



Brabners

we make the difference

Andrew Cross

7 March 2023

“How risky is a capability process when reasonable adjustments have been exhausted but absence continues, or contractual obligations are only partially fulfilled?”

DECONSTRUCTING THE QUESTION

- The management of long term ill health/health conditions
- Focus is on the later time when dismissal is in contemplation
- Distinguish “*capability process*” from a “sickness absence policy” which has several purposes:
 - set out sick pay conditions including notification procedures
 - procedure for managing longer term absence
 - procedure for managing short term intermittent absence
 - addressing disability
 - has a “*capability process*” providing a fair procedure for dismissal

DECONSTRUCTING THE QUESTION (CONT'D)

- “*when reasonable adjustments have been exhausted*” - it is unsafe to assume this is objectively the case
- assume that the employee is disabled
- Two scenarios:
 - 1) where “*absence continues*”
 - 2) where “*contractual obligations are only partially fulfilled*” meaning ongoing difficulties in performing the job because of their ill health condition

HOW RISKY IS IT?

What risk are we considering?

The risk that we might lose an employee where they could have successfully been retained ?

The risk that we might lose or have to settle at cost an ET claim for unfair dismissal and disability discrimination.

Level of Risk depends on :

- How well do you understand the legal principles underlying your policies and processes and the main claims likely to be made?
- How well drafted your sickness absence policies and processes are and how well you apply them

HOW RISKY IS IT? (CONT'D)

Level of Risk cont'd:

- How well do we manage our employees in general and in particular how well do we adjust their working circumstances to remove difficulties that prevent them from doing their job to the best of the ability?
- How well have we managed the ill health/ condition from the outset and in particular the focus on return to work including an adjusted (temporary or permanent) return?
- The facts of the individual case
- How fast do you want a termination outcome - settlement agreement?

UNDERSTANDING AND DE-RISKING UNFAIR DISMISSAL AND DISABILITY DISCRIMINATION (THE MAIN CLAIMS) IN RELATION TO LONG TERM HEALTH MANAGEMENT Preliminary Points

- Unfair dismissal (1974)
- Disability discrimination (1995):
 - i. The duty to make “reasonable adjustments” (*section 20 EqA 2010*)
 - ii. Discrimination arising from something connected to disability (*section 15 EqA 2010*)
- Legally Unfair Dismissal and Disability Discrimination are very different claims
- Unfair dismissal : ET considers whether the employer’s reasons for and approach to dismissal falls within “a range of reasonable response” – ET cannot substitute its own view on whether it would have dismissed
- Cf disability discrimination whether employer has failed in its duty to make reasonable adjustments is judged objectively (it is the ET’s view that counts)

UNFAIR DISMISSAL AND DISABILITY DISCRIMINATION (CONT'D)

- The width of what adjustment might be reasonable is theoretically limitless
- It is the employer's duty to make reasonable adjustments and the employee is not obliged to tell the employer that they are disabled nor to tell the employer what adjustments should be made or whether they are reasonable (but it is best to encourage openness and engagement on these matters)
- Defence to section 15 EqA 2010 claim in practice is closely linked to whether you made reasonable adjustments

UNFAIR DISMISSAL the basic conditions – reason plus reasonableness

- Employees with two years' qualifying service have the right not to be unfairly dismissed.
- A dismissal will be held to be not unfair if two conditions are satisfied:
 - 1) The employer shows that the **reason (or principal reason)** was one of the five potentially fair reasons for dismissal:
 - Capability or qualifications (“capability” covers both “ill health” **and** “sub-standard performance”
 - Conduct
 - Redundancy
 - Statutory restriction
 - “Some other substantial reason” (SOSR)

UNFAIR DISMISSAL the basic conditions (CONT'D)

- 2) (a) Whether in the circumstances (including the employer's size and administrative resources), the employer acted reasonably in treating that reason as a sufficient reason for dismissal, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case – i.e. the fairness of the dismissal process and approach to dismissal (*Section 98(4) Employment Rights Act 1996*)

(“reasonableness”)

IMPORTANCE OF IDENTIFYING THE PROSPECTIVE FACTUAL BASIS FOR CAPABILITY DISMISSAL : DIFFERENT BASIS, DIFFERENT PROCESS

- Capability
 - Long term underlying ill health condition: *process characterised by eg proper enquiry into the health condition and its consequences with employee, OH, medical reports, with discussion with employee focussed on return to and remaining in work with adjusted return as appropriate, failing which more formal meetings ultimately raising the prospect of termination etc. ACAS Code not applicable but many features of the Code will be included for fairness*
- Capability / SOSR
 - Short term intermittent absences – no underlying ill health condition : *process characterised by eg setting standard of attendance expected, a review of the pattern of frequency of and reasons for absence, possible medical enquiry to rule out underlying cause, sympathetic warnings leading to final warning in absence of improvement etc ACAS Code not applicable but many features of the Code will be included for fairness*

IMPORTANCE OF IDENTIFYING THE PROSPECTIVE FACTUAL BASIS FOR CAPABILITY DISMISSAL : DIFFERENT BASIS, DIFFERENT PROCESS (contin)

- Capability
 - Unable to satisfactorily perform the job (no ill health/condition issue) *process characterised by eg evidence of shortcomings / lack of performance, formal meeting with opportunity to challenge, consideration of support enabling improvement, warnings with improvement required and sustained with timescale, ultimately dismissal but prior consideration of alternative employment ie a job that the employee is capable of performing etc. ACAS Code applicable*
- Conduct
 - Non-genuine reason for absence “malingering” / breach of sick reporting / unauthorised absence *process characterised by eg investigation, possible suspension, invitation to disciplinary with clear factual allegations, opportunity to challenge and address allegations, warnings with timescale, dismissal if serious etc ACAS Code applicable*

UNFAIR DISMISSAL “REASONABLENESS” IN LONG TERM ILL HEALTH (DRAWN FROM UNFAIR DISMISSAL CASES)

- Employer needs to inform itself of the medical position including the nature of the illness, the prospects of returning to work and by what date, the likelihood of a complete recovery or if not the ongoing issues and the likelihood of a recurrence of the illness
- Employer needs to consult effectively with the Employee on their illness and their health condition and the medical position; discuss medical reports obtained and establish if the employee accepts the reports and considers medical evidence from the employee if wanted and possibly further medical evidence if there is a conflict. The employer needs to explain the impact of the employees absence on the rest of employers workforce and the need for the employer to have someone doing the work that the employee does and how it is being managed in their absence
- The Employer is engaged in an enquiry and consultation exercise balancing the position of the employee and the employer respectively. In the case of ongoing absence the question arises **How long do I (reasonably) have to wait ?**

HOW LONG WILL AN EMPLOYER BE REASONABLY EXPECTED TO WAIT? (Principles drawn from Unfair Dismissal cases)

Relevant factors:

- Availability (and cost) of temporary cover
- Whether the employee has exhausted their sick pay (dismissal when there is evidence that a return to work might occur before sick pay exhausted may be unfair)
- Administrative costs associated with keeping the employee 'on the books'
- Size of the organisation
- Stresses and strain caused by the absence

Before deciding on dismissal the Employer needs to consider the availability of alternative employment and, if appropriate, the availability of PHI and ill health retirement

DISABILITY DISCRIMINATION: THE DEFINITION OF “DISABILITY”

A person has a disability if:

- (a) They have a physical or mental impairment, and
- (b) The impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities

Deemed Disabilities eg Blindness, MS, HIV infection, Cancer, severe disfigurement

The definition poses four questions:

1. Does the person have a physical or mental impairment?
2. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
3. Is that effect substantial?
4. Is that effect long-term?

Note the width of the definition “impairment” may not be obvious.
Note the questions are factual for the ET to decide.

DISABILITY DISCRIMINATION: THE DUTY TO MAKE REASONABLE ADJUSTMENTS

- Where a provision, criterion or practice (PCP), [or physical feature] puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled the employer must take such steps as it is reasonable to take to avoid the disadvantage *EqA 2010 S 20(3) and 20(4)*
- Where a disabled person would but for the provision of an auxiliary aid be put at a substantial disadvantage in comparison with persons who are not disabled the employer must take such steps as it is reasonable to take to provide the auxiliary aid *EqA 2010 S 20(5)*
- Width of the duties
- Purpose of the duty: to remove the disadvantage... but a good manager would say of any employee “how do I create conditions that allow us to get the best out of an employee in their job?”

THE EMPLOYER IS NOT UNDER A DUTY TO MAKE REASONABLE ADJUSTMENTS IF THEY DO NOT KNOW THE EMPLOYEE IS DISABLED AND DO NOT KNOW THAT THE EMPLOYEE IS AT A SUBSTANTIAL DISADVANTAGE

- Do not pursue “hear no evil, see no evil..” as a policy !
- Knowledge can be actual (e.g. the employee’s manager knows) or constructive (the employer ought to have known)
- There is no legal obligation for an employee to disclose a disability to their employer
- The benefits of disclosure
- Encouraging disclosure
- Confidentiality and consent to share
- Building trust: the important role of the line manager

REASONABLENESS OF ADJUSTMENTS

- The extent to which the adjustment would have removed or ameliorated the disadvantage
- The extent to which the adjustment was practicable
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities
- The financial and other resources available to the employer
- The nature of the employer's activities
- The size of the undertaking

(EHRC Employment Statutory Code of Practice)

REASONABLENESS IN ADJUSTMENTS (CONT'D)

- Many adjustments come at no or little cost, e.g.
 - Change work hours, i.e. to avoid traffic
 - Increasing one-to-one supervision
 - Mentors
 - More flexible work from home
 - Physical changes, i.e. desk height, moving assessment procedures
- Engagement with the employee: by discussing how a job can be done differently you may find ways to do it better
- Keep adjustments under review and make note of agreed adjustments
- Taking specialist advice and many sources of support such as: EHRC “Employing people: workplace adjustments”, Access to Work (possible financial support), October 2022 £64m “Support with Employee Health and Disability “online service , Disability Confident /CIPD “Practical guide for line managers”

DISCRIMINATION ARISING FROM DISABILITY

- “Discrimination arising from disability” occurs where both:
 - A person (A) treats a disabled person (B) unfavourably because of something arising in consequence of B's disability, and
 - A cannot show that the treatment is objectively justified as a proportionate means of achieving a legitimate aim

(Section 15(1) EqA 2010)

- Legitimate aims might include: having staff attend with sufficient regularity; having a fair, effective and transparent sickness management policy/procedure; and making efficient use of resources.
- Proportionate means would involve considerations as to whether this was the least discriminatory way to achieve the legitimate aim – hence if there has been a failure to make reasonable adjustments you will not be able to show proportionate means .

CONCLUDING :THE TWO SCENARIOS: (1) “ABSENCE CONTINUES” OR (2) “CONTRACTUAL OBLIGATIONS ARE ONLY PARTIALLY FULFILLED”

- 1) “Absence continues” – probably the easier scenario: the unfair dismissal “reasonableness” plus “how long do I have to wait” considerations plus the disability considerations of reasonable adjustment attempting to get the employee back to work in an adjusted role or a new role if available
- 2) “Contractual obligations are only partially fulfilled” the ongoing management of someone with a disability/ health condition which affects adversely their performance
 - Equal access to training and development for all
 - Making adjustments to the performance management process, e.g. accessible meeting room, longer time to prepare, work colleagues to support
 - Discussing performance through a positive process focusing on support to allow employee’s best – discussions to explore and develop openness and trust. Detailed consideration and effecting reasonable adjustments to their job.

Thank you

Any questions?

Disclaimer

Brabners retain all the rights in the intellectual property (including without limitation copyright, patents, design rights and trade marks) (IP) and confidentiality rights in these slides provided to you (the Materials). The Materials may only be used for the specific purpose for which they have been provided and must not otherwise be used, reproduced or disclosed for any other purpose without permission.

The Materials are provided for information purposes only and are not intended to amount to advice on which reliance should be placed and no warranties or representations are made about the contents of the Materials. To the fullest extent permitted by law, we disclaim and exclude any liability and responsibility for any damage or loss caused by reliance on or in connection with the Materials or their contents.