

## **White Paper Conference on Redundancy and Dismissal**

Disability Discrimination – managing performance and attendance

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## Managing performance and attendance

What are you to do with a disabled employee if you've adjusted his or her work pattern but attendance or performance is not improving?

# Key Principles

# How to manage performance

## ACAS Guide

### Managing underperformance

- Regular feedback
- Support and coaching
- Need for difficult conversations
- Disciplinary/capability procedure
  - Identify the performance issue
  - Explain the improvement required
  - Set a timescale for the improvement to be achieved
  - Fix a review date
  - Confirm support (including training) employer will provide

# How to manage attendance

## *Managing long-term illness*

- Clear policy in place for both long-term and short-term absence
- Assess if colleagues can manage for a while without a temporary replacement
- Keep in regular contact with the employee about their:
  - position
  - sick pay
  - promotion opportunities
- Obtain medical advice/opinion
- Return to work interview
- Phased return and other adjustments?

# How to manage attendance

## *Managing persistent short-term absence*

- Monitor absence levels
  - pattern/underlying cause?
- Is the absence work-related?
- Request fit notes
- If no fit notes, then is this a disciplinary matter?
- Flexibility – reasonable absence
- Set appropriate attendance targets
- Staged warnings

# Disability Discrimination

## Types of disability discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Duty to make reasonable adjustments
- Harassment
- Victimisation

# Case Study

## Case Study

Sarah has been employed in the compliance team for four years. Two years ago she had an accident whilst running and, as a result, she has developed a back condition which severely restricts her movement.

Nine months ago she came back to work following an operation.

You adjusted Sarah's working hours from 9.00am to 5.00pm to 10am to 4.00pm so that she could avoid the rush hour commute.

## Case study

Sarah has been back at work for nine months but her performance and attendance have not been good.

Her line manager Frank reports that her attention to detail is poor and she regularly misses deadlines.

Her sickness absences are also the highest in the firm. There is no particular pattern to these, although she often seems to be ill on Fridays.

## Case Study

Do you:

- A. start a formal performance management process in relation to Sarah?
- B. start a formal attendance process in relation to Sarah?
- C. have an informal chat with Sarah about your concerns and her performance/attendance?
- D. refer Sarah to occupational health?
- E. wait for two months and then speak to her at her annual appraisal in January?
- F. something else?

## Case study

You and Frank speak informally to Sarah about the issues with her performance and attendance.

Sarah reacts very badly to the issues raised. She says that there were complications with the operation, that she is taking very strong painkillers and that she often feels exhausted by the end of the week as she is completely overworked.

Following the meeting she is signed off work with “work-related stress/anxiety”.

What do you do now?

## Case study

After three months Sarah's company sick pay expires. After a further month she says that she is ready to return to work.

You have referred her to the firm's OH advisers who have recommended a number of additional adjustments to help facilitate Sarah's return.

Sarah has also requested a number of additional adjustments of her own.

Which of the following would you implement?

## Case study

### OH recommendations:

- a phased return starting with Sarah working three days a week for three months before returning to her previous pattern
- that the company carry out a stress risk assessment
- weekly meetings be held between Sarah and her line manager to monitor her workload

### Sarah's requested adjustments:

- a change in her line manager as she attributes her anxiety to Frank's behaviour
- increased flexibility around deadlines going forward to reflect her phased return
- payment for the period when she was in receipt of nil pay because the company was responsible for her ill health
- waiver of the rule in the company's discretionary bonus plan that an employee with more than three months' sick leave in a year is not eligible for a bonus

## Case study

Sarah returns to work on a phased basis and continues to report to Frank for the next three months. Despite Frank holding regular meetings with her, her performance continues to deteriorate.

Frank tells you that three important deadlines have been missed as her reports were late despite reasonable extensions.

You therefore decide to implement the first stage of the performance management process and hold a meeting with her.

What should you address at this meeting?

## Case study

The meeting goes reasonably well and Sarah acknowledges that there have been some failings. She makes it clear that she wants to continue in the role and you put a review programme in place.

Sarah's performance improves for a while, but after a few weeks she begins to miss deadlines again and there are further instances of carelessness in her work.

You hold a further meeting and give her a final written warning in accordance with your performance management procedure.

What should the final written warning say?

## Case study

The following week Sarah mistakenly sends out a highly confidential internal document to the firm's regulator.

She immediately recognises her mistake and says that this is as a result of the painkillers that she is continuing to take which affect her levels of concentration.

This is reported to the CEO who sends an email to you demanding that she be fired immediately stating that "given her medical condition, she represents an unacceptable risk to the business".

## Case Study

Do you:

- A. fire Sarah immediately?
- B. ask Sarah to attend a further performance management meeting to consider her dismissal?
- C. try to persuade the CEO to allow Sarah's employment to continue so that her performance can properly be assessed at the end of the review period?
- D. refer Sarah to occupational health before considering what further action to take?
- E. offer Sarah a settlement package to go?
- F. something else?

## Key issues to consider

- Obtain medical advice and follow recommendations
- Carry out risk assessments
- Carry out return to work meetings
- Keep notes/minutes of all communications with employee
- Follow your absence management procedure (be flexible where appropriate – emergency leave / justifiable absence)
- Follow the performance management procedure (but consider adjustments)
- Consider alternative roles/another manager. If this is not practical, can you explain why?
- Role of dismissing manager

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