why that is. According to Acas, short-term sick leave (typically, absence under four weeks) accounts for 80% of UK workplace absences[1].

At any one time, one in six workers will be experiencing depression, anxiety or problems relating to stress. The average employee takes seven days off sick each year, of which 40 percent are due to mental health problems.[2]The Health and Safety Executive's 2018 annual statistics[3] further outlines that:

- 595,000 workers suffered from work-related stress, depression or anxiety in 2017/18;
- 15.4 million working days were lost due to work-related stress, depression or anxiety in 2017/18 (an average of 25.8 days lost per case);
- In 2017/18, stress, depression or anxiety accounted for 44% of all work-related ill health cases and 57% of all working days lost due to ill health.
- Professional occupations that are common across public service industries (such as healthcare workers, teaching professionals and public service professionals) show higher than average levels of stress compared to all jobs.

Clearly, frequent short-term sickness absences can pose a problem for employers and it is not uncommon for such absences to be caused by mental health issues. Indeed, the CIPD's Health and Wellbeing at Work Survey 2019 reported that mental ill health and stress are both within the top five causes for short-term absence reported by employers. Although this has been the case for several years, mental ill health is now cited by 35% of employers as a top five reason for short-term absence, compared to only 17% in 2016. It is understandable (and, indeed, advisable) for employers to take steps to do something about frequent absences once a pattern has emerged.

Disability, particularly when it relates to mental health, is notoriously complex. The relationship between disability and capacity to carry out workplace duties, and its relationship to health and safety, has led to some complicated cases. To be answerable for alleged disability discrimination an employer has to know, or be in a position where they should have known, that the employee is disabled.

Keeping records and spotting patterns

[1] Acas – "Managing attendance and employee turnover", page 4
[2] The Sainsbury Centre for Mental Health
[3] www.hse.gov.uk/statistics/

Once an employer notices that an employee's attendance has been erratic, or that sickness absences have been happening often, an important preliminary step is to analyse the figures to understand how frequent the absences are. All employers should be keeping clear and complete absence records as a matter of course.

Analysing the absence data will not simply allow an employer to identify how many days' sickness absence an employee has taken, but will also reveal whether there are any trends to the reasons given (e.g. is it a number of disparate reasons, or do the same reasons crop up repeatedly?) or any patterns to when the sickness absence happens (i.e. whether the employee tends to take sick days on Mondays).

Having all of the facts as to the patterns of sickness absence will allow an employer to investigate those absences more intelligently.

Recording sickness absence data diligently can allow the use of particular absence management tools such as the 'trigger point' approach (i.e. an absence review procedure triggered after an employee's absence levels exceed a particular threshold). Likewise, other procedures can help to ensure that complete data is obtained in relation to every period of sickness absence, such as compulsory use of self-certification forms or holding return-to-work interviews even after short periods of absence.

Is it a disability?

Once a pattern of short-term sickness absences has been identified, and provided that the individual falls within the extended definition of employment under the Equality Act 2010 (encompassing employees, workers and some self-employed persons), the first question which should be in a manager's mind is whether that pattern is caused by a disability. If the employee is disabled, then the courses of action open to the employer are limited by discrimination law pursuant to the Equality Act 2010. Naturally, penalising or dismissing someone *because* they are suffering from a mental health condition amounting to a disability would certainly amount to direct disability discrimination, and is unlawful.

However, the focus of this paper is on what an employer is expected to do to understand whether:

(a) frequent short-term sickness absences are caused by a disability; and

(b) what steps it is expected to take and what latitude it has to manage the situation if that proves to be the case.

The process of identifying disability and especially mental health conditions will be tackled by taking an in-depth look at various cases.

The employer's obligations and freedoms in the event the employee is disabled will be considered principally through the lens of the duty to make reasonable adjustments and not to discriminate against individuals for a reason related to disability without justification.

Defining and investigating disability

The definition of disability can be found in section 6 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"

For the purposes of this definition:

- "*normal day-to-day activities*" can include work-related activities[4];
- "*substantial*" means "*more than minor or trivial*"[5], which case law has confirmed amounts to a fairly low hurdle to surmount[6]; and
- "*long-term*" means that the impairment: (a) has lasted for at least 12 months already; (b) is likely to last for a period of at least 12 months; or (c) is likely to last for the rest of the person's life[7].

Mental ill-health may or may not satisfy the definition of disability depending on the features of the illness. "Stress" in and of itself is not a disability, but there are many different mental health conditions which result in stress, which could potentially meet the definition, including but not limited to one or a combination of the following:

- anxiety;
- clinical depression;
- bipolar disorder;
- obsessive compulsive disorder;
- schizophrenia; and
- dementia.

The law expects an employer to undertake a reasonable investigation to uncover whether or not any of the employee's impairments amount to a disability. It is advisable to conduct such an investigation because:

- if disability is established, an investigation will enable the employer: (a) to make reasonable adjustments appropriate to the disabled employee's needs; and (b) to recognise the limitations on its freedoms to manage the situation as it would otherwise prefer; or
- if the employee is not disabled, conducting a reasonable investigation will bolster the employer's case that a subsequent dismissal is fair in all the circumstances and the employer will have the comfort of knowing it can act without reference to the Equality Act and therefore relative freedom and reduced risk.

The case of ***Donelien v Liberata UK Ltd*** [8] confirmed that an employer is not expected to do everything in its power to establish whether an employee is disabled – all that is required is a reasonable enquiry.

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[4] See for example *Law Hospital Trust v Rush* [2001] IRLR 611; *Cruickshank v VAW Motorcast* [2002] IRLR 24; *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706; *HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab and another C-335/11*

[5] section 212 Equality Act 2010

[6] See for example *Vicary v BT* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19

[7] Paragraph 2(1), Schedule 1, Equality Act 2010

[8] [2018] EWCA Civ 129

What amounts to a reasonable investigation will depend on the circumstances and may also change over time. Consequently, this can be dangerous territory for employers since there are no hard and fast rules that can be applied in every case.

This was made clear in the recent case of ***Lamb v The Garrard Academy***[9]. Here, an employer was fixed with constructive knowledge of an employee's disability after she had been off sick for four months on the grounds of reactive depression. The employee's depression had been triggered by bullying and other issues at work which were the subject of an ongoing grievance investigation. The EAT decided that the employer could not be criticised for failing to investigate the employee's health at the very outset of the sickness absence. At that stage it was fair to expect the employee to recover and return to work once the ongoing grievance process had been completed. However, four months later, things had changed: the employee remained off sick and the grievance process had stalled. The EAT held that a reasonable employer would have sought occupational health advice at that point (and would almost certainly have been advised that the employee was disabled). The result was that the employer was fixed with constructive knowledge of the disability and was found to have failed to make reasonable adjustments.

This means it is difficult to predict with certainty what amounts to a reasonable investigation. Employers can help themselves by devising a timetable of typical steps to take at certain points (such as consulting with the employee, obtaining medical records and seeking occupational health advice). However, it should always be remembered that this timetable may need to be adjusted in some cases.

Some of the factors in the reasonableness of an investigation in this context are likely to be common to investigations in a grievance or disciplinary context; an example is the size, resources and sophistication of the employer. A large multinational with a dedicated HR department is likely to be held to a higher standard than a small company. The extent to which an employee is willing to comply with the investigation is also potentially relevant to how much is expected from the employer[10]. In the recent case of ***A Ltd v Z***[11] the EAT held that an employer should not be fixed with knowledge of an employee's disability in circumstances where she had suppressed information about her mental ill health and would not have submitted to a medical examination that might have uncovered this.

Consultation

Consultation with employees is amongst the most crucial aspects of an investigation into their ill health and can be arranged by employers of all sizes and means.

Where an employee has been absent from work sporadically this may prompt the employer to begin consultation with the employee. If the cause of the absence relates to mental illness, however, there are likely to be other signs which an employer would be remiss to ignore. For example, the EHRC Code gives the following examples of "red flags" that an employee is suffering with depression:

- sudden deterioration in time-keeping and performance, particularly where accompanied with a change in demeanour[12]; and

[9] UKEAT/0042/18RN

[10] See *Donelien v Liberata (ibid)* as an example.

[11] UKEAT/0273/18

[12] Paragraph 5.15 EHRC Code

- crying at work and having difficulty dealing with customer enquiries[13].

Both Acas and Mind strongly recommend that line managers have a conversation with any members of staff they suspect are experiencing mental ill health.

Acas[14] suggests that a confidential meeting should be arranged as soon as possible in order for the line manager to do the following:

- allow the employee as much time as they need to talk things through;
- attempt to identify what the cause of concern is;
- think about potential solutions; and
- monitor the situation as it progresses.

Mind[15] has also reported that 1 in 6 workers is dealing with a mental health problem and this can stop people performing at their best. Organisations perform better when their staff are healthy, motivated and focused. Mind recognises that managers will sometimes need to make the first move in initiating a dialogue about an employee's mental health and it recommends raising any concerns around performance or frequent absence at an early stage. Mind states that managers should avoid directly asking the employee if he/she is ill, and instead focus on open, non-judgemental questions which allow the employee to disclose whatever he/she feels comfortable with disclosing.

If the employee does feel comfortable enough to discuss his/her condition, he/she may be able to give the employer more detail about the symptoms and how they correspond with their pattern of short-term sickness absences. He/she may also be able to suggest measures which could help to improve the situation and reduce the amount of absence. Regardless of the employee's approach, the employer will be obliged to undertake some further enquiries, normally involving medical evidence.

The support people receive from employers is key in determining how well and how quickly they are able to get back to peak performance. Having clear policies and approaches for managing mental health assists organisations to ensure consistency in developing and delivering a clear positive culture and approach on mental health.

The courts have consistently stated that there should be no distinction drawn between physical and psychological injury[16]. Therefore, employers should create a culture where employees feel able to discuss difficulties that might cause mental health problems with their managers in the knowledge that they will receive a sympathetic hearing and a tolerant and flexible response within the limits of what the organisation can provide.

Referral to Occupational Health

Often, an employer will need to obtain medical evidence in order to help it to understand the nature and impact of the employee's impairment(s).

[13] Paragraph 6.19 EHRC Code
[14] Acas: "Managing staff experiencing mental ill health"
[15] Mind: "Supporting staff with mental health problems"
[16] Hartman v South Essex Mental Health and Community Care NHS [2005] EWCA Civ 6

Having consulted with the employee, it may be that he/she is willing and able to provide medical evidence from a GP and/or a specialist as to his/her diagnosis and prognosis. Evidence from the employee's treating medical practitioners is likely to be useful to the employer's assessment of the situation, as those practitioners will have had ongoing, repeated contact with the employee as opposed to a one-off consultation.

That said, most employers will still want to refer the employee to occupational health (OH) to understand how the employee's mental condition impacts on his/her ability to perform their contractual duties. OH will often be in a better position to make a practical assessment of the impact of the employee's condition relative to the workplace, and to suggest reasonable adjustments where it considers them to be necessary.

Although a referral to OH is advantageous, there are pitfalls for employers if they approach OH in the incorrect way.

The overriding principle an employer must bear in mind when dealing with medical evidence is clearly stated by the EAT in ***East Lindsey District Council v Daubney***[17] as follows:

> *"While employers cannot be expected to be, nor is it desirable they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by the employers in the light of the available medical advice. It is important therefore that when seeking advice employers should do so in terms suitably adjusted to the circumstances. Merely to be told… that an employee 'is unfit to carry out the duties of his post and should be retired on grounds of permanent ill health', is verging on the inadequate, because the employer may well need more detailed information before being able to make a rational and informed decision whether to dismiss."*[18]

Subsequent cases have shown that a similar principle applies in the post-Equality Act 2010 world in relation to an employer's determination as to whether or not an employee is disabled. The leading case on this is ***Gallop v Newport City Council***[19]. Although *Gallop* was decided on the basis of the Disability Discrimination Act 1995 (DDA), predecessor legislation to the Equality Act 2010, the EAT confirmed that its decision was also relevant to the disability discrimination provisions of the Equality Act 2010. Given the importance of the decision, it is worth explaining what happened in detail.

Facts of Gallop

Mr Gallop worked for Newport City Council from 1997 in various landscaping roles. In May 2004, Mr Gallop notified the Council that he was suffering from stress accompanied by a lack of sleep and loss of appetite, nausea, headaches, eye strain, tearfulness, comfort eating and an inability to concentrate and deal with simple tasks. The Council referred Mr Gallop to OH for an assessment. OH concluded that Mr Gallop had "*stress-related symptoms*" but that there was no sign of clinical depression. They, therefore, referred him for stress counselling.

[17] [1977] IRLR 181
[18] *ibid.* at paragraph 17
[19] [2013] EWCA Civ 1583

In August 2005, Mr Gallop went off sick and following an assessment in September, OH again reported that he had a "*stress-related illness*" but did not consider that he had a "*depressive illness*". OH recommended further counselling.

Mr Gallop returned to work in October 2005 having agreed a phased 'return to work' plan with OH and the Council. He eventually returned to his normal role in July 2006.

As of 15 August 2006, Mr Gallop was signed off sick again. On 21 August 2006, he lodged a grievance stating that he had been diagnosed by his GP as suffering with depression and that the Council had failed to take sufficient steps to protect his health and safety at work.

A letter from Dr Riley in OH on 11 September 2006 stated that Mr Gallop was steadily recovering but that he was not yet fit to return to work so his condition would be kept under review. A GP's certificate dated 20 September 2006 diagnosed Mr Gallop as suffering from *'reactive depression'*. The grievance hearing was held on 21 September 2006, at which the Council did not uphold Mr Gallop's complaints. By a further GP's certificate of 18 October 2006, Mr Gallop was signed off work for five more weeks on the basis of the same diagnosis.

On the following day (19 October 2006), the Council wrote to another OH doctor, Dr Crosbie, stating that the Council:

> *"…would like to know –*
>
> *(i) is there any improvement in his condition since you last saw him?*
> *(ii) is he able to carry out day to day activities?*
> *(iii) is he fit to attend an investigatory hearing and possibly a Disciplinary Hearing?*
> *(iv) Would you consider him to be disabled under the DDA? If so, are there any reasonable adjustments which should be made to his current range of duties?*
>
> *By way of background, I can confirm that [Mr Gallop] has had time off work previously on grounds of stress and that on the last occasion this was because a Disciplinary Investigation [was] underway at that time. As a result of this, an Action Plan was written which gave [him] a reduced workload. We were still working within this Action Plan when [he] went off again sick, recently as a result of his alleged stress."*

A further report from Dr Riley in OH arrived on 23 October 2006 and stated, among other things:

> *"I understand his GP is questioning a various number of diagnoses which may be accounting for some of his symptoms including symptoms of chest discomfort. I have taken the chance to request a report from his GP with regards to what this diagnosis might be but also to help engage in his longer term prognosis. …While he reports symptoms of stress I did not find him to be specifically depressed today although I will request that his GP comments with regard to this also."*

On 22 November 2006, a further GP's certificate was issued, again stating a diagnosis of 'reactive depression'. On 4 December 2006, Dr Riley issued another report on the basis of a further consultation with Mr Gallop and the review of a report from his GP. Dr Riley stated his hope that Mr Gallop could return to work in January 2007, and went on to add:

> *"I have taken the opportunity to refer him for counselling in order to assist with any ongoing stress and I would confirm that the provisions of [the DDA] do not apply in this case in my view."*

On 15 January 2007, OH reported that Mr Gallop had recovered well from his "stress-related illness" and could return to work on a phased basis from 24 January 2007. In the event, Mr Gallop did not return to work until 19 February 2007, and was signed off sick again from 11 April 2007.

Mr Gallop was once again referred to OH, who, on 30 April 2007, reported that his symptoms had "relapsed" and that he had depression of moderate severity as a reaction to events at work. Following a further consultation on 11 June 2007, OH stated that Mr Gallop's condition had not improved and that he was reporting symptoms of moderate to severe anxiety. Mr Gallop's GP wrote to OH on 4 July 2007 stating:

> *"It appears that his anxiety and depression has been as a result of stress experienced at his workplace. … I am unable to comment on whether he will be permanently incapable of returning to any work in the future, but… I doubt he will successfully return to work in his current job."*

On 25 July 2007, in response to the GP's letter of 4 July 2007, Dr Crosbie wrote to OH noting the GP's advice that Mr Gallop was being treated for anxiety and depression and that the GP doubted Mr Gallop could successfully return to his job. Dr Crosbie stated that, whilst Mr Gallop's condition had improved slightly, his own consultation with him confirmed that he continued to show symptoms of anxiety and depression. However, without further explanation, Dr Crosbie concluded that *"I do not feel that this gentleman is covered under [the DDA]."* In a follow-up report on 14 December 2007, Dr Crosbie stated that Mr Gallop was likely to remain unfit for the foreseeable future, but *"he is not covered under [the DDA]"*.

In January 2008, the Council wrote to Mr Gallop regarding OH's most recent report. Mr Gallop disputed aspects of the report and questioned OH's ability on the information they had to opine on his fitness to return to work. He exhibited a positive attitude regarding return to work and was certified fit to do so by his GP and OH towards the end of the month.

Mr Gallop went back to work on 25 February 2008 but was promptly suspended on the basis of allegations of bullying made by colleagues going back to 2005. Mr Gallop was dismissed on the basis of those allegations in May 2008.

Court of Appeal decision

Mr Gallop asserted that he was disabled within the DDA definition and brought various discrimination claims on that basis. In its defence, the Council stated that OH had only ever advised it that Mr Gallop was suffering from work-related stress and had at no stage diagnosed him as suffering from a mental impairment which had a substantial and long-term adverse effect on his ability to perform day-to-day activities.

The Employment Tribunal found that Mr Gallop *was* disabled from July 2006 until the termination of his employment in May 2008. However, it concluded that because the Council *"was in receipt of continuous unequivocal advice from its Medical Advisors, who were its external Occupational Health*

Advisors, that [Mr Gallop] was not disabled for the purposes of the [DDA]", it did not know and could not reasonably be expected to know that Mr Gallop was disabled. It further held that the Council *"unless it has good reason to consider otherwise, is entitled thereafter to rely on the advice that is being given by its Medical Advisors."* The EAT upheld the ET's judgment.

The Court of Appeal unanimously disagreed with the ET and EAT's conclusions on the value of the advice from OH. It held as follows:

> *"Their opinions amounted to no more than assertions of their view that the DDA did not apply to Mr Gallop, or that he was not 'covered' by it or words to that effect. No supporting reasoning was provided. As the opinions were those of doctors, not lawyers, one might expect them to have been focused on whether, from the medical perspective, the three elements of section 1 were or were not satisfied. Since, however, OH made no reference to such elements, neither Newport nor the ET could have any idea whether OH considered (i) that Mr Gallop had no relevant physical or mental impairment at all; or (ii) that he did, but its adverse effect on his ability to carry out normal day-to-day duties was neither substantial nor long-term, or (iii) that he did, but it had no effect on his ability to carry out such duties. OH's opinion was, with respect, worthless."*

The Court of Appeal went on to clarify that the ultimate decision-maker on disability status is the employer. Where an employer has received medical advice stating that the employee is disabled, then the Court of Appeal stated that the employer would ordinarily accept that opinion unless they had good reason to disagree. However, where OH has advised that the employee is *not* disabled (as in *Gallop*), the Court of Appeal held that the employer must view that advice with a critical eye – they are not permitted to *"simply rubber stamp the adviser's opinion"*.

The Court of Appeal added that:

> *"…this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether an employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability."*

Therefore, it is even clearer post-*Gallop* that whilst obtaining medical evidence is an important part of the investigation into an employee's potential disability, it is certainly not the only step expected of an employer, and the medical advice itself must be fit for purpose.

As the Court of Appeal advised, employers in all cases should ask OH clear, focused questions as to the nature and severity of the employee's condition, how it affects the employee's day-to-day life (including his/her employment duties), how long it is expected to last, and whether any adjustments would assist the employee.

In cases involving sporadic, short-term absences, an employer may need to ask some additional questions, such as whether the absences were all caused by the employee's condition, or (taking it back a step further if no condition is known yet) whether there is any condition which could explain the pattern of absences in the first place.

Once a referral is made to OH, it will usually be difficult for an employer to make a fair decision about how to deal with the frequent sickness absences of an employee suspected of suffering from mental ill health without OH's cogent answers to those questions.

In the recent case of ***Kelly v Royal Mail Group Ltd***[20]*,* which did not relate to a mental health condition, the EAT held that in the absence of other evidence, the employer's reliance on occupational health reports to determine whether their employee is disabled did not amount to a rubber-stamping exercise.

Mr Kelly worked as a postman and had a poor attendance record generally. He had triggered Royal Mail's attendance policy on several occasions due to repeated episodes of planned and unplanned absences. In 2017, he had two further periods of absence relating to surgery to treat carpal tunnel syndrome in his hands. These absences triggered the attendance policy again, with the second period of absence triggering the final stage of the policy. This entitled Royal Mail to review the whole of Mr Kelly's attendance record. The result was that they decided they had lost confidence in his ability to maintain a satisfactory attendance record and so they dismissed him.

Mr Kelly brought claims for discrimination arising from disability and unfair dismissal, both of which failed. He appealed to the EAT arguing that the Employment Tribunal had erred in finding that Royal Mail had properly considered the question of disability when, in fact, it had simply relied on the OH reports. He also submitted that it was perverse to conclude that it was fair to dismiss him for two periods of absence for corrective surgery and for his employers to rely upon earlier absences.

The EAT held that the original decision as to the fairness of the dismissal was not perverse. The attendance policy expressly permitted earlier absences to be taken into account. Conduct that is in line with the policy was deemed unlikely to be unfair. The periods of absence for corrective surgery were, in each case, extended by other factors and it was not outside the band of reasonable responses to take these absences into account. It was held that the policy applied to all absences, irrespective of fault or blame, and Royal Mail was entitled to look at the overall pattern of absence in determining whether there was a likelihood of satisfactory attendance in the future. In terms of disability, the OH reports considered the question of disability in detail (i.e. they were more than a bare assertion). In the absence of any other evidence (including evidence from Mr Kelly and his representative), reliance on them would not be considered a rubber-stamping exercise (an option not open to the employer in *Gallop*).

An employer faced with a pattern of frequent short-term absences should commit to consulting the employee, obtaining relevant medical evidence, looking at all of the available evidence critically, and keeping an open mind. If, having done so, it reaches the conclusion that its employee is not disabled within the statutory definition, then it ought to have done all that is expected of it to avoid having constructive knowledge of any disability later found to have existed.

Further instances where mental health conditions (depression and paranoid schizophrenia) found to be a disability

[20] UKEAT/0262/18

Employment Tribunals and the EAT have had no difficulty in holding that depression is potentially capable of constituting a disability. In ***Harris v Royal Mencap Society***[21], Mr Harris was signed off work in February 2008 on the grounds of anxiety and depression. He began taking anti-depressants. He came back to work between March and October 2008. He was then signed off sick again and never returned. At a preliminary hearing, the Employment Tribunal found that he was disabled for the purposes of the DDA. By July 2008, he had been taking antidepressants for four months and the Tribunal was satisfied that, but for the medication, his depression would have had a substantial adverse effect on his concentration – a day to day activity. Moreover, there was a significant risk that the impairment would last 12 months.

In ***Burdett v Aviva Employment Services Ltd***[22], Mr Burdett suffered from a paranoid schizophrenic illness and was dismissed for sexually assaulting female colleagues and members of the public. This occurred after he stopped his medication without medical approval. On appeal, the EAT disagreed with the Tribunal's reasons for rejecting the discrimination claim and held that the Employment Tribunal had failed to set out detailed reasons for its decision and had failed to consider whether Mr Burdett's mental illness meant that he was not culpable for the conduct in question. It was also not clear that the Tribunal had carried out the requisite balancing exercise when deciding that dismissal was proportionate and had given too much weight to Aviva's legitimate aims over the discriminatory effects of dismissal on Mr Burdett.

Yet, in ***Herry v Dudley Metropolitan Council***[23], the EAT upheld an Employment Tribunal's decision that an employee was *not* disabled, even though he had to take a long time off work due to stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT noted that work-related issues can result in real mental impairment (for example, see *Lamb v The Garrard Academy* discussed above), especially for those who are susceptible to anxiety and depression. Yet it indicated that unhappiness with a decision or colleague, a tendency to nurse a grievance or a refusal to compromise are not, of themselves, mental impairments. Any medical evidence in support of a diagnosis of mental impairment should be considered with great care. Where a person suffers an adverse reaction to workplace circumstances that become entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this does not necessitate a finding of mental impairment.

Knowledge/constructive knowledge of substantial disadvantage

Where a disabled employee suffers a substantial disadvantage caused by a provision, criterion or practice (PCP) applied by the employer, the employer must take reasonable steps to alleviate that disadvantage[24].

What is a Provision, Criterion or Practice ("PCP")?

[21] ET Case No 2303029/09
[22] UKEAT/0439/13
[23] UKEAT/0100/16/LA

[24] section 20(3) Equality Act 2010

Given that the substantial disadvantage has to be caused by a PCP operating on the disabled person, it is important to understand what the PCP is in any given case. Whilst the legislation does not define "PCP", the EAT in ***Lamb v The Business Academy Bexley***[25] stated that it is a concept to be construed broadly, and could include formal or informal arrangements, rules, practices, arrangements, policies. One-off management decisions can also potentially qualify as PCPs[26].

An expectation to work long hours was held to amount to a PCP in ***United First Partners Research v Carreras***[27] despite there being no strict requirement to that effect, demonstrating that a PCP need not be set in stone.

There are some limits to what can amount to a PCP, however. It seems a PCP must be work-related in some way[28], and cannot relate solely to the employer's ineptitude or mistakes[29].

Where an employee's short-term sickness absences are the employer's primary concern, the appropriate PCP will likely relate to the employer's expectations on attendance. Case law has established that an employer's requirement for consistent attendance[30] or attendance at a certain level[31] amount to PCPs.

Substantial disadvantage

Whether there is a substantial disadvantage is assessed objectively[32] and by comparing the employee to persons who are not disabled. Unlike in direct and indirect discrimination, the comparison for these purposes does not have to be 'like for like' – i.e. there is no need to identify a real or hypothetical person whose circumstances are identical to the employee barring his/her disability[33].

In the abstract, it may be difficult to see where the distinction lies between the two limbs of the knowledge test, given that the test for disability already contains examination of the impairment experienced by the individual on their ability to perform day-to-day activities.

A good illustration of how the distinction works in practice is provided by ***Thomson v Newsquest (Herald & Times) Ltd***[34]. The employer conceded knowledge of disability, as it was aware that Ms Thomson had been diagnosed with, and was receiving medical treatment for, depression.

[25] UKEAT/0226/15
[26] *British Airways Plc v Starmer* [2005] IRLR 862
[27] [2018] EWCA Civ 323
[28] *Kenny v Hampshire Constabulary* [1998] ICR 27
[29] See *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, Nottingham City Transport Ltd v Harvey UKEAT/0032/12* or *Carphone Warehouse Group plc v Martin UEKAT/0371/12,* for example.
[30] *General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14*
[31] *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265
[32] *Copal Castings Ltd v Hinton UKEAT/0903/04*
[33] *Archibald v Fife Council* [2004] ICR 954; *Fareham College Corporation v Walters* [2009] IRLR 991
[34] ET/121509/09

However, it transpired that a symptom of Ms Thomson's depression was that she labelled all activities as either 'safe' or 'unsafe'; in particular, she labelled opening post as 'unsafe' with the consequence that she was not opening important letters from her employer regarding her sickness absence.

The EAT held that the employer could not reasonably have been expected to know that Ms Thomson's disability caused her to fear opening post or that corresponding with her via post would place her at a substantial disadvantage. The employer had not been provided with medical evidence on this point and its attempts to arrange an appointment with OH were met with silence given that the letters were not being opened. The post was also not being returned to sender so the employer did not know anything was amiss. Therefore, the second limb of the knowledge requirement was not satisfied and the duty to make reasonable adjustments to the requirement that she respond to postal correspondence did not arise.

Therefore, even if an employer is aware that the employee who has taken frequent short-term sickness absences is disabled, it may not have to make reasonable adjustments to the employee's duties, working arrangements, environment, etc, or be confined by the Equality Act 2010 in how it should respond, unless it knows (or could be reasonably expected to know) that something about the employee's mental illness is putting him/her at a substantial disadvantage compared to those without a disability.

In reality, the substantial disadvantage being suffered by Ms Thomson was fairly unusual, which contributed to the finding that her employer could not reasonably have been expected to know about it. In many cases, the disadvantage caused by the disability is likely to be more obvious, such as the employee struggling to face working full days or to travel into the office every day of the week. This will often become apparent from consulting with the employee regarding their reasons for taking so many sickness absences, and/or from a medical advisor's opinions on the impact of the disability and whether any adjustments would be appropriate. In those cases, the employer will most likely have the requisite knowledge to trigger their duty to make reasonable adjustments, rendering "drawing a line" under the sickness absences without at least further consideration an inappropriate course of action.

Making reasonable adjustments

If an employer's investigation into an employee's sporadic sickness absences has led to the conclusion that the employee is disabled *and* is experiencing a substantial disadvantage as a result of a PCP it has applied, then the next question on the employer's mind must be what would be reasonable adjustments to eradicate that disadvantage.

Steps to be taken

There are a large number of different adjustments an employer could make and not all of them (possibly none of them) will be reasonable in the circumstances. As ever, a good place to start is by consulting employees on what adjustments they think will assist them and/or obtaining a medical opinion on what steps it is appropriate for the employer to take.

The EHRC Code and Acas both set out lists of adjustments which may be reasonable for an employer to take. Where the disability relates to mental health, the following suggestions from the list may be suitable:

- allowing additional/longer breaks;
- changing or truncating working hours;
- reassigning duties which the employee is struggling with;
- allowing the employee to work from home part of the time;
- providing a private space for employees to use if they need privacy;
- assigning a mentor or buddy to support the employee; or
- arranging regular catch-ups with management.

The EHRC Code points out that sometimes more than one adjustment will be reasonable in order to remove the employee's disadvantage[35].

Both Acas and the EHRC Code also note that an appropriate adjustment in some cases may be to move the employee to a vacant role with more suitable duties (provided, of course, that the disabled employee consents to the change to their terms and conditions[36]).

Case law on this adjustment shows how extensive this duty can be; as held in ***Kent County Council v Mingo***[37], it may include giving the disabled person priority over other applicants, including those at risk of redundancy who are seeking redeployment. In *Archibald*, the House of Lords held that an employer might be required to appoint a disabled employee to an alternative, vacant post, even if he/she is not the best candidate for that role. However, the EAT in ***Wade v Sheffield Hallam University***[38] made it clear that this does not equate to giving the disabled person a role they are not suitable to perform.

The requirement that there be an existing vacancy is not hard-and-fast either. An employer in the middle of a total restructure was required to create a new post from scratch for its disabled employee[39] and a police force was required to facilitate a job swap between a disabled police officer and a colleague who was happy in his job[40]. Steps like these will not always be appropriate, but they should be considered where circumstances permit.

What is 'reasonable'?

As the name implies, the benchmark for whether an adjustment needs to be made is whether it is reasonable for the employer to make it.

The impact on the employer is relevant to the assessment of reasonableness, as can be seen in the contrast between the cases of ***Job Centre Plus v Wilson***[41] and ***Caen v RBS***[42].

In *Wilson*, an agoraphobic employee's request to work from home did not amount to a reasonable adjustment because the employee's job centred around holding face-to-face interviews with clients

[35] Paragraph 6.32 EHRC Code
[36] *G4S Cash Solutions (UK) Ltd v Powell UKEAT/0243/15*
[37] [2000] IRLR 90
[38] *UKEAT/0194/12*
[39] *Southampton City College v Randall* [2006] IRLR 18
[40] *Chief Constable of South Yorkshire Police v Jelic UKEAT/0491/09*
[41] *Secretary of State for Work and Pensions (Job Centre Plus) and others v Wilson UKEAT/0289/09*
[42] *Caen v RBS Insurance Services Ltd ET/1801133/09*

and working from confidential files which could not leave the office. The inconvenience to the employer would, therefore, be considerable.

In contrast, the Employment Tribunal in *Caen* found that the request from a disabled employee (who suffered with agoraphobia and depression) to change her working hours to 6:30am to 2pm in order to avoid traffic on the roads during her commute was a reasonable adjustment. The employer was prepared to let her start at 7:30am and no earlier. The Tribunal held that the employer's insistence on an hour's difference had no logical basis or advantage to the employer and it was, therefore, unreasonable for it not to agree to make the employee's requested adjustment.

Where the proposed amendment would require positive steps from the employer, the extent to which it would be logistically difficult for the employer would also be relevant to reasonableness. In ***McCarthy v Jaguar Cars Ltd***[43], it was held to be a reasonable adjustment to amend the redundancy scoring for the disabled employee because it would be straightforward enough for particular criteria not to be applied to one employee. Contrast this with ***Dominique v Toll Global Forwarding Ltd***[44], where the EAT suggested that it would be more difficult to apply discounts to redundancy criteria to account for disability.

In a case involving frequent sickness absence, the employer is likely to have to consider whether it would be reasonable to make an adjustment to any absence thresholds in its attendance management policy (or equivalent). This is because applying a cut-off point for absences is very likely to place a disabled person at a substantial disadvantage if their disability means they need to take additional sick days. This could be the case where the disability pertains to mental ill health.

HMRC v Whiteley[45] attempted to provide some guidance in this area. Mrs Whiteley claimed for failure to make reasonable adjustments after she was issued with a warning when her absence triggered a sickness absence policy where her employers would consider absences of more than 10 days due to ill health in a rolling year up to the date of consideration. She had been absent from work for 15 days up to and including 15 October 2010. She was asthmatic and 41 of her 54 days' absence were due to acute upper respiratory tract infections. The Employment Tribunal agreed that HMRC had failed to make adjustments by not discounting all of her absences that had been due to viral infection. The EAT stated that there are at least two approaches that may be acceptable where an employer is considering what allowances to make for absences that stem from the interaction of a disability with other ordinary ailments:

1. Consider the periods of absence in detail (and, if necessary, with expert evidence) to assess precisely the level of absence that is attributable to disability and ignore these; or
2. Having considered the proper information, consider what level of absence someone with a particular disability would reasonably be expected to have over the course of an average year due to their disability and discount this.

The latter approach may well be more attractive to employers who may like the idea that, when applying sickness absence policies to disabled employees, they can disregard reasonable absence

[43] *UKEAT/0320/13*
[44] *UKEAT/0308/13*
[45] UKEAT/0581/12

linked to their particular disability over an average year. Yet, it remains to be seen how employers will make this assessment and whether this approach will be "reasonable" in each case.

Yet, it will not always be the case or clear cut that simply adjusting the threshold or discounting sick days taken due to disability will be reasonable. As always, it is a case-by-case assessment. In *Griffiths* it was held not to be reasonable to expect the employer to: (a) disregard a period of disability-related sickness absence so that a warning would not be issued under the attendance management policy; and/or (b) extend the trigger point by 12 days so that the employee would only be considered for disciplinary action after 20 days' absence. This was because the employee's condition (fibromyalgia) was, on evidence from medical advisors, likely to give rise to further, lengthy periods of sickness absence in future such that a relatively short extension to the threshold would have limited value (although the outcome could very well have been different if it had been a short-term absence). However, the Court of Appeal overturned the conclusion of the EAT that an absence management policy, under which all employees, both disabled and non-disabled, were treated equally, was not capable of placing a disabled employee at a substantial disadvantage and that, therefore, the duty to make reasonable adjustments was not engaged. The Court of Appeal emphasised that the duty to make reasonable adjustments goes beyond equal treatment and requires employers to take positive steps. Employers, therefore, should have regard to the duty to make reasonable adjustments when issuing disciplinary warnings for sickness absence.

The fact sensitive approach of the UK courts and tribunals to the application of sickness absence policies was broadly confirmed by the European Court of Justice (ECJ) in ***Ruiz Conejero v Ferroser Servicios Auxiliares***[46]. This was an indirect discrimination claim and involved the provisions of Spanish law that allowed dismissal for intermittent sickness absence. The ECJ held that these provisions constituted potential indirect disability discrimination under the Framework Directive, unless they could be objectively justified. The relevant provisions created absence thresholds beyond which employers were entitled to dismiss. The ECJ held that the thresholds placed disabled employees at a disadvantage because they were likely to have more absences than non-disabled persons. However, the provisions pursued a potentially legitimate aim to combat absenteeism. The key issue was whether the relevant provisions of the Workers Statute were appropriate and whether they went beyond what was necessary. Relevant factors identified by the ECJ were direct and indirect costs that must be borne by companies due to absenteeism, whether the Workers Statute encourages recruitment and retention in employment, potential adverse effects for employees, including their prospects of re-employment and the fact that Spanish law requires reasonable adjustments for workers who are placed at a disadvantage by a disability. The case was remitted back to the National Courts for further consideration.

As outlined above, in the UK, the type of intermittent sickness absence trigger points contained in the Spanish Workers Statute tend to be found in the employers' sickness absence management policies. This judgment appears to support the position that the UK courts and tribunals have adopted in relation to the application of such policies to disabled workers. It remains the case that such policies are not inherently unlawful in relation to disabled workers, but a duty to make reasonable adjustments might arise and/or the employer might be required to justify any decision to dismiss or issue an absence-related warning. In any event, the outcome will be fact sensitive.

[46] SA (C-270/16) EU:C:2018:17

What if the adjustments are not reasonable?

It is feasible (as it was in *Griffiths*) that the proposed adjustments are found not to be reasonable once the employer has explored them.

The Court of Appeal in *Griffiths* was, however, clear that this does not allow employers free reign to discipline a disabled employee for their absences. Lord Justice Elias gave the following note of caution:

> *"…the positive duty to make reasonable adjustments is only part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under section 15* [of the Equality Act 2010] *to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were a result of the disability and it was not proportionate in all the circumstances to effect the dismissal."*[47]

Section 15 of the Equality Act 2010 is, if described in short-hand, discrimination arising from disability. In an abridged sense, the EAT has stated[48] that this means asking the following two questions:

- Is there a "something" which is caused by or arises from the Claimant's disability?
- Did the employer's treatment of the employee amount to unfavourable treatment because of that "something"?

Dismissing (or disciplining) an employee for their poor attendance record when that poor attendance record is caused by a disability relating to their mental ill health could give rise to a claim. This must be borne in mind when considering whether to "draw a line" under the absences.

An employer's primary line of defence in resisting a section 15 claim is to show that the treatment is a proportionate means of achieving a legitimate aim. If the employee's attendance is significantly problematic for the employer, no reasonable adjustments can be identified, no improvements are expected by medical advisors and the requirements of the employer's applicable processes have been followed, then it could be proportionate to discipline or dismiss the employee despite their disability with the aim of (for example) ensuring adequate resourcing. However, the section 15 test is notoriously difficult to apply, so an employer facing this prospect should take detailed legal advice before taking decisive action.

A recent example of the risk of incurring liability under s.15 by triggering action under an attendance management policy was seen in ***DL Insurance Services Ltd v O'Connor***[49]. Here, the employer knew that Mrs O'Connor was disabled. It operated an attendance management policy which provided for disciplinary action where sickness absence exceeded a certain threshold. Mrs O'Connor's sickness

[47] [2015] EWCA Civ 1265 at paragraph 79
[48] In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14*
[49] UKEAT/0230/17

absence was six times the trigger point for disciplinary action under the policy – in the previous 12 months her sickness absences amounted to 60 days. Despite finding that all but one of the absences were related to Mrs O'Connor's disability, the employer proceeded to issue a written warning which would last for 12 months. The effect of this warning was that Mrs O'Connor would no longer receive company sick pay for future sickness absences. Mrs O'Connor brought a s.15 claim for discrimination arising from disability.

The Employment Tribunal upheld the claim, concluding that it was evident that the written warning had been imposed because of Mrs O'Connor's disability-related sickness. The Tribunal noted that the warning meant that Mrs O'Connor was at risk of further, more serious, disciplinary action and that she would lose sick pay in future. This was unfavourable treatment arising in consequence of her disability. The Tribunal rejected the employer's argument that the treatment was justified. Although wanting to ensure adequate attendance levels was a legitimate aim, the action was not proportionate. In reaching this decision, the Tribunal noted that the employer:

- had not taken disciplinary action in previous years when the absence levels had exceeded the trigger point;
- had failed to consult OH or obtain medical advice before taking action; and
- had not taken account of a recent improvement in her sickness absence levels (following a change of role).

Further, it was relevant that the employer could not explain how the written warning would help improve Mrs O'Connor's sickness absence levels. The EAT agreed with the Employment Tribunal, noting that the purpose of the written warning was: *"…to punish the Claimant for the absences which she could not help by not paying her or by forcing her to go to work when she was unfit to do so".*

All in all, disciplining or dismissing an employee on the basis of their persistent short-term sickness absences if those absences are caused by a disability is high-risk. There is a more stringent expectation in disability cases for the employer to accommodate the employee, and the employer must take care to avoid subjecting the employee to less favourable treatment on grounds of his/her disability or something arising from it. Whilst it is conceivably possible to dismiss a disabled employee, the margin for error is significant and detailed legal advice should be sought at all stages of the process.

What does your sickness absence policy say?

Even if the employee's mental health condition does *not* amount to a disability, an employer may be obliged to follow any processes set out in its sickness absence policy. A failure to do so could, if the policy is contractual, amount to a breach of contract, or in any case render a subsequent dismissal unfair (provided, of course, that the member of staff is an employee and has the necessary 2 years' continuous employment to bring an unfair dismissal claim).

From the unfair dismissal perspective, dismissal on the grounds of frequent but genuine short-term sickness absences will probably be by reason of 'capability' or 'some other substantial reason' (SOSR), both of which are potentially fair reasons for dismissal under section 98 of the Employment Rights Act 1996.

Whether to rely on capability or SOSR will depend on what aspect of the situation is at the forefront of the employer's mind when it decides to take steps to dismiss[50]. Where the employer's concern is the employee's fitness to continue doing his/her job as a result of their mental health, capability is probably the best fit. If the employer's concern is more that the employee is failing to meet attendance targets and/or not complying with an attendance policy, then (following ***Wilson v Post Office***[51]) SOSR is a better description. In many cases, and especially for short term absences, there will be an element of both concerns at play, so relying on capability and SOSR in the alternative is a good catch-all.

Most businesses will have an absence policy, a capability policy or something equivalent to state how the employer will approach cases of persistent absence. Cases of persistent, short-term intermittent absence may be more difficult to deal with than long-term absence as it can be hard to predict whether attendance will improve. In order to conduct a fair procedure, the employer will be expected to follow the procedure it has prescribed for itself.

Generally speaking, a well-drafted absence/capability policy will have something to say on the following points:

- what the threshold number of absences is before an employer will contemplate taking action i.e. use of trigger mechanisms to review attendance;
- how the employer will consult the employee on the situation, including holding return-to-work meetings;
- the arrangement of return-to-work meetings;
- involving trained line managers in absence management;
- whether, and under what circumstances, any adjustments will be made to accommodate the employee's illness despite it not amounting to a disability; and
- at what point warnings will be issued and dismissal will be contemplated.

Each of those aspects will be considered below.

Absence thresholds

A policy should state the point at which an employer will take steps to address an employee's absences. As discussed earlier in this paper, this will normally be expressed as a number of days within a set period of time but could be calculated as a percentage of the available working time within a reference period. That threshold may be worked into an employer's HR computer systems to flag particular employees once it has been reached.

All employees should be made aware of what the employer's trigger point is generally and what the consequences of reaching it are. In individual cases, the employee should be notified once their absences have reached the threshold and be informed of what the next steps will be.

Generally speaking, the next step will be for the employer to commence the first stage of an investigation into the absences. It should collate its sickness data and the reasons and/or evidence provided for each absence, then prepare to discuss them with the employee.

[50] *Ridge v HM Land Registry* [2014] UKEAT/0485/12
[51] [2000] EWCA Civ 3036

First Consultation

As discussed above in relation to disability, consultation with the employee is a crucial first step in the employer's investigation. This remains the case whether or not the employee's mental ill health amounts to a disability, partly because consultation will help the employer understand whether there is a disability in the first place.

All consultations held in relation to the absence policy should be documented and notes should be taken.

The initial consultation is likely to be informal and may take the form of a return-to-work meeting. This is likely to be the case where the timing of a consultation coincides with a period when the employee is on sick leave. If so, a larger focus may be placed on the most recent period of absence, the reasons for it, and what needs to be done in the immediate term to reintegrate the employee. This may mean that the employer decides to leave it slightly longer to see how the reintegration goes before arranging a formal capability/absence consultation.

The first formal consultation may broach the following issues:

- the overall number of absences and whether there is any pattern to them (including whether there is an underlying disability);
- the impact the employee's absences are having at work, such as an increased workload for colleagues, uncertainty in resourcing, a decrease in profits, or disadvantage to clients;
- an indication of whether any future short-term absences are expected or likely;
- the impact future absences are likely to have;
- whether the employer can take any steps to help the employee improve his/her attendance; and
- at what point a formal warning may be appropriate and what the consequences would be.

Medical evidence

Whether or not the employee expresses a view on their health during this meeting, the employer should try to obtain meaningful medical evidence by asking the employee's permission to contact their GP and/or refer him/her for OH assessment. As discussed above, from a discrimination perspective this is important if the employee is later judged to be disabled.

However, even if there is no disability, it will be wise to seek medical input in order to understand the circumstances of the employee's absences and the likelihood of the situation improving. It can be difficult for a medical advisor to give meaningful advice where the absences are truly unpredictable and sporadic (as was suggested some time ago in ***Lyncock v Cereal Packaging Ltd***[52]). In this case the EAT held that it was fair to dismiss an employee suffering from short-term unconnected illnesses without first obtaining a medical report. The EAT recognised that little purpose could be served in seeking a medical opinion where there was no underlying health condition to investigate. However, in most cases – especially where the employee has stated that they are suffering with a mental health condition – it will be possible for a doctor to give some insight into the employee's condition, diagnosis and prognosis.

[52] [1988] ICR 670

The EAT put it this way in *Daubney*:

> *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."*[53]

Evidence from the medical advisor as to the cause of the mental ill health would also be useful. This is because, generally speaking, an employer will be expected to give the employee additional leeway and time to improve if his/her condition was caused by the employer and a personal injury claim is more likely to succeed if they do not.

In ***McAdie v Royal Bank of Scotland***[54], the Court of Appeal (agreeing with the EAT's decision) held that the employer's responsibility for the employee's ill health is relevant to whether and when it is reasonable to dismiss the employee by reason of that ill health. The EAT in this case had previously clarified that this would not mean that there could never be a fair dismissal where the employer had caused the illness, but it could mean that the employer had to go the *"extra mile"* in giving the employee additional time to improve or making more effort to find alternative employment instead of dismissing them.

At some point during the consultation process, the employee should be given the opportunity to comment on the medical evidence the employer has amassed on their condition. He/she may be able to contextualise or explain the evidence presented, identify problems within it, or provide medical evidence of their own. If the employee wishes to provide a counter-report but is denied the opportunity to do so, a consequent dismissal runs the risk of being unfair[55].

Making adjustments

Having held an initial consultation and obtained medical evidence, it may be possible to identify ways in which the employer can make adjustments in order to help the employee improve their sickness absence record taking into account their mental ill health. Employers will note that the EHRC Code[56] advises that it is good practice for an employer to ask a disabled employee about possible adjustments and agree any proposed adjustments in advance.

Disabled employees are more likely than others to have significant sickness absence, including those with mental health conditions. Therefore, the application of sickness absence policies which could potentially lead to dismissal may place them at a substantial disadvantage and the duty to make reasonable adjustments may, therefore, arise.

As was also implied by *McAdie*, an employer is generally expected to consider whether it is possible to put the employee in an alternative role instead of dismissing them (albeit more effort is required where the employer caused the ill health). Failing to put one's mind to alternative roles could render

[53] [1977] IRLR 184 at paragraph 18
[54] [2007] EWCA Civ 806 at paragraph 37
[55] *Liverpool Area Health Authority (Teaching) Central & Southern District v Edwards* [1977] IRLR 471
[56] Paragraphs 6.32 and 17.80, EHRC Code

a dismissal unfair even if the rest of the process was fair[57]. That said, the employer will only have to look at existing vacancies – it is under no duty to create a job especially[58].

Short of giving the employee another job, the employer should also apply its mind to whether any other modifications could be made to the employee's role to help them improve their attendance. It may be possible to tweak the employee's duties or environment to make coming to work consistently a more comfortable experience; if it is, the employer will most likely be expected to take them before contemplating dismissal. See for example ***Garricks (Caterers) Ltd v Nolan***[59], where the EAT held that the employer ought to have considered whether the aspect of the job Mr Nolan struggled with, namely carrying heavy boxes, could have been removed from his job description permanently rather than dismissing him. As heavy lifting was only a small part of his job and could easily have been reallocated to a colleague, resorting to dismissal was unfair.

Other possible adjustments could include providing access to an employee assistance programme which enables the employee to consult a professional counsellor or making other modifications to the employee's work (e.g. flexible hours could assist an employee suffering from depression as a result of a bereavement or a marriage breakdown).

If adjustments have been made, sufficient time should be allocated to a trial period of sorts in order to see if they make a positive impact. Employers should avoid making any rash decisions to progress to dismissal before the employee has been given a fair chance to adapt to the change of circumstances.

Formal written warning

If the employee has been consulted over their absences, medical evidence has been sought, any appropriate adjustments have been made and allowed the time to bed in, but no improvements have been made to their attendance, then the employer will be entitled to take matters further.

The most appropriate next step in most cases is to issue a written warning formally putting the employee on notice of the need to improve. The terms of the warning should clearly state what degree of improvement is expected, and within what timeframe. It should also state in terms what the consequences will be of those targets not being met. In some circumstances, it will be appropriate for more than one warning to be issued, and in others it may be acceptable to proceed straight to a final written warning.

What an employer cannot do is progress to a dismissal before giving the employee adequate notice to improve. This was the problem faced by the employer in ***Connorton v British Steel plc***[60]. Mr Connorton had taken frequent sickness absences for a number of years, but the employer had shown a high degree of tolerance; whilst a string of performance targets had been set for him, Mr Connorton had never been issued with a final written warning or suspended. Therefore, the Tribunal held that the decision to progress from that state of affairs to dismissal was unfair *"…in the circumstances,*

[57] *Scottish and Southern Energy plc v Mackay* [2007] UKEAT/0075/06
[58] *Merseyside v Taylor* [1975] ICR 185
[59] [1980] IRLR 259
[60] 2502634/99

particularly in view of the background of its dealings with [Mr Connorton] without some proper warning". In essence, an employer must let the employee know that they are on their last chance to improve before decisive action is taken.

Second consultation and dismissal

If an employee's attendance has not improved despite the issuing of a final written warning, and the employer has warned him/her that a possible consequence of that is dismissal, then the employer will probably be considering dismissal. At least one further consultation should be held with the employee before the decision to dismiss is made.

It is good practice to write to the employee in advance of this meeting setting out its basis, the factors the employer intends to take into account, what evidence it is relying on and what steps have led to the contemplation of dismissal. This enables the employee to understand fully the situation and puts them in a better position to state their case. Failing to do so runs the risk that the employee turns up, says that they have not been afforded a sufficient opportunity to prepare, and requests that the meeting be postponed.

Section 13 of the Employment Relations Act 1999 gives a right for an employee to be accompanied by a union representative or a colleague to any "disciplinary meeting", which it defines as any meeting which could result in a formal warning being issued or the employee being dismissed. Therefore, even though an ill health or SOSR process is not a disciplinary procedure, it is best for an employer to offer proactively the right to be accompanied. In any event, it is likely to be a reasonable adjustment (whether on disability or fairness grounds) to permit an employee with mental health concerns to have someone with them for support.

The purpose of a further consultation meeting is to ensure that the employee has had sufficient opportunity to make representations about their situation and make any suggestions they wish to make as to alternatives to dismissal. The employee may be able to explain why they were unable to comply with the attendance requirement set by a final written warning and be able to make the case for additional time to be afforded to them. They may also be able to raise mitigating factors in their favour, such as a long period of service unaffected by absence concerns[61].

The employee may also be able to cast doubt on the validity of prior warnings. An employer dismissing on the basis of a series of prior warnings is under a duty to ensure the previous warnings were validly issued in order for the dismissal to be fair.

If, taking all information before it in the round, the employer considers it is appropriate to dismiss, then it may do so. Once a dismissal decision has been communicated, the employee ought to be given the right to appeal that decision within a reasonable timeframe giving their grounds for doing so in full. Best practice is to appoint a more senior manager than the dismissing officer to conduct the appeal and arrange for it to be conducted in person. Any appeal outcome should be communicated in writing in order to put the reasons on the record.

Conclusions

[61] See *Alexander v Downland Retirement Management Ltd* ET/3103380/03

If an employee has taken a number of short-term sickness absences due to mental ill health, an employer should take steps to address it.

It will rarely be open to an employer to 'draw a line' under the absences (i.e. dismiss the employee) immediately, regardless of whether the employee's mental health condition amounts to a disability or not. A reasonable and fair process is required and the best thing to do in the first instance is to talk to the employee. Whilst conversations of this nature are difficult, a manager should initially hold an informal meeting with the employee to understand what the situation is and what the employer can do to assist.

A crucial factor in these situations will naturally be whether the absences are caused by a disability or not, and an employer is obliged to conduct a reasonable investigation in order to ascertain that. Medical evidence will be important to this enquiry, but the employer cannot follow a medical opinion blindly.

If the employee *is* disabled, they are protected under from unfavourable treatment on the basis of their disability and an employer is obliged to make whatever adjustments are reasonable to prevent him/her experiencing a disadvantage. Moreover, disciplinary action or dismissal due to an employee's levels of disability-related sickness absence may be discriminatory. Unless the action can be shown to be a proportionate means of achieving a legitimate aim, the employer will be at risk of a discrimination claim. This will be a difficult hurdle to surmount.

If the employee also has unfair dismissal rights then he/she cannot be dismissed lawfully without due process. At least two consultation meetings should be held, efforts should be made to obtain the employee's side of the story and the employer should consider whether it can do anything to help the employee improve their attendance. The employee should always be given an opportunity to improve and sufficient warning should always be given if the matter progresses to a stage where dismissal is being contemplated.

Ultimately, whilst the law does not require employers to turn a blind eye to disruptive sickness absence, it does require them to act reasonably in the circumstances when deciding how to deal with them. So long as the employer treats the employee with compassion and patience throughout, and takes legal advice from an early stage, it should be possible resolve the situation in a way which works for the employer.

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