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Disability-related Long-Term
Sickness Absence & Dismissals

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Mark Landon
Partner, Employment
0207-822-1905
mark.landon@weightmans.com

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The issue

“When diagnosis and timeframe for recovery are uncertain, how many ‘false dawns’ of a return to work do you allow a disabled employee who’s on long-term sick leave?”

Some general observations

- The same considerations apply in both the public and private sectors, albeit that there is often a more generous sick pay scheme and greater potential scope for rehabilitation/redeployment in the public sector
- Decisions about how best to handle disabled sick employees, including whether and when to dismiss them, ultimately rest with management
- However, management must make (and be able to evidence) well-informed, objectively justifiable decisions involving a fair and reasonable process...

...Potential contributors: the employee, HR, OHA, Disability experts, H&S assessor

Some general observations

- Employers are not expected to put up with unreasonable levels of disability-related long-term sickness absence
- It will always be lawful to dismiss an employee who's duration (and/or frequency) of sickness absence has become unsustainable...
...provided that management has given due consideration to its various legal obligations towards that employee...

Disability-related sick absence dismissals – legal issues

- Fair dismissal principles, notably adopting a fair procedure throughout...
- Disability discrimination:
 - Discrimination arising from disability) ...both include the concept of
 - Indirect disability discrimination) justification...which in turn depends upon the employer fulfilling...
 - The Duty to make reasonable adjustments -> cornerstone of disability law
- n.b. potential impact of **Age discrimination** / **Health & safety legislation** / **Personal injury law**

Discrimination arising from disability

- Section 15 of the Equality Act:

1) A person (A) discriminates against a disabled person (B) if–

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim (i.e. A cannot justify the unfavourable treatment).

2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

Discrimination arising from disability

Recent case law:

- Buchanan v The Commissioner of Police of the Metropolis [2016] EAT
- Hall v Chief Constable of West Yorkshire Police [2015] EAT & Risby v LB Waltham Forest [2016] EAT
- Charlesworth v Dransfields Engineering Services Ltd [2016] EAT
- City of York Council v Grosset [2018] CA

Indirect disability discrimination

- Consists of three elements:
 - The employer applies (or would apply) a provision, criterion or practice (PCP) to everyone;
 - The PCP disadvantages (or would disadvantage) a particular group who share a particular disability;
 - The claimant – who is a member of that group – is disadvantaged by the PCP; and
 - The employer cannot objectively justify its actions

Duty to make reasonable adjustments

Comprises three elements...

- Where a provision, criterion or practice applied by or on behalf of the employer; or
- Where a physical feature of the employer's premises; or
- Where the non-provision of an auxiliary aid or service...

puts a disabled person at a substantial disadvantage in comparison with non-disabled people, the employer must make reasonable adjustments to prevent that disadvantage

- Crucial factor in handling sick absence management

Duty to make reasonable adjustments

- Factors when considering what is a 'reasonable' adjustment:
 - Effectiveness (and may need expert guidance)
 - Practicability (and remember Health & Safety)
 - Cost (the employer must bear this)
 - Employer's financial or other resources
 - Availability of financial or other assistance
 - Type and size of employer
- The ultimate decision re reasonableness rests with the Employment Tribunal

Duty to make reasonable adjustments

Reasonable adjustments may include...

- Re-allocating duties
- Transferring the disabled person to an existing vacancy (n.b. evolving case law)
- Altering working hours
- Assigning to a different place of work or training, or arranging homeworking
- Time off for rehabilitation, assessment or treatment
- Arranging training / mentoring for the disabled person & others
- Acquiring or modifying equipment, instructions, etc.
- Permitting flexible working

Duty to make reasonable adjustments

Reasonable adjustments and absence management:

- Griffiths v Secretary of State for Work and Pensions [2015] CA
 - PCP = the requirement to maintain a certain level of attendance at work, rather than the attendance policy – this requirement would substantially disadvantage disabled employees with disability-related sick absences
 - The reasonable adjustments duty was engaged, even though the absence management policy was applied equally to everyone – duty is activated once there is evidence that a PCP places a disabled person at a substantial disadvantage because of their disability

Duty to make reasonable adjustments

- Buchanan v The Commissioner of Police of the Metropolis [2016] EAT:
 - It was the application of the employer's sick absence procedure to the individual that had to be objectively justified, rather than simply the procedure itself
- Ruiz Conejero v Ferroser Servicios Auxiliares [2018] ECJ:
 - Policies involving attendance thresholds are not inherently unlawful in relation to disabled workers but a duty to make reasonable adjustments might arise, or the employer might be required to justify any decision to dismiss or issue an absence-related warning. The outcome in any case will be fact sensitive

Practical Issues

- Maintain accurate records & a robust paper trail
- Adopt a partnership approach with the employee (and Rep.)
- Address any management concerns proactively and early
- Be sure to explain the commercial impact of any disability-related concerns from the outset

Disability dismissals – practical Issues

- Seek medical and other relevant expert input proactively and early...
 - OH referrals
 - Joined-up medical advice
 - Does the medical report make sense or do you require clarification / need to await outstanding test results or treatment, etc?
 - Is the diagnosis and prognosis certain?
 - Conflicting medical reports

Disability dismissals – practical Issues

- In cases of longer -term sickness absence, be sure to maintain regular contact with the absent employee – key aspect of ‘acting reasonably’ should an employee ultimately be dismissed
- Review considerations re rehabilitation, reasonable adjustments and suitable alternative employment on an ongoing basis...
 - knowing what vacancies exist within the Business (e.g. at other sites)
 - persuading another manager to take on ‘lame duck’
 - maintaining adequate paper trail to evidence when no alternative duties exist

Disability dismissals – practical Issues

Long-term sickness absence – consideration of dismissal considerations:

- nature, length and effect of illness on business / colleagues
- prospects and timescale for recovery
- nature of employment and ability to cover absence
- employee's length of service
- How illness was caused
- Whether contractual sick pay has expired (& PHI position)
- Requirements of disability legislation
- Requirements of H&S legislation

(Employee should have a right of appeal)



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Contact Details

Mark Landon

Partner

0207-822-1905

Mark.landon@weightmans.com

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