

A large, three-dimensional sculpture of the company name 'CLYDE & CO' is displayed on a white, textured marble surface. The letters are made of a brushed metal, possibly stainless steel, and are arranged in a perspective view, receding into the background. The background consists of vertical grey panels.

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Capability & Absence  
23 November 2016

Stephen C Miller, WS

# When does absence become a matter of capability?

s98 The Employment Rights Act 1996: potentially fair reasons

## Capability Dismissal

Ill health

Incompetence

Lack of qualifications

# When does absence become a matter of capability?

**Ill health absence does not lend itself to contractual terms and conditions.**

See: *Wandsworth London Borough Council v. D'Silva and another* [1998] IRLR 193

# When does absence become a matter of capability?

## *Wandsworth London Borough Council v. D'Silva and another*

“the industrial tribunal spoke good sense when they stated a general approach to codes of this sort in these terms:

‘...As a matter of good industrial practice we believe that ill health absence should be treated with much more flexibility compassion and common sense than many other aspects of the employment relationship. There is a case for saying that a young man who takes one day off allegedly for a cold but is seen shopping in the town centre should be treated much more severely than, say, someone with long-term asthma difficulties and a number of days' absence’.” (para 24)

# When does absence become a matter of capability?

Notwithstanding the obvious wisdom of the Wandsworth Judgment, an employer is still free to create contractual terms governing the management of ill health absence.

***Sparks & others v Department of Transport* [2016] ICR 695**

# When does absence become a matter of capability?

## **Ill Health Absence, ACAS Code & statutory compensation uplift**

"While misconduct obviously involves culpable conduct, poor performance is capable of involving both culpable and non-culpable conduct. Where, for example, the poor performance is a consequence of genuine illness or injury, it is difficult to see how culpability would be involved or disciplinary action justified. Where an employee is absent through illness or ill health leading to dismissal, disciplinary action cannot ordinarily be invoked, and without more, the Code does not apply..."

***Lund v St Edmund's School UKEAT/0514/12***

# When does absence become a matter of capability?

## **Ill Health Absence, ACAS Code & statutory compensation uplift**

“...The position is different where the ill health leads to a failure to comply with sickness absence procedures or an allegation that the ill health is not genuine. In those cases, however, any disciplinary procedure invoked would be invoked to address the alleged culpable conduct on the employee's part rather than any lack of capability arising from ill health.” (para 13)

***Lund v St Edmund's School***

# When does absence become a matter of capability?

## III Health Absence can lead to misconduct cases:

“an employee [who] "pulls a sickie" is representing that he is unable to attend work by reason of sickness. If that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of the trust and confidence that is at the heart of the employer/employee relationship.” (para 44)

***Metroline West Ltd v Ajaj* UKEAT/0185/15**

# When does absence become a matter of capability?

## **III Health Absence can lead to misconduct cases:**

“the reason for dismissal was the Respondent's belief that the Claimant had: obtained or claimed sick pay by fraudulently representing to be sick when he was not; misrepresented his ability to attend work at review meetings with Mr Power and the Occupational Health doctor; and either exaggerated his condition or deliberately attempted to defraud the company with a claim of injury at work that was exaggerated or even staged. Exaggeration was part of the case advanced by the Respondent and was found as a fact to be part of the reasons for dismissal in the mind of the dismissing and appeals officers. Moreover, it is clear that each of those allegations was underpinned by a real question mark as to the Claimant's honesty about the extent of his injuries.” (para 31)

***Metroline West Ltd v Ajaj***

# What if you think the stress is not caused by work?

## Metroline

- Employment Practices Data Protection Code
- *McGowan v Scottish Water* [2005] IRLR 167
- Article 8 and *Kopke* [2010] ECtHR 420/07

# What if you think the stress is not caused by work?

“it is never likely, if ever it could be, that an investigation will be held unreasonable because it is too thorough – at least without the nature of the investigation having in some other way made the dismissal of the employee unfair. If what was unfair here about what the employer did was taking videos of him in public, and it had nothing to do with the dismissal because the dismissal was already sufficiently evidenced, then that would be no basis for holding the dismissal unfair since it would not be relevant to the dismissal itself, even though in this separate respect the employer might not have behaved entirely to the tribunal's liking.” (para 26)

***City and County of Swansea v Gayle* [2013] IRLR 768**

# What if you think the stress is not caused by work?

## **DDA / Stress / Relevance of Medical Reports**

“We bear in mind, as the tribunal recognised, that depending on who calls whichever doctor or doctors to give evidence, there is likely to be quite appropriate cross-examination or examination-in-chief as to possible sources of whatever stress or other ill health (if any) Miss Wilson has suffered from other than work-related sources. The doctor or doctors cannot be expected to address that competently without knowing what other possibilities there might be, nor when they might have operated.” (para 29)

***De Keyser Ltd v Wilson* [2001] IRLR 324**

# What if you think the stress is not caused by work?

## Going the extra mile...or not?

“The EAT then considered the question of what would have happened had the tribunal not misdirected itself:

‘...The medical evidence was unequivocal both that Mrs McAdie was unfit for work and that there was no prospect of recovery: even if the bank had been able to offer some solution (perhaps involving a reopening of the grievance or a full apology) that was not going to be acceptable’.” (para 39)

***McAdie v Royal Bank of Scotland plc* [2007] IRLR 895**

# What if you think the stress is not caused by work?

## Going the extra mile...or not?

“it was not, in my judgment, an error of law for the Employment Tribunal to consider the decision in McAdie. That decision gives useful guidance applicable where the employer is “in some sense responsible for their employee’s incapacity”. It does not only apply where the employer has caused the employee’s incapacity. Informed by this guidance the Employment Tribunal correctly took the view that the degree of responsibility the Respondent bore for the Claimant’s condition was a relevant factor for the purposes of section 98(4).”  
(para 30)

***L v M* UKEAT/0382/13**

How do you justify capability management when stress-related absence is frequent rather than over a long period?

**Persistent intermittent absence**

*International Sports Co Ltd v Thomson*

**[1980] IRLR 340**

## How do you justify capability management when stress-related absence is frequent rather than over a long period?

"In such a case, it would be placing too heavy a burden on an employer to require him to carry out a formal medical investigation and, even if he did, such an investigation would rarely be fruitful because of the transient nature of the employee's symptoms and complaints. What is required, in our judgment, is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee'."

***International Sports Co Ltd v Thomson***

# Questions





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