

White Paper Conference- Discrimination in the Public Sector

Short term absence: When is it reasonable to draw the line under frequent short-term absences due to an underlying mental health condition?

Introduction

- Short term absences and the nature of the absence
- Definition of Disability
- Duty to make reasonable adjustments
- Sickness Absence policies and procedures
- Case law

- What are the reasons for the short term absence?
- Is there any pattern to the short term absences – Monday or Friday?
- Do the absences coincide with specific work flows?

- Critical that you look at each case on a case by case basis.
- Do you need to obtain up to date medical information, Occupational Health report?
- What does your sickness absence/capability policy provide in relation to short term absence.
- What are its trigger points?

Equality Act 2010

Section 6

(1) A person (P) has a disability if—(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Section 20 of the Equality Act 2010

- Where a provision, criterion or practice applied by the employer puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. Here the employer must take such steps as it is reasonable to take to avoid the disadvantage –20 (3)

What does this mean in the context of short term absences?

- Are the absences related to the underlying mental impairment – be wary of making presumptions.
- Are there any adjustments you could make which may decrease the number of days taken where they relate to the mental impairment, e.g.
 - Reduced working hours;
 - Additional support .

In circumstances where the situation does not improve, what are your next steps?

- How do you decide that the situation is not acceptable?
- Does your duty to make reasonable adjustment extend to the way you deal with absences and your policies?
- Do you make allowances within your policy or procedure where an employee is disabled?

- When considering the making of reasonable adjustments consider the PCP and the precise nature of the disadvantage which it creates.

Griffiths –v- Secretary of State for Work and Pensions UKEAT/0372/13

- Ms G had worked for SoS as an administrative assistance with effect from 1976.
- In 2011 she had a period of continual absence of 62 days during which time she was diagnosed with post viral fatigue syndrome.
- On her return from work, the OH specialist diagnosed her as suffering from Fibromyalgia.

- The level of absence triggered a written improvement warning – this indicated that that a future pattern on sickness may trigger a further warning or dismissal.
- Ms G lodged a grievance against the warning and sought reasonable adjustments. The adjustments requested were:
 - that Ms G's absence period would be disregarded for the purposes of the attendance policy; and
 - that the number of days absence which would activate the policy would be increased.

- The EAT observed that the policy applied to all employees and made special provision for those who were disabled.
- At the Court of Appeal – the EAT looked at the wrong PCP it was not the operation of the sickness procedure but the requirement to maintain a certain level of attendance in order not to suffer the risk of disciplinary sanctions.

Bray –v- London Borough of Camden UKEAT/1162/01

- Mrs Bray was employed as Senior Benefits Assessor and suffered from Osteoarthritis.
- She had significant periods of absence as a result of her disability.
- The Council had targets for absence – 8 days absence per employee in a twelve month period.
- The “capability procedure” contained trigger points for action by management after fifteen days, thirty days or seventy days.

- After a third significant period of absence, Mrs Bray was issued with a final written warning for the level of her absence.
- Mrs Bray issued a claim for disability discrimination against the Council and a failure to make reasonable adjustments.
- Mrs Bray, argued that the Council had failed to make a reasonable adjustment by failing to exclude from the capability procedure that part of her absence from work which was as a result of her disability

Jennings –v- Barts and the London NHS Trusts UKEAT/0056/12

- Mr Jennings was dismissed in 2008 for poor attendance;
- Over the course of his employment he suffered from a number of conditions including:
 - Back problems/pain;
 - Angina – later found to be an incorrect diagnosis;
 - Stress;
 - Anxiety symptoms which indicated PTSD – later found to be an inaccurate diagnosis

- Mr Jennings was subsequently dismissed for capability.
- Mr Jennings complained that he had been discriminated against on the grounds of his disability and had been unfairly dismissed. He also claimed that the NHS Trust had failed in their duty to make reasonable adjustments.

- Issues in relation to reasonable adjustments were identified as follows:
 - Sickness absence policy;
 - Attendance criterion;
 - Dismissal policy/practice;
 - Performance, assessment and target – setting policy and/or practice.

- The EAT upheld the Employment Tribunal's decision that it was not a reasonable adjustment for the employer to exempt the employee from the short term absence policy

- Short term absences are not easy to manage;
- There are no quick fixes;
- Treat each case/employee on a case by case basis;
- Think through the PCP when looking at reasonable adjustments;
- Good luck!



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