

Dismissal: Shaping New Developments into Solution- Focused Answers for Scottish Employers

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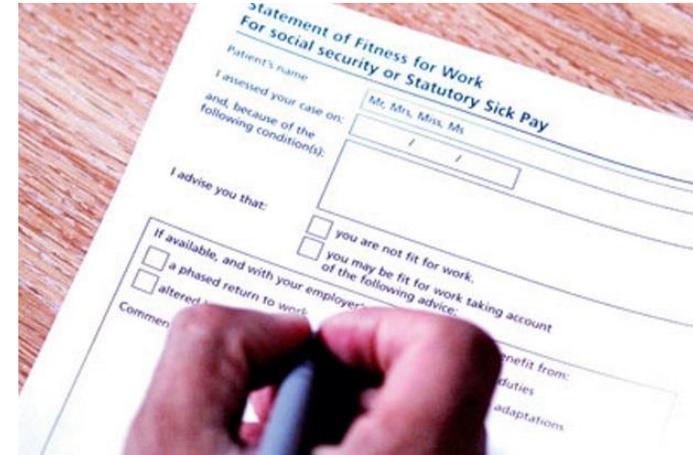
Stress

How do you break the cycle with a capability dismissal when performance management has led to stress, absence, and a refusal to return to work?

Two alternative questions

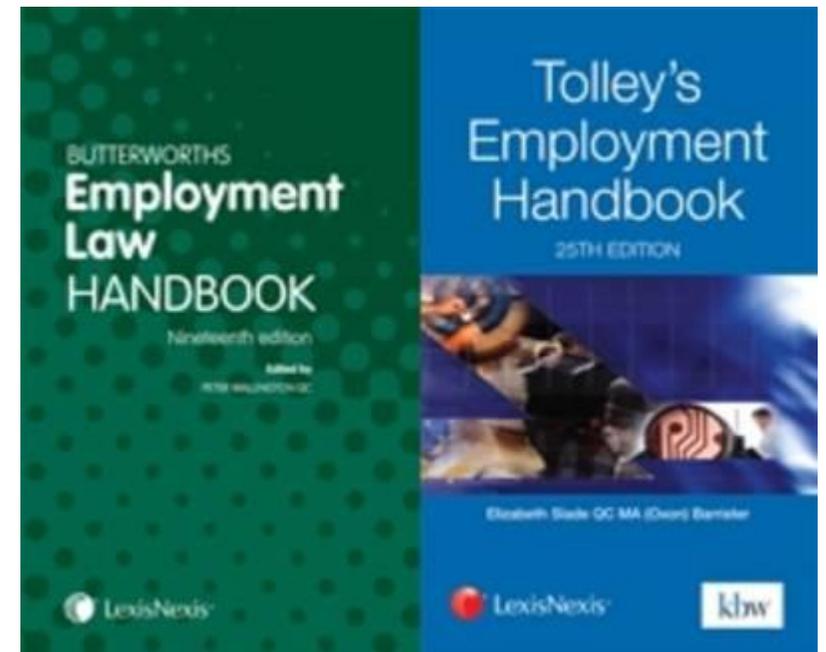
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- When stress or possibly even disability creep into an ongoing performance improvement plan, what should a reasonable employer be aware of?
- When a performance improvement plan is disrupted by absence, what should a reasonable employer do?



Legal Issues to keep in mind

- Unfair dismissal (if the person is dismissed)
- Breach of contract/constructive dismissal if matter not handled properly
- Discrimination claim if the employee is disabled



Practical Issues

- Disruption caused to business as a result of underperformance – worsened if absence follows
- Management time and effort
- Possible financial and reputational damage if claims arise
- Ask what outcome you really want and then work back on how to get there – do you want to dismiss or are you open to supporting the person back and playing the long game?



Scenario 1

Simon

- Number of errors and poor output of work
- Employer implements a PIP
- Simon discloses that he has been struggling with his mental health recently and thinks this is why his performance is poor



Scenario 1 (cont)

Disability

- Substantial long term adverse effect on ability to perform normal day to day activities
- Stress is defined as “the adverse reaction which people have to excessive pressure or other types of demand put on them”
- Herry v Dudley Metropolitan Council & Another UKEAT/0100/16/LA

Scenario 1 (cont)

Check yourself before you wreck yourself!

- Consider obtaining a medical report to assess true medication position
- This will assist in forming a view if Equality Act is likely to apply
- Relevant because duty to make reasonable adjustments may apply

Scenario 1 (cont)

Reasonable adjustments

- Implementing a PIP will amount to a PCP (*Osei Adjei v RM Education*)
- If it places a disabled employee at a disadvantage, may need to be adjusted/
- Is the adjustment likely to make a difference to the disadvantage
- EHRC – alter hours of work; training or mentoring; modifying procedures; providing supervision or other support.



Scenario 2

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- Formal PIP commences
- Employee reacts badly
- Fit note citing stress at work
- What are your options?



Scenario 2 (cont)

- Pause the PIP
- Be patient and extend the PIP to cover time of absence?
- Absence management procedures?
- Intermittent or long term
- Consider obtaining medical advice

Take away tips

- Focus on what outcome you want
- If dismissal is the outcome be patient and prepare to exhaust all alternatives
- If a hint of underlying medical condition – seek expert advice
- Be aware of reasonable adjustments
- Allow time for adjustments to “bed in” (*South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley*)
- Make sure you can justify any unfavourable treatment



Questions?

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