

Capability and absence

Malcolm Pike, Partner

Some facts and figures...

- ▶ CIPD Annual Survey Report on Absence Management 2016:
 - ▶ Average level of absence **6.3 days** per year per employee
 - ▶ Higher for **public sector** workers
 - ▶ Higher for **manual** workers
 - ▶ Higher for workers in **larger** organisations

More facts and figures...

▶ Top 5 causes of short term absence:

- ▶ Minor illnesses
- ▶ Stress-related illnesses
- ▶ Muscular-skeletal injuries
- ▶ Mental ill-health
- ▶ Back pain

▶ Top 5 causes of long-term absence:

- ▶ Stress-related illnesses
- ▶ Acute medical conditions
- ▶ Mental ill-health
- ▶ Muscular-skeletal injuries
- ▶ Back pain

**WHEN DOES ABSENCE BECOME
A MATTER OF CAPABILITY?**

Non-genuine absence

- ▶ **Will the dismissal be by reason of capability?**
 - ▶ **No:** does not relate to the employee's skill, aptitude, health or other physical or mental quality
- ▶ **Will the dismissal be by reason of conduct?**
 - ▶ **Yes:** dishonest representation of ill-health to take absence from work and claim sick pay
 - ▶ Metroline v Ajaj: “*dishonesty and a fundamental breach*”
 - ▶ Apply disciplinary procedure

Genuine frequent short-term absence – minor and unconnected reasons

- ▶ **Will the dismissal be by reason of capability?**
 - ▶ Is the employee's skill, aptitude, health or other physical or mental quality at the forefront of the employer's mind?
 - ▶ **NO** = SOSR dismissal
 - ▶ Wilson v Post Office and Ridge v HM Land Registry
 - ▶ **YES** = capability dismissal
 - ▶ The importance of the statutory label: Devonshire v Trico-Folberth

Genuine frequent short-term absence – minor and unconnected reasons

- ▶ **What process should be followed?**
 - ▶ **If SOSR dismissal:**
 - ▶ Follow any written absence management policy
 - ▶ (i) Review absences and reasons; (ii) Allow employee chance to make representations; (iii) Issue warnings
 - ▶ Not strictly required to obtain medical advice: Roll-Royce v Walpole
 - ▶ **If capability dismissal:**
 - ▶ Same as process for frequent, short-term absences where there is an underlying condition (next slide)

Genuine frequent short-term absence – underlying condition

- ▶ **Will the dismissal be by reason of capability?**
 - ▶ **Yes:** the employee's skill, aptitude, health or other physical or mental quality will be at the forefront of the employer's mind
 - ▶ Where past absenteeism also an issue, treat as capability dismissal not SOSR
- ▶ **What process should be followed?**
 - ▶ Similar to process for long-term ill-health absence:
 - ▶ (i) review absences and reasons; (ii) consult with the employee; (iii) investigate health; (iv) consider options other than dismissal
 - ▶ Consider disability status and reasonable adjustments

Genuine long-term absence

- ▶ **Will the dismissal be by reason of capability?**
 - ▶ **Yes:** the employee's skill, aptitude, health or other physical or mental quality will be at the forefront of the employer's mind
- ▶ **What process should be followed?**
 - ▶ Consider whether it is possible to wait any longer for the employee to return
 - ▶ Follow a fair process:
 - ▶ (i) consult with the employee; (ii) thoroughly investigate health; and (iii) consider options other than dismissal
 - ▶ Consider disability status and reasonable adjustments

Genuine absence – frequent & long term

- ▶ Might the employee be disabled?
- ▶ In all cases, consider:
 - ▶ Disability status
 - ▶ See: Gallop v Newport City Council
 - ▶ Reasonable adjustments
 - ▶ Nikola-Erotokritou v Herfordshire County Council

Does the Acas Code apply to capability dismissals?

- ▶ Acas Code silent on whether it applies to ill-health dismissals
- ▶ Holmes v Qinetiq:
 - ▶ Code does **not** apply to capability dismissal procedures
 - ▶ Only applies in context of ill-health where there is culpable conduct requiring sanction (e.g. failure to comply with absence reporting procedure)
- ▶ Sensible to benchmark capability procedure against Acas Code principles

STRESS-SPECIFIC ISSUES

What is stress?

- ▶ HSE definition:
 - ▶ “...*the adverse reaction people have to excessive pressures or other types of demand placed on them*”
- ▶ Stress is a ‘reaction’ rather than an illness itself.
- ▶ Can be caused by factors inside and / or outside the workplace.
- ▶ Important to treat mental illness (caused by stress) as an illness / injury in exactly the same way as physical illnesses and injuries (e.g. back problems, dermatitis)

What is the cause of the stress-related absence?

- ▶ The importance of ascertaining the cause: compliance with Health & Safety obligations
- ▶ **Investigate** whether the stress is work-related:
 - ▶ Review the absences and the reasons given
 - ▶ Consult with the employee
 - ▶ Obtain medical advice: GP and/or occupational health

Capability management for frequent, short-term stress-related absences

- ▶ Dismissal likely to be by reason of capability
- ▶ Procedure the same way as frequent, short-term absence for underlying condition with some additional steps

Capability management for frequent, short-term stress-related absences – additional steps

- ▶ If stress **is** work-related:
 - ▶ Ensure all health and safety obligations have been discharged → **can any steps be taken to alleviate the stress?**
 - ▶ Consider options other than dismissal → **where stress is work-related then “go the extra mile” before dismissal (Royal Bank of Scotland v McAdie)**
- ▶ If stress **is not** work-related:
 - ▶ Consider what other help could be offered to help resolve their stress e.g. Employee Assistance Programme; flexible working

ANY QUESTIONS?