

The logo for Weightmans, featuring the name in white text on a dark teal, wavy rectangular background.

Weightmans

# Weightmans

## Frequent Absences due to Underlying Mental Health – Amending Trigger Points & Progressing Warnings

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A decorative graphic at the bottom of the slide consisting of several overlapping, wavy teal lines that create a sense of movement and depth.

## Some general points

- How best to handle each case is inevitably fact-specific
  
- Management's approach will generally be similar for both underlying mental and physical ill health (and there's often an overlap)
  
- Managing frequent sickness absence will be harder if...
  - Absences are not properly recorded; and
  - If management don't clearly explain the expected standards & the sick absence management process that will be followed

## Some general points

- Managing frequent sickness absence will be easier if...
  - Managers understand the ethical, commercial and operational imperative for proactively managing sickness absence;
  - Employees understand the ‘big picture’ commercial and operational impact of their sickness absence; and
  - If managers and employees work in partnership within a culture of mutual trust & confidence
  
- Managers also need to understand the key legal issues which impact upon sickness absence management...

## Legal considerations

- Breach of contract
- **Unfair dismissal**
- **Disability discrimination**
- Health & Safety
- Data protection

## Legal considerations

- **Unfair Dismissal** – management must ensure that
  - There was a fair reason for the dismissal (SOSR or capability)
  - They adopted a fair (and clearly understood) procedure before deciding to dismiss, including:
    - The provision of clear warnings about the expected attendance standards and the consequences of not achieving them
    - Obtaining timely & relevant expert input (e.g. from an OH clinician)
  - The dismissal decision was ‘reasonable’ in all the circumstances

## Legal considerations

- **Disability discrimination** – applies where an underlying mental health condition is a ‘disability’ under The Equality Act 2010

Indirect disability discrimination -----|----- Discrimination arising from disability  
|  
|  
|

**A failure to make reasonable adjustments**

(often the crucial factor, given the ‘justification’ defence)

## Legal considerations

- The duty to make reasonable adjustments covers:
  - An employer’s **provisions, criteria or practices**;
  - **Physical features** of the employer’s premises; and
  - The provision of **auxiliary aids or services**
  
- The duty is a significant factor in the avoidance of/reducing sickness absence...

## Legal considerations

- Reasonable adjustments may include...
  - re-allocating duties / altering hours of work
  - transferring to an existing vacancy
  - assigning to a different place of work
  - time off for rehabilitation, assessment or treatment
  - acquiring or modifying equipment, etc.
  - permitting flexible working / homeworking
  - permitting disability leave

## Practical steps

- **Proactive, informal intervention:**
  - Ensure the employee's sick absence record is accurate
  - Although absences may currently be short and frequent, would it be more appropriate to deal with the case as a long-term illness if there's an underlying mental health issue?
  - Are there any contributing factors, e.g.: domestic problems / addiction issues / bullying at work, etc?
  - Would it be sensible to seek updated medical guidance?

## Practical steps

- **Proactive, informal intervention (cont.)**
  - Can future absences be avoided altogether (with any relevant reasonable workplace adjustments?)
  - If not, can future absences be minimised (with any relevant reasonable workplace adjustments?) such that any formal sick absence management procedure is not triggered?
  - If not, would the facts of the case justify imposing less demanding attendance standards under the formal procedure?
  - Explain the **commercial/operational impact** of the employee's sickness absence, the expected standards of future attendance and the consequences of failing to improve

## Practical steps

- **Formal intervention:**
  - If formal action becomes appropriate then progress the relevant stage(s) of the absence management procedure promptly
  - At each formal stage:
    - (Re-)consider management's actions and any mitigating circumstances to-date
    - Consider whether you need updated OH or other expert input
    - Maintain a comprehensive written record and confirm the outputs of each stage in writing to the employee

## Practical steps

- Consideration of dismissal factors:
  - Nature of the illness(es) & the likelihood of a recurrence
  - Pattern of absences & interim periods of good health
  - Commercial & operational impact
  - Mitigating circumstances
- The employee should have a right of appeal
- The overall impact of mental ill health



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## Contact details

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