

How do you reduce the risk of dismissing an employee with a disability (including mental health and cancer)?

**** What if medical opinion is divided, the condition is fluctuating or requires a further lengthy absence or wait for an operation?**

**** How long do you hold back before making a reasonable decision?**

Phil Allen

Partner – Weightmans

0161 214 0504

Phil.allen@weightmans.com

Ill health dismissal – the legal tests

- Is the dismissal fair – usually for capability
- Has a full and fair procedure been followed (including warnings where required, meetings and your own policies/procedures)?
- Has the employee been discriminated against because of their disability (including reasonable adjustments)?
- Have you breached their contract of employment (important where formal policies or PHI)?

Ill-health and unfair dismissal: the critical questions

- Key points for employers to consider:
 - Can the employer be expected to wait longer before dismissing?
 - What impact does the absence have on your business and other employees?
 - Was the employee consulted with?
 - Were steps taken to understand the condition and prognosis?

BS v Dundee City council

Disability discrimination

For long term ill health dismissals the key issues are usually disability discrimination:

- Direct discrimination
- Indirect discrimination (and is it justified)
- Discrimination arising from disability (and is it justified)
- The duty to make reasonable adjustments

You can treat a disabled person more favourably than others (and often must do so)

What is a Disability

- A physical or mental impairment
- Is long term – that is lasts more than 12 months or is likely to last/recur over 12 months
- Has a substantial adverse effect (but substantial means only more than minor/trivial)
- On the individual's ability to carry out normal day to day activities
- The effect of measures taken to treat or correct it are ignored
- Remember certain conditions are automatically covered including cancer

Reasonable adjustments, some examples

- Allocating some of the disabled person's duties to another
- Transferring a disabled person to fill an existing vacancy
- Allowing absence for rehabilitation assessment or treatment
- Modifying procedures

Disability reasonable adjustments – factors to be taken into account

The key is whether the adjustment is reasonable.

Things to be considered include:

- The extent to which the adjustment addresses the disadvantage
- Whether it is practicable
- The cost and disruption of the adjustment
- The resources available to the business
- The size of the business

Disability Discrimination

- Employer operated an absence management policy with ‘trigger points’ for consideration of formal action
- Absence threshold extended for disabled employees
- Claimant given a formal warning following absence for a disability related illness (after hitting the ‘extended’ trigger point)
- Court confirmed that the duty to make reasonable adjustments does apply to absence management policies
- Focus on justification so practical not technical – is it a proportionate means of achieving a legitimate aim?

Griffiths v DWP

Attendance warnings and disability discrimination

- You can still operate a detailed absence management policy with ‘trigger points’ (but need to be able to justify if challenged)
- You don’t have to ignore disability related absence
- Some flexibility for disabled employees may be required as a ‘reasonable adjustment’
- When dealing with genuine absence try not to use ‘disciplinary’ language

Griffiths v DWP

The problem of pay and reasonable adjustments

- Employer suffering from serious back issues unable to perform his own role
- Placed in a more junior, less skilled position but on his own higher rate of pay. Employer eventually sought to vary contract and reduce pay rate
- Employer is NOT entitled to impose a reasonable adjustment. Employee must consent
- ‘Protecting’ pay to enable employee to remain in work may be a reasonable adjustment in some circumstances

G4S Cash Solutions Ltd v Powell

Medical reports and problem issues

- You can rely upon OH expertise
- You can usually prefer one report over another
- You are not obliged to accept a report's view on whether a disability
- However you also must not accept a report's view on disability without question
- You must not set yourself up as a medical expert, but can potentially make a decision based on experience in the light of the optimistic report
- If consent for the report to be provided is refused, you have to make a decision based upon what you know

Reasonable adjustments the key points

- You can and should ask what the employee thinks, but the onus is on you to identify
- Record what you considered and why it was not possible
- It is all about “reasonable” so there is no certainty, but what do you really think?
- How practicable is the step and will it alleviate the same issue for others?
- Does the step enable the employee to fulfil their role/return
- Do consider temporary arrangements but do make clear that they are temporary and review
- You will often need to make the adjustments even if you cannot really envisage it working

Ill health dismissal the key points

- Don't leave the start of the process too late
- Do arrange meetings and keep the process moving
- Ask for the employee's input and views
- Absence and capability are key – not really the classification of it
- Don't be afraid to adjourn/give a little more time at each stage
- You can and must ask further questions if the medical report is unclear
- If they can't do the job you can dismiss – so don't be afraid to move through the process
- Always have reasonable adjustments in mind

Ill health dismissal the key points

- Know and follow your own procedures
- Get up to date medical and other evidence
- Why are you dismissing and why now?
- Think about alternatives and adjustments
- Have you exhausted all available support?
- Keep in mind that the reason for dismissal is capability
- Can you say that there is no reasonable prospect of the employee undertaking their role in the foreseeable future (or one that is available)?
- Is there PHI and, if so, ensure the process has been exhausted

The logo for Weightmans, featuring the word "Weightmans" in white text on a dark teal background with a wavy top edge.

Contact Details

Phil Allen

Partner

0161 214 0504

Phil.allen@weightmans .com

Follow the Weightmans Employment Team on Social Media:

Twitter: @Weightmans_Empl

LinkedIn: Weightmans Employment