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**What do you do about the inherent fear of dismissing employees who cannot sustain a good level of attendance because of a long term condition? What if the employee cannot or simply will not engage with you?**

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## What makes managers hesitate?



- Unwillingness to sacrifice time in absence management
- Lack of time to look back and analyse
- Emphasis on getting the job done, turnover, figures
- Belief staff will “get the message”
- Personal reactions to ill health
- Inconsistency ~ at all levels
- Dislike/fear of prying/confrontation
- Unawareness of process
- Fear of legal repercussions

# What are you trying to avoid?



## Allegations/claims of:

- Disability discrimination
  - Direct incl harassment
  - Indirect
  - S 15 EqA: “something arising”
  - Reasonable adjustments
- Unfair dismissal
  - Capability – ill health
  - Conduct – non engagement
  - SOSR – is it presence or absence? Clarity!!
- Breach of contract
  - Specifically “Aspden” claims

## What are you trying to avoid?



**Management time and effort**

**Reputational damage**

**Employee relations implications**

# Dismissal – the last resort



## Before you get there...

- Process – referral
- Occupational Health
- Is the employee disabled?
- Process - consultation
- Reasonable Adjustments
- Process – implications of RAs
- Sick pay
- Notifications
- Process

# Dismissal – the last resort



## What is a fair process?

- The “range of reasonable responses” test
- Prior absence management
- Accumulation of fair warnings
- Fair timescale for improvement
- Legal minimum procedures

# Fairness & Reasonableness



## What are appropriate considerations?

- Illness duration
- Recurrence and its impact
- Extent of absence, periods of attendance in between
- Need for temporary cover
- Impact on colleagues
- Length of service and proportion of absence
- Relevant options
- Level of employee's understanding

# Lessons from Europe and Case Law



### Is continuing sick pay a reasonable adjustment?

- **Griffiths v DWP [2015] EWCA (Civ) 1265**
  - Not necessarily; a disabled employee cannot require an employer to goldplate already favourable treatment

## Exhaust other options



### Early retirement

- **First West Yorks Ltd v Haigh UKEAT/0246/07**
  - Reasonable employer should give proper consideration to ill health retirement scheme before it dismisses for long term sickness

# Breach of Contract



## Impact of PHI

- **Aspden v Webbs Poultry [1996] IRLR 521**
  - Implied term – entitlement to benefit
- **Lloyd v BCQ Ltd UKEAT/0148/12 & 0239/12**
  - Unless an express provision allows for it in the contract, employee will have damages claim if dismissal thwarts a potential or actual claim under PHI cover

## Frustration – another means to an end?



### Legal history?

- **Marshall v Harland & Wolff [1972] IRLR 90**
- **Egg Stores (SH) Ltd v Leibovici [1976] IRLR 376**
- **Hogan v Cambs CC UKEAT/0382/99**
  - Termination was independent of the parties
  - Employee began degree course while off sick
- **Warner v Armfield & Retail Leisure Ltd UKEAT/0376/12**
  - Doctrine may apply but not if there is a failure to make RAs or employer could reasonably have acted to maintain employment

## Received wisdom of the past



### In the past, courts and tribunals took a robust view...

- Yes, but employer may then have to dismiss - *Elmbridge Housing Trust v O'Donoghue*
- If in Tribunal, claim may be struck out - *Hanlon v Kirklees MBC*

### But then along came s15 EqA ...

# Failure to engage



## Urso v DWP [2017] IRLR 304

- Absence and/or failure to engage (= refusal to see OH)
- can be something arising in consequence of disability
- Is it justifiable to dismiss following a refusal to engage?
- Yes, potentially

## Justification - Proportionate means & legitimate aims



**“Objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”**

- **Business requirements**
  - Continuity of service
  - Customer relationships
  - Training and awareness
- **Management principles**
  - Development
  - Opportunity
  - Consistency
  - Certainty



## Individual considerations

- Health & Safety (stereotyping?)
- OH recommendations
- Personal wellbeing
- Impact on colleagues/workplace?

# Non-engagement



## Seek medical advice: is employee well enough

- (i) to attend work?
- (ii) to attend a meeting?

## Adjourn or proceed?

- Reasons given
- Medical evidence
- Previous attempts

## Proceeding in absentia

- Invite employee submissions where possible
- Show these were considered!

# Medical Suspension



## Restricted usage

### ss 64, 65, 69, 70 ERA 1996

- Protection from specific H&S hazards
- Subject to one month's service, entitled to 26 weeks' pay
- Pay at statutory rate

### No pay if ...

- Incapability due to disease/bodily/mental disablement
- Been offered suitable alternative work which has been unreasonably refused or not complied with availability requirements

# FAQs



### Can an employer deny a disability without medical evidence?

- Almost certainly not – *De Keyser v Wilson*
  - Joint expert
  - Briefed by agreement
  - With relevant legal background
  - Tribunal will set timetable



### Can you dismiss an absent employee without considering reasonable adjustments or seeking medical advice?

- Probably, if you are not on notice of disability
- No, if you are aware or on notice of disability
- *Murray v Newham CAB*



### **Can you manage sickness absence with GP's input, only?**

- Yes, but not advisable

### **Can you justify a sickness dismissal with information you find out later?**

- No, although this may affect compensation

# What does it cost to get it wrong?



## Compensation

- unfair dismissal awards
- no upper limit on disability discrimination awards
- main award - based on financial losses
- injury to feelings award
- compensation for personal injury
- employer and individual liability (*Way v Crouch*)

## Legal fees

## Precedent

## ER impact

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