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# De-risking long term sickness absence dismissals

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March 2024

## Introduction [1]

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- Long term sickness absence is a growing issue for employers and the economy.
- Increasingly the reason is mental health.
- In 2023 - 2.6 million people in the UK not working due to long-term sickness.  
Up from 2 million in 2019.

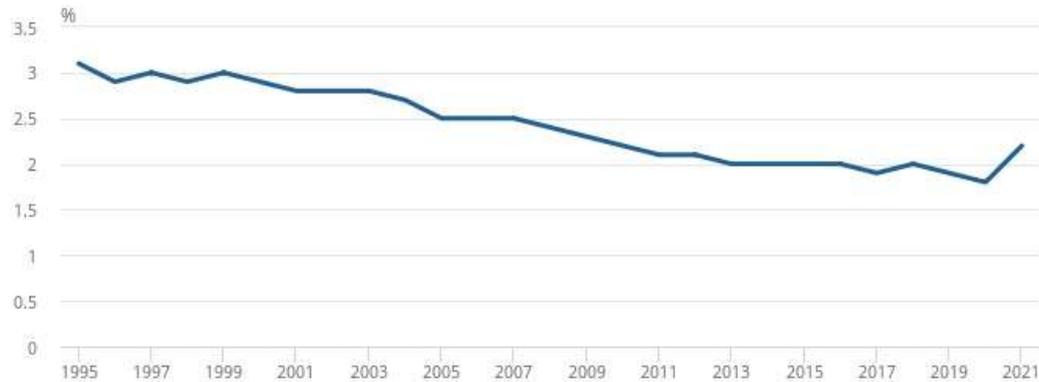
## Introduction [2]

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- But context - sickness absence rate declined through the 2000s and remained relatively flat until 2020.

Figure 1: The sickness absence rate rose to 2.2% in 2021, from a record low of 1.8% in 2020; this is the highest sickness absence rate since 2010

Sickness absence rate, for all people in employment aged 16 years and over, UK, 1995 to 2021



Source: Office for National Statistics – Labour Force Survey

## Introduction [3]

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- For employers the decision to dismiss for long term sickness absence is often not clear cut and requires a judgement call.
- ... against a backdrop of expensive claims.
- The key is being aware of the legal tests the Tribunal will apply and obtaining as much information as you reasonably can to help you make that decision.

## The question for today

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How do you de-risk capability dismissals in long-term sickness absence cases, where:

- 1) OH is sitting on the fence, but a return to work seems unrealistic, and
- 2) the employee insists on returning but repeatedly and quickly falls sick again?



## The legal framework

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- The two main claims to be aware of are unfair dismissal and disability discrimination.
- More risk if the employee is disabled (likely in long term absence dismissals) – higher compensation, expensive lengthy hearings and damage to reputation.
- But be aware of other claims like personal injury (notify insurers).

## Unfair dismissal – quick recap

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Ill health is a potentially fair reason.

- genuine belief that you need to dismiss for ill health,
- reasonable grounds for that belief,
- carried out reasonable investigation,
- acted within the range of reasonable responses, and
- (if disabled) – reasonable adjustments.

Fair process must include:

- Up to date medical evidence;
- Consult with the employee about that medical advice;
- Considering alternatives to dismissal (e.g. other roles, or adjustments to role).



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## Discrimination – quick recap

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If an employee is disabled:

- Duty to make reasonable adjustments;
- Unlawful to discriminate directly, indirectly or because of something arising from the disability.

Don't need two years' service.

Long term sickness absence dismissals: likely potential claims are indirect discrimination (e.g. PCP is absence policy) and discrimination because of something arising from disability (e.g. disability related absence).

Most long-term sickness absence dismissals – employee is disabled - if in doubt, err on side of caution.

*“OH is sitting on the fence ...”*

## The importance of OH reports

- Up to date medical advice is the foundation of your dismissal - remember you need to consult with the employee too.
- Employers entitled to take OH reports at face value unless it is clearly wrong.
- Poor medical advice will increase legal risk of dismissal.
- Duty is on the employer to obtain medical advice. No defence in the ET to blame a poor OH report.
- But ... you don't need to leave 'every stone unturned' – test is what a reasonable employer would do.



### What can you do if the report is unclear.

#### Work to the legal test:

- genuine belief that you need to dismiss for ill health,
- reasonable grounds for that belief,
- carried out reasonable investigation,
- acted within the range of reasonable responses, and
- (if disabled) – reasonable adjustments.

OH report is important part of the jigsaw.

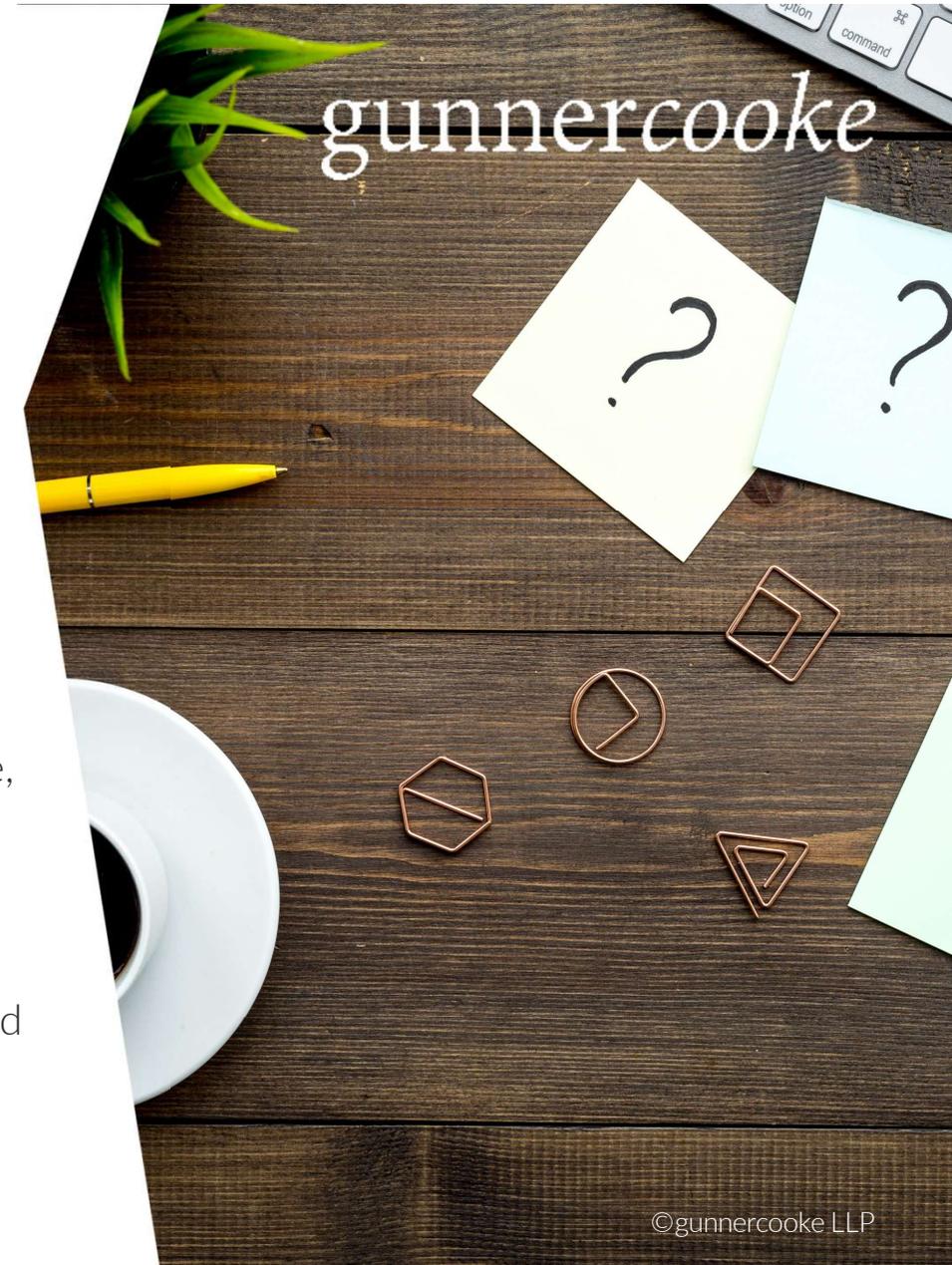
When looking to de-risk:

1. First, try to improve the quality of the OH report.
2. Then, look to the other parts of the jigsaw.

## Try to avoid getting there in the first place

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- Ensure you have a comprehensive and clear letter of instruction.
- Avoid generic letters. These are often the cause of a poor result.
- Give all the relevant information: details of role and working arrangements, the medical condition, the impact on work to date, conversations with the employee, medical advice to date.
- Ask specific questions re return to work, impact on duties, timeframes for return, details of phased returns, are they disabled (and why).



## Seek clarification from OH

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- The reality is – if a report is not clear, you need to do whatever is reasonable to seek clarification. ET will expect this and you will need to evidence your efforts.
- Ask specific follow up questions. If you are not clear, the ET likely to also be unclear.
- Raise concern with the OH provider if necessary. Ask for another expert if you need to.
- Ask your lawyers for recommendations.

## Seek clarification from OH [2]

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- What are the areas lacking clarity? Can you take a view?
- Is the issue the lack of engagement from the employee? If so, as long as you have made reasonable efforts you can make a decision on the information available.
- Disability is a question for the ET and you may be comfortable taking a view.
- Details of timeframe for return, a phased return or impact on role require clarity from OH.
- You may not end up with a perfect report, but test is what a reasonable employer would do – you will de-risk if you can demonstrate you tried to seek clarity.

## Do you need to get another report or expert report?

- It is the employer's decision to dismiss, not OH's decision. If the Manager making the decision is not satisfied the test has been met because of the report, consider getting a fresh one. Remind them of the witness stand if there is a lack of engagement ...
- The issue may be that the condition requires an expert report. Failure to get an expert report when appropriate can make a dismissal unfair.

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## Remember to consult with the employee

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Consult with the employee on the medical evidence including OH report.

Important part of process often overlooked. Unfair dismissal if you don't.

Consulting with the employee may clarify issues in the OH report, e.g. what they can do, when they can return.

The employee may wish to obtain their own medical evidence, which may clarify issues or may require need for further OH advice..

## *“Employee insists on returning but repeatedly and quickly get sick again”*

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Suggests that not fit to return and need further medical advice, especially on what they can do and any adjustments.

Common question – how long do you have to wait?

Depends on circumstances. Factors include:

- a) The availability of temporary cover (including its cost).
- b) The fact that the employee has exhausted their sick pay.
- c) The administrative costs that might be incurred by keeping the employee on the books.
- d) The size of the organisation.

## “Employee insists on returning but repeatedly and quickly get sick again” [2]

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*O'Brien v Bolton St Catherine's Academy*. Employee had been off for 14 months and at appeal provided medical evidence that he was fit to return. Held employer should have got own medical advice and waited bit longer. Court of Appeal guidance on timing.

- *Saying give me more time is easy for employee to say but the employer is entitled to draw a line.*
- *The severity of the impact on the employer of long term sickness absence is a significant element in balancing if a dismissal is fair.*
- *But the employer must be able to provide evidence.*

Prepare an internal report (remember disclosable if not privileged) on why you cannot continue to cover the absence - operational, recruitment, logistical, financial.

Explore all options, even if seems obvious. Critical that you can evidence your thought process. Remember – the Judge doesn't know your business..

## Other areas to reduce risk

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If you still have limitations with the OH report – look at other areas to de-risk.

Other medical evidence, like fit notes, GP records?

Can you get guidance /advice from an organisation or charity for that represents the medical condition, e.g. National Autistic Society.

Are there any alternative roles? Can you make adjustments to the role (required even if not disabled)?

Phased returns, trial periods?

Ill health retirement?

Settlement agreement?



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## Other areas to reduce risk [2]

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You are entitled – and required to – rely on all the information available.

Remember legal test:

- genuine belief that you need to dismiss for ill health,
- reasonable grounds for that belief,
- carried out reasonable investigation,
- acted within the range of reasonable responses, and
- (if disabled) – reasonable adjustments.

Important that you document your thought process (evidence for ET).

Employer's decision to dismiss, not OH's decision. Manager making the decision must be satisfied the test has been met.



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Any questions?



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## Your trusted adviser

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- Paul is an employment law specialist, described in the legal directories as 'excellent'. He has significant experience of advising employers on their employment issues.
- Paul gets to understand his clients and their business so he can give pragmatic, commercial advice to help them achieve their goals and reduce risk.
- Paul's expertise covers all areas of employment law, including senior exits, board disputes, discrimination, strategic advice on reorganisations / restructuring, TUPE, corporate transactions and employment issues connected to corporate insolvency.
- Paul is an experienced and successful employment litigator, with cases reported in the national press and the law reports.

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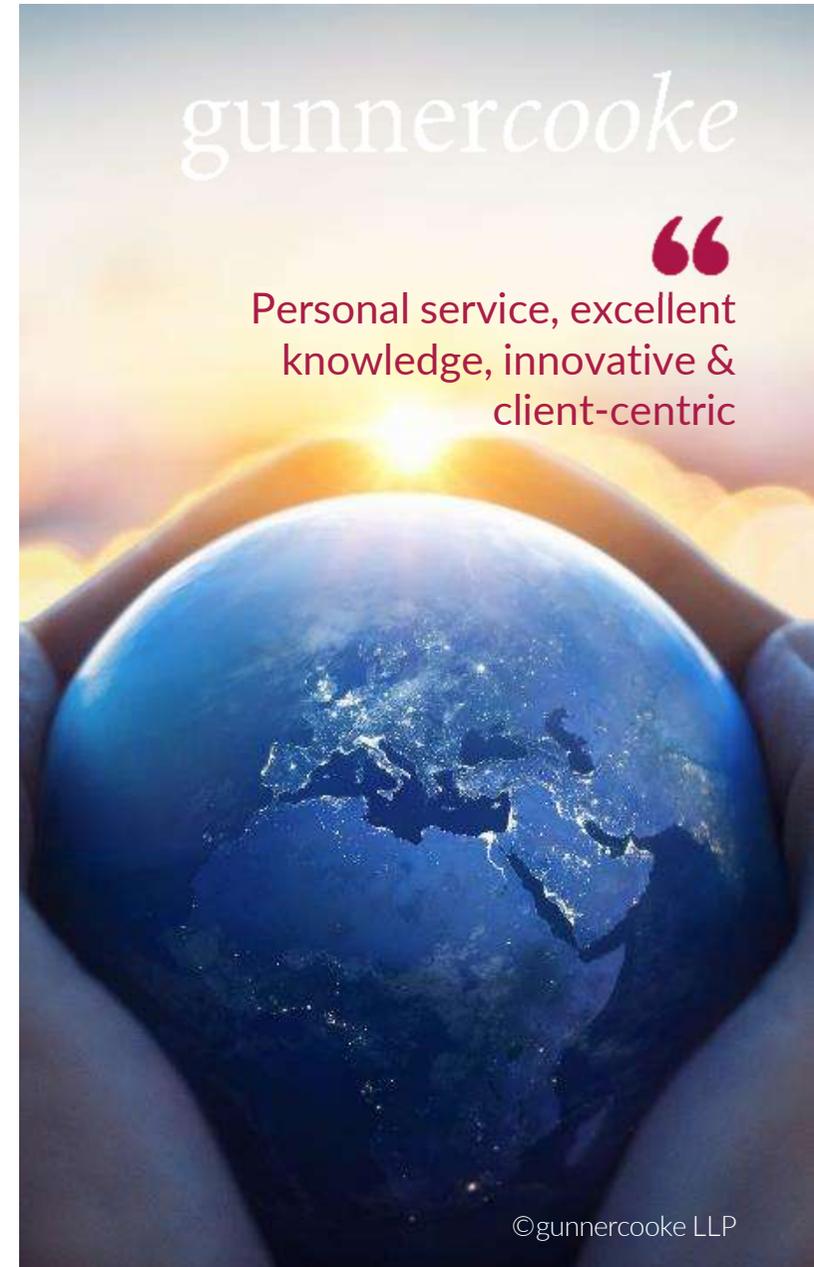
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