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Long-term sickness absence: De-risking capability dismissals

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How do you de-risk capability dismissal in long term sickness cases where:

- 1) OH is sitting on the fence but a return to work seems unrealistic; and
 - 2) the employee insists on returning to work but quickly falls sick again.
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Legal framework

Unfair dismissal

- Ill health (capability) is potentially fair reason for dismissal
- Employer has to demonstrate:
 - Genuine belief there is a need to dismiss for ill health
 - Reasonable grounds for belief
 - Carried out reasonable investigation
 - Acted within range of reasonable responses

Disability discrimination

- Unlawful to discriminate on grounds of disability
- Disability definition
 - Physical or mental impairment
 - Substantial and long term negative effect on ability to do normal day to day activities
- Indirect discrimination & discrimination arising from disability



Legal framework – fair process

- Up to date medical advice
 - Consultation with employee about medical advice
 - Fair warning of risk of dismissal
 - Consider alternative positions/reasonable adjustments
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**SITTING
ON THE FENCE
IS STRICTLY PROHIBITED**



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How to de-risk if OH is sitting on the fence

Reasonable grounds for belief – reasonable investigation – reasonable response

- Raise concerns and ask more questions
 - Request a second opinion
 - Explore specialist/GP/expert input
 - Consult with employee
 - Prepare report setting out thought process
 - Basis of belief likely to fall sick again
 - How reached that belief
 - Operational, logistical, financial impact of further absence
 - Ensure manager aware of legal test and satisfied decision is reasonable
-



Out
Sick



Out
Sick



Out
Sick

How to de-risk when employee insists on returning but quickly falls sick again

Reasonable grounds for belief – reasonable investigation – reasonable response

- Consult with employee
 - Conduct a risk assessment
 - Seek OH input – ask specific questions about likelihood of recurrence
 - Prepare report setting out thought process
 - Basis of belief likely to fall sick again
 - How reached that belief
 - Operational, logistical, financial impact of further absence
 - Ensure manager aware of legal test and satisfied decision is reasonable
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Questions

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