



**Q: When and how do you amend  
trigger points and progress warnings  
for frequent short term absences due  
to a mental health condition?**

**Gareth Brahams**

**Managing Partner**

**Brahams Dutt Badrick French LLP**

**BDBF**

**A:** It is not about how many extra days you must wait but about the steps you take to get to the decision and what you discover when you make the enquiries

# The Legal Parameters

- Contract
- Fairness
- Equality

# Contract

- Notice
- Pay
- Contractual policies on notification of absence
- Right to refer to medical assessment

# Fairness

- Qualifying service
- Employer must be properly informed of the medical position
- Consulting the employee
- Giving them reasonable warning
- Consideration for alternative employment where appropriate

# Equality Act

- Only applicable if:
  - employee disabled
  - employer knows/ought to have known employee is disabled
  - disability causes the problem
- Reasonable adjustments to practices or criteria
- Detriment/dismissal is for a reason related to disability and dismissal/detriment is not proportionate means of achieving legitimate aim

# It all comes down to...

- Not being mechanical but:
  - Discussing it with the employee
  - Obtaining appropriate medical input, but
  - Making your own judgment

# What are you trying to find out?

- Is the employee actually disabled?
- What is the cause of the condition?
- What impact does the condition cause? Is the absence actually caused by the disability?
- How long will this go on for?
- What can the employer do that would actually help apart from just giving the employee extra leeway?

# What allowances should be made for absence caused by disability?

- 2 legitimate approaches (*HMRC v Whiteley*)
  - Discount all disability related absence; or
  - Discount what would be reasonable?
- What is reasonable?
- Fact specific but:
  - Will it work? (e.g. *Griffiths, O'Connor*)
  - Is it reasonable? Proportionate to achieve the legitimate aim of combatting absenteeism? Recent record? Prognosis
  - Weigh relative impacts and benefits

# Contact

Gareth Brahams

Managing Partner

0203 828 0352

[garethbrahams@bdbf.co.uk](mailto:garethbrahams@bdbf.co.uk)