Capital Law

info@capitallaw.co.uk
capitallaw.co.uk

White Paper Conference- 5th December 2024

How do you de-risk capability dismissals in long-term sickness cases where:

01 OH is sitting on the fence, but a return to work seems unrealistic, and

02 the employee insists on returning but repeatedly and quickly falls sick again?

Key Cases of Note

Hutchinson v Enfield Rolling Mills [1981] IRLR 318

Mr Hutchinson was dismissed after being seen at a union demonstration while off sick with sciatica.

The (then) Industrial Tribunal found the dismissal to be unfair because it was not reasonable for the employer to go behind the sick note indicating that he was unfit for work, but Mr Hutchinson was held to have contributed 100% to the dismissal so no compensatory award was made. Mr Hutchinson appealed against this and the employer cross appealed.

The Employment Appeal Tribunal allowed the cross appeal and remitted the case for fresh consideration, directing that it was not unreasonable for an employer to go behind a sick note where they could justify doing so.

Merseyrail Electrics 2002 Ltd v Taylor [2007] UKEAT/0162/07/MAA

Ms Taylor brought a claim for unlawful deduction from wages. The employer refused to pay sick pay, based on a contractual term which permitted them to withhold it, if there was any doubt that the absence was for reasons other than ill health.

The Employment Appeal Tribunal dismissed the employer's appeal, stating that '*in the absence of any contradictory medical evidence[…] a tribunal should not go behind what appears on the face of the medical certificate*'.

Liverpool AHA v Edwards [1977] IRLR 471

Mrs Edwards was dismissed based on a medical report which said she could not do some of her duties. She appealed against the dismissal and requested a further medical report. Her request was refused but, a further medical report stated her movement was not restricted in any way and she was fit to continue in her role.

The Employment Appeal Tribunal stated that a layman was not required to evaluate expertise in medical reports (unless it was plainly erroneous), and there would be a potential breach of the common law duty of care to employees, if an employer were to ignore a medial report and an employee was subsequently injured.

The appeal was allowed because Mrs Edwards not given a reasonable opportunity to challenge the medical report with a counter report.

East Lindsey District Council v Daubney [1977] IRLR 181

The employer dismissed Mr Daubney, on the basis of a report from their own medical adviser.

The dismissal was held unfair because the employee had not been consulted on the report, and was therefore deprived of the opportunity to give his view and/or request an independent medical opinion.

The decision to dismiss is not a medical question, it is a decision made *in light* of the available medical evidence. The medical advice needed, and level of detail, will depend on the situation.

Spencer v Paragon Wallpapers Ltd [1976] IRLR 373

Mr Spencer was off work with a bad back when a redundancy situation arose, during which he was transferred to a different role. The situation changed and the workforce was required to be back at work. The employer contacted Mr Spencer's doctor to ascertain when he would return to work, with the doctor advising a return within 4-6 weeks.

Mr Spencer was dismissed so his position could be filled immediately.

The Employment Appeal Tribunal confirmed the importance of consultation and noted that there should be discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover their health.

BS v Dundee City Council [2014] IRLR 131

BS was on long-term sick leave suffering from anxiety and depression. The employer set dates for return to work, and occupational health advised his condition was improving and he was expected to be back in work in 1-3 months. However, when BS attended a meeting with his employer, he said he was not feeling any better since their last meeting. The employer dismissed on the basis he was unlikely to return in the short term or foreseeable future.

The Employment Tribunal originally held that the dismissal was unfair because the employer did not have reasonable grounds for its belief that BS was unlikely to return to work. The Employment Appeal Tribunal allowed the employer's appeal and remitted for fresh tribunal consideration, then BS subsequently appealed. The Court of Session remitted for fresh consideration (again), directing to consider:

1. Whether any reasonable employer would have waited longer before dismissing the employee;
2. The need to consult the employee and take into account their views; and
3. The need to take steps to discover the employee's medical condition and likely prognosis, but this merely requires obtaining proper medical advice, it does not require employer to push for detailed medical examination. The employer must ask the correct question and ensure it is answered.

In the circumstances where there was such an inconsistency between the occupational health opinion and the employee's opinion, it was not reasonable to disregard the medical advice without first attempting to clarify the medical position.

O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145

Ms O'Brien was on long-term sick leave from December 2011 following incidents at work. In January 2013, she had recently been referred to a therapist and hoped to return to work by the end of April 2013, but this could not be confirmed by her therapist without further treatment. She was dismissed on the basis of the length of time she had been absent, with no firm indication of a likely return to work date.

Ms O'Brien brought claims for unfair dismissal and discrimination arising from disability (s.20 EqA 2010).

The Employment Tribunal upheld her claims, but this was over turned by the EAT and the case was further appealed to the Court of Appeal. The Court of Appeal restored the Employment Tribunal's original decision as there had been evidence that she was fit to return to work.

Underhill LJ stated:

'The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis[…] the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject.'

O'Donoghue v Elmbridge Housing Trust [2004] EWCA Civ 939

Ms O'Donoghue had been off work for more than 3 months and was not cooperative when her employer made attempts to investigate her absence. After lengthy correspondence, she was dismissed.

It was reasonable to dismiss Ms O'Donoghue in light of the refusal to consent to medical assessment over a long period of time and the reasonable attempts by the Respondent to obtain it.

DB Schenker Rail (UK) Ltd v Doolan [2011] 4 WLUK 345

Mr Doolan was on sick leave due to suffering from work-related stress. His employer took advice from an occupational health physician and an occupational psychologist, despite the doctor's view that referral to an occupational psychologist was not required. The physician and Mr Doolan's GP advised that he was fit to return to work. Mr Doolan was of the view he was highly unlikely to be off work due to stress again, and wanted to return to his usual job. However, the occupational psychologist (instructed by the employer) thought it was unlikely he could return to the same role, without further stress-related absences. Mr Doolan was dismissed based on capability.

The Employment Tribunal found that Mr Doolan had been unfairly dismissed, however the Employment Appeal Tribunal allowed the appeal, siding with the employer. The EAT stated:

"*Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report*.

Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee and, in cases, such as the present, requires to make his own assessment of the risk of a return to work causing a recurrence of the employee's ill health, albeit that any such assessment will normally be informed by the content of an expert report or reports."

Brightman v TIAA Ltd UKEAT/0318/19

Mrs Brightman was dismissed by reason of capability, but by the date of dismissal the GP report relied on was over a year old and the occupational health report was over 6 months old. Mrs Brightman had had periods of sickness absence but, was back in work and working her contracted hours by the time of dismissal.

The claims for unfair dismissal and discrimination arising from disability were dismissed, and this decision was appealed by Mrs Brightman. The Employment Appeal Tribunal drew a distinction between dismissing on the basis of long-term sickness and risk of future periods of absence.

The crux of this case was not about Mrs Brightman's long-term sickness but rather about the foreseeable risk of future periods of sickness absence. The tribunal must look at the information relied upon by the decision maker *at the time of the decision*. The case was remitted to the tribunal for re-hearing.

Crampton v Dacorum Motors [1975] IRLR 168

Mr Crampton had been advised by his GP to rest for 4 weeks, due to suspected angina, but the diagnosis of the condition had not yet been confirmed. Mr Crampton was due to have be examined by a specialist to attempt to reach a firm diagnosis. The employer decided it was in their best interests for Mr Crampton to stop working in his role and, with no other role available for him, he was dismissed.

It was held that the dismissal was unfair because it was unreasonable for the employer to dismiss based on the GP's opinion alone, rather than seeking a specialist's opinion. The employer acted too hastily in this case.

Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471

Mr Mitchell was unable to work due to a fractured tibia and he told his employer he could not yet give a date he would be back in work as he had to see a consultant to get a firm prognosis. The employer dismissed Mr Mitchell because he could not say when he would be returning to work.

The tribunal held the dismissal was fair, and the Employment Appeal Tribunal subsequently allowed Mr Mitchell's appeal. There is no duty on employees to provide information and indicate prospects of recovery, the onus is on the employer to investigate and to seek medical advice as appropriate.

CFS Management Services Ltd v Thomas [2012] UKEAT/0511

An occupational health advisor wrongly assumed that Mr Thomas was in work and did not examine him.

The tribunal held the dismissal was unfair, and the employer appealed this decision. The Employment Appeal Tribunal dismissed the appeal. The employer should be alive to the question of whether occupational health had been accurately briefed and should not rely on a medical report which is obviously flawed.