

# Weightmans

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Weightmans Guidance Note [Spring 2016]

Short -Term

Sick Absence Management Guide  
for Senior Managers

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Key Contact

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## 1) Introduction: the Importance of sick absence management:

1.1) Tackling sickness absence proactively and in a timely fashion is a key imperative for all employers:

- employers have an ongoing responsibility for helping those who are absent through injury or illness to return as healthy, productive and supported members of the workforce;
- at the same time, employees need to understand the commercial impact of their sickness absence on their employer's business and on their work colleagues.

1.2) Managing sickness absence is an ongoing challenge which involves a balancing act between the needs of the employee and those of the business. To complicate matters, there are sometimes non-medical contributory factors involved, such as low morale resulting from workplace or domestic problems.

1.3) It's important that managers and employees work together to address the issues, both medical and non-medical, which will enable staff to return safely and successfully to work and to thereafter remain at work. Aside from the benefits for employees, effective sick absence management saves the employer significant cost, helps improve workforce morale and enables the employer to compete more effectively in the marketplace.

1.4) This note provides legal and practical guidance on the management of short-term sickness absence and is up-to-date as at the [beginning of May 2016](#).

## 2) The importance of comprehensive contractual provisions covering sickness:

2.1) The law requires employers to provide employees with written details of: "...any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay..." (section 1 of the Employment Rights Act 1996). This information can either be set out in the employee's contract of employment or in some other reasonably accessible document to which the contract cross-refers, such as a staff handbook.

2.2) It is important for an employer to have a comprehensive set of contractual provisions covering all aspects of sickness absence. Not only will this facilitate sick absence management, but there are in fact very few statutory provisions covering sickness and employees are therefore dependant upon whatever contractual rights exist.

## 3) Reducing levels of sickness absence:

Sickness absence is most effectively tackled when managers and employees work together, and there are a variety of tools which managers can adopt, as outlined below.

### 3.1) The contract of employment and sick absence policies:

a) As mentioned above, the starting point should be the contract of employment and any relevant company sick absence policies and procedures. Employees should be provided with copies of, or be given access to, all relevant policies and procedures at the outset of their employment. Furthermore, management must ensure that employees understand both the standards of attendance that are required and also their commercial rationale – which messages must be repeated on a regular basis.

b) Employers should also ensure that they have appropriate policies and procedures for dealing with requests for time off work for reasons other than sickness, such as to attend medical appointments and to cope with domestic emergencies (and it should be noted that there is a statutory right to reasonable unpaid time off to deal with emergencies relating to arrangements for the care of dependants). The adoption of such policies, coupled with sensible flexible working arrangements to facilitate attendance at medical appointments, etc. is likely to benefit employers and employees and should also result in fewer staff falsely claiming to be ill in order to attend such appointments.

### 3.2) Management responsibilities:

Front line managers have a vital role to play in sick absence management. Arguably their most important contribution is their day-to-day observation and knowledge of their team, e.g.: does someone seem to be 'out of sorts'; are there reports of health or domestic problems on the office 'grape vine'? Such local knowledge enables managers to offer appropriate support at an early stage.

There are, in addition, a number of more formal practices that should be adopted by managers:

#### a) Ensure that employees properly report their sickness absences:

i) Employees must be required to adhere to the employer's rules about reporting in sick. It's good practice to require them to call their manager (and not a colleague) personally, a prescribed minimum period before their contractual start time. Unless there are extenuating circumstances, it is not appropriate for a friend or relative to make the call, nor should a message be left without the provision of contact details to allow the manager to return the call. (Where an employee is required personally to report short absences from work due to illness, experience indicates that the overall effect is to discourage absenteeism).

ii) It's important for managers to be sensitive whenever an employee is reporting in sick. Managers should be appropriately trained to deal sympathetically with staff and to question them appropriately, so that they have sufficient information to recognise any issues which may necessitate further enquires or follow-up action. Typically, a manager should ask about (and record in writing) certain minimum information such as:

- the reason for the absence;
- the expected duration of the absence; and
- whether the employee is seeking medical advice.

iii) The employee should be required to notify the manager as soon as possible if there is any change to this initial information, e.g. if the employee anticipates a later return to work date or if there is an update on their medical condition. In any event, an employer should proactively seek regular updates on the absent employee's medical position: the onus is on the employer to request updates rather than on the employee to provide them.

iv) Having an effective policy in place will help employers to deal with absences consistently and effectively, as well as putting employees on notice as to the expected standards of attendance and reporting. Given that an employee will be unlikely to have a copy of any sick absence policy when they are on sick leave, their manager should remind them of any key points as and when necessary.

b) Accurately record sick absences / monitor sick absence data:

Short-term absences from work should be recorded on a self-certification form and be provided at a return to work interview. Absences over seven days should be supported with one or more medical certificates from the employee's doctor. Managers need to ensure that they have accurately recorded all forms of absence together with the reasons for them – and there are important benefits in doing so:

- it helps to ensure a safe working environment: accurate absence data enables any patterns or potential problems to be identified early, thereby allowing management to both support an individual and to tackle any health & safety risks to both the individual and/or colleagues;
- an accurate picture of the level and patterns of absence enables management to invoke any relevant procedures promptly and consistently; and
- data concerning the level and patterns of sickness absence can be used to back up management decisions in relation to necessary changes in policy.

c) Keep in regular touch with absent employees:

i) It is important for employers to maintain appropriate contact with employees who are on sick leave. A balance should be struck between demonstrating concern and offering support, and maintaining sufficient distance so that the employee does not feel pressured to offer help whilst off sick at home and/or try to return to work before they are fit to do so.

ii) If the absence lasts for longer than a week then the manager and the employee should agree on a protocol for keeping in touch. Telephone calls once or twice per week should suffice. This should not be considered as 'harassment' on the part of the employer, but should rather be portrayed (and hopefully viewed) as the actions of a concerned employer who cares about the wellbeing of its employees. However, employers should avoid any course of conduct that could cause distress and reasonably be regarded as amounting to harassment. (This risk is likely to be greater where the employee is alleging that their illness is work-related, and especially if it is allegedly linked to workplace bullying).

iii) In addition, contact should be maintained if there are time-sensitive issues which need to be resolved, such as a redundancy consultation or ongoing disciplinary proceedings. In such cases, an employer should form a view about whether the employee is well enough to participate in the relevant procedure, seeking appropriate expert medical guidance and implementing reasonable adjustments to the process involved, wherever relevant.

d) Evidence of incapacity & keeping updated on the employee's medical condition:

An employer should require evidence from the employee of their incapacity to work. This usually consists of:

- A "self-certification" for absence of seven calendar days or less; and
- A doctor's certificate for longer absences ('fit notes').

Employees who take frequent periods of short-term sick leave for the same condition should be encouraged to contact their employer following any update on their medical condition and an employer should actively seek an update on the medical position: the onus is on the employer to request updates rather than on the employee to provide them.

e) Undertake effective return to work interviews:

i) Once the employee has returned to work, a return to work interview should be conducted by their line manager or supervisor as soon as possible: any undue delay will send a signal that neither the employee's sick absence, nor his/her return to work, are seen as important. An employer's approach to return to work interviews should be applied consistently in order to ensure that individual members of staff do not feel "singled out" or make allegations that they have been discriminated against.

ii) Such interviews are one of the most important tools in successful sickness absence management. They are vital for a manager in building up trust with an employee, so that the employee can reveal any underlying issues that may be contributing to the sick absence. The tone of the meeting should be sympathetic and the questions should not indicate any doubt regarding the authenticity of the illness. The purpose of the return to work interview is for the manager to:

- make the employee aware that his/her absence has been noted and that their return to work is valued;
- establish the reason(s) for the absence (which may not be those originally reported);
- determine whether there may be a common thread (such as an underlying illness) between intermittent absences;
- demonstrate that the manager is concerned to ensure that the employee has recovered and is fit for work;

- determine whether Occupational Health advice is required; and
- to consider whether there are any workplace adjustments that should be implemented to help the employee maintain good and safe attendance.

iii) A manager should prepare carefully for return to work meetings and should set aside sufficient time to conduct them properly. The manager should make a written note of the meeting which should be a factual record of the conversation, rather than including any opinion, etc.

iv) In the case of employees who regularly take periods of short-term absence, return to work interviews can be a useful opportunity for management to raise any concerns and to explore whether there are any underlying reasons for the employee's absence, which in turn may require the consideration of adjustments to their job or working environment. An employer should always proactively consider whether adjustments might be necessary to facilitate a successful return to work as early as possible. It is always advisable to agree any adjustments with an employee in advance of their implementation.

f) Return to work when the employee "may be fit":

i) The statutory Statement of Fitness for Work ('fit note') used by GPs to sign an employee off work contains a "may be fit for work" option, which was introduced in April 2010 (in addition to the "not fit for work" option). Where this option is selected, there are tick boxes for the GP to suggest common ways to facilitate a return to work:

- a phased return to work;
- altered hours;
- amended duties; and/or
- workplace adaptations.

This is meant to facilitate a discussion between the employer and the employee about ways of getting the employee back to work. There is also space for further advice or information, including how the employee's condition will affect what they do.

ii) The guidance on fit notes issued by the DWP points out to employers (at page 4) that:

- "If you can't agree on any changes, you should treat the fit note as if it says that your employee is not fit for work and use it as described above. Your employee does not need a new fit note from their doctor to confirm this."

iii) Even assuming the employer is able to make the adjustments suggested by the GP in the fit note, allowing an employee back into the workplace when they "may be fit" presents employers with a number of problems, not least that they may be inadvertently putting the employee or other people at risk, or possibly invalidating their employer's compulsory liability insurance. DWP guidance on fit notes for employers suggests that an employee can go back to work at any time, including before the end of the fit note, without seeing their GP again (even if the GP has indicated that they need to

assess them again) without breaching Employers Liability Compulsory Insurance, provided a suitable risk assessment has taken place, if required. It also suggests that an employer should ensure that it takes account of the advice in the fit note, performs any relevant safety procedures and considers whether a risk assessment is necessary. It should contact its insurer if it has any concerns.

g) Maintain a comprehensive paper trail:

It is important for management to ensure that accurate and comprehensive records are kept of all sick absence-related meetings and correspondence with an employee, including file notes of telephone conversations and records of any telephone messages left by them. Ideally, messages and telephone conversations should be followed up with letters which summarise the steps taken to maintain contact with the employee and any agreed action plans. Such documentation will provide important contemporaneous evidence that an employer acted reasonably in its dealings with the sick employee and it should always be borne in mind that – should an employee ever bring a Tribunal claim against management in respect of its handling of him/her – then these documents are likely to be discloseable. Records should be stored confidentially and in accordance with the employer’s record-keeping policy. Medical records are sensitive personal data for Data Protection Act purposes and should only be used for the purposes for which they are collated (please see below).

**3.3) Occupational health expertise and rehabilitation:**

The services of an Occupational Health expert are an important element in the appropriate management of sickness absence. They can assist pro-active case management, provide regular medical reports, and assist with an employee’s return to work by both recommending a bespoke rehabilitation programme and by supporting the employee during this period. Whilst reports from an employee’s GP frequently give a useful insight into the nature and likely duration of the relevant medical condition, they often have little knowledge of the relevant employment context (or else only have the employee’s perspective). Understandably also, a GP has his/her patient’s interests at heart, and has no need to balance this with the employer’s requirement for good attendance. A good OH expert will, however, understand the need for this balance.

**4) Overview of potential sick absence-related legal claims:**

4.1) There are a variety of potential legal issues which may be relevant when an employer is managing short-term sickness absence, of which the two most common are:

- unfair dismissal (including constructive dismissal); and
- disability discrimination.

**4.2) Unfair dismissal claims:**

a) In addition to any contractual rights on termination, the Employment Rights Act 1996 (“ERA”) gives employees a statutory right not to be unfairly dismissed, subject to satisfying certain qualifying pre-conditions. Unfair dismissal claims are the most common type of claim associated with dismissals for

sickness absence and an employee who believes that he or she has been unfairly dismissed may complain to an Employment Tribunal.

b) When an employee lodges an unfair dismissal claim, the first issue for the Employment Tribunal will be to establish whether there has in fact been a dismissal (and in most cases this is not in dispute). Once that has been established, it is then for the employer to demonstrate:

- that the reason (or, if there is more than one, the principal reason) for the dismissal was one of the potentially fair reasons set out in the ERA;
- that the employer adopted a fair procedure when dismissing the employee; and
- that the decision to dismiss was reasonable.

c) A dismissal for persistent short-term sickness absence is a potentially fair reason for dismissing an employee. Once a valid reason for the dismissal has been established, the employer must then be able to demonstrate that it adopted a fair procedure when carrying out the dismissal. Details about the appropriate procedure to be adopted appear later in this guide. A Tribunal will judge the fairness of any sick absence-related dismissal on whether, given the particular facts of the case, including the size and administrative resources of the employer, the employer acted reasonably or unreasonably in treating the sick absence history as a sufficient reason for dismissing the employee. Further details about the relevant factors again appear later in this guide.

d) Where an employee successfully claims unfair dismissal then an Employment Tribunal will consider whether to order reinstatement, re-engagement and/or the payment of compensation:

#### 4.3) Disability discrimination Claims

a) Disability discrimination, contrary to the Equality Act 2010, is the most common type of discrimination claim in cases involving sickness absence: if an employee suffers from an underlying medical condition which either causes frequent, short term sick absences and/or a long-term sickness absence, then such a condition may amount to a disability under the Equality Act.

b) The Equality Act requires that, prior to dismissing an employee for disability-related sickness absence, an employer must be able to both justify the dismissal and ensure that there are no reasonable adjustments which would avoid the need for the dismissal (such as modifying the employee's duties to enable him/her to attend regularly, or else redeploying the employee to suitable alternative work).

c) A summary of the protection afforded to disabled employees in the context of short-term sickness absence is provided in the **Appendix** to this guidance note.

## 5) Step-by-step guide to managing frequent short term ill-health

### 5.1) Introduction:

a) Where an employee has a series of short-term absences, it can be easy for the employer to overlook the fact that there is a pattern emerging, so the employer may be slow to realise that the matter needs to be dealt with formally. It is important for the employer to consider whether there is an underlying health condition giving rise to the absences and to satisfy itself that the absences are genuine. The employee's absence may not even be health-related: it may instead relate to a problem with a colleague, manager or his/her workload, or indeed be related to domestic issues.

b) Frequent short-term sickness absence can often be more disruptive for an employer than one single, lengthy sickness absence for an identified medical reason. In order to eliminate or reduce frequent short-term sickness absences to an acceptable level or, failing that, in order to fairly dismiss an employee if the level of absences is no longer sustainable, an employer must undertake a fair review of the employee's attendance record and provide an appropriate series of warnings about the fact that the business can no longer tolerate the current level of absence and that, ultimately, there may be no choice but to dismiss the employee.

c) Set out below are the suggested steps that should be followed in dealing with unacceptable levels of short-term sickness absence. At all formal stages of such a warning procedure the employee should be offered the opportunity to be accompanied at meetings by a trade union official or fellow worker.

### 5.2) Step 1: review the employee's attendance record:

a) The manager should begin by ensuring that the employee's attendance record is accurate and that (where applicable) any earlier stages of the company's attendance procedure have been correctly implemented. The reasons given for the previous absences should be reviewed to determine whether there is any discernible pattern or potential underlying cause(s). The three main issues for consideration at this stage are:

#### i) Is there an underlying medical problem?

Is there any indication that there may be an underlying medical problem which is causing the persistent intermittent absences? (For example, an employee may be suffering from HIV but the illness may be presenting various symptoms which at first appear unrelated and minor, such as flu, stomach complaints, rashes, etc)?

#### ii) Is medical evidence required?

Case law has recognised that medical reports may be of little assistance in the case of frequent, unconnected, short-term sick absences: by the time the employee sees a doctor the symptoms may have disappeared. However, up-to-date medical guidance should always be sought:

- if there is any suggestion of an underlying illness;
- if the employer is contemplating dismissing the employee; or
- if the employer intends to discipline someone because it is not thought that his or her alleged illnesses are genuine.

iii) Is this better regarded as a long-term sick absence case?

If there is an underlying medical condition, would it be more appropriate to adopt the approach for managing long term sickness?

b) In any of these scenarios an employer must be able to show that it investigated the reasons for the absences and was sufficiently informed of the up-to-date medical position, including:

- The likelihood of continuing absences and the potential impact on the employee's colleagues, department and the employer's business;
- Whether there are changes to the employee's job or redeployment opportunities that would assist their attendance, reduce the effect on colleagues or the employer's business;
- Whether the employee has a disability and, if so, whether there are any reasonable adjustments that could be made; and
- Whether it is appropriate to give the employee a warning that their attendance levels need to improve.

**5.3) Step 2: informal counselling:**

a) A manager should discuss the employee's health and attendance record with him/her before any formal stage of the company attendance procedure is triggered, e.g. during return to work interviews or at any time if it's becoming apparent that an employee is struggling to cope with his or her duties, etc. (The manager's aim should always be to take appropriate, proactive steps to improve the employee's sick absence record and thereby avoid the implementation of any formal warning procedure).

b) The manager should listen to the employee's explanation for their sickness absences and to any representations that he or she may make. The manager should always be on the look out for any signs of underlying issues, such as:

- an underlying medical condition;
- any suggestion of harassment or bullying at work;
- stressful or de-motivating/boring work;

- drug or alcohol problems;
- domestic or family problems;
- any suggestion of malingering.

c) Even though informal, any meetings or discussions with the employee should be fully documented (and such notes should be kept confidential, as explained above).

#### 5.4) Step 3: warnings:

a) Whenever considering the issuing of a warning under any relevant company attendance procedure, the manager should review any previous warnings to ensure that they were correctly given and should arrange the current attendance procedure meeting promptly (as any delay might undermine the impact of the warning). When preparing to hold a meeting with an employee to consider the issuing of a warning, the employee should:

- be given advance written notice of the meeting/its purpose;
- be provided with a copy of his/her previous attendance record; and
- should be allowed to be accompanied by a union official or workplace colleague and have the opportunity to put forward reasons against the issuing of the warning.

b) When meeting with an employee to consider the issuing of a warning due to an unacceptable level of short-term sickness absence, the employer should discuss the following issues:

- the effect of the absences on the employee's colleagues, his/her department and the employer's business as a whole;
- the likelihood of continuing future absences and their potential impact;
- whether there are any workplace adjustments that can be made (irrespective of whether the employee is disabled) that would assist the employee in achieving better attendance and/or reduce the detrimental impact of his/her sick absences on colleagues or the employer's business;
- whether the employee has a disability and, if so, whether there are any reasonable adjustments that could be made; and
- whether, taking into account all the relevant facts of the particular case, it is appropriate to issue a warning to the employee that their attendance level needs to improve. (What action is appropriate will always be a matter of degree, depending on the specific circumstances. However, an employer's actions should also be consistent with its treatment of other staff in similar circumstances).

c) What action is appropriate will always depend upon the specific facts of a particular case. If it is decided that a warning is appropriate then this should always be confirmed in writing and should mention:

- that the current level of sick absences is unacceptable;
- the effect that the current level of absences is having on the employer's business and the employee's work colleagues (and it is important to ensure that the employee understands the bigger commercial picture re the impact of his/her sickness absence on the business generally);
- the extent to which, and the timescale within which, the employee's sick absence record needs to improve;
- the consequences for the employee if there is no improvement (including that dismissal may ultimately be an outcome); and
- that the employee has a right of appeal (where applicable).

d) Case law has drawn a distinction between disciplinary warnings and warnings that are issued in the case of genuine but nevertheless disruptive short-term ill health absences: in the latter, the employee should be treated with "sympathy, understanding and compassion" and it is probably more appropriate to say that the employer should 'caution' the employee that the stage will be reached where, with the best will in the world, it will become impossible to continue their employment if the current level of absenteeism continues.

#### 5.5) Step 4: the decision to dismiss

a) As soon as the final stage of any relevant company attendance procedure has been triggered by an employee's continued unacceptable level of frequent short-term sick absences, the manager should review the previous warnings to ensure that they were correctly given and should arrange a consideration of dismissal meeting promptly. When doing so, the employer should write to the employee and:

- set out full details of the employee's absence record to-date, together with a summary/copy of any relevant medical evidence;
- explain that the employee's attendance is unacceptable, including brief details of the reason(s) why;
- summarise the steps taken by management to deal with the absence record to-date (including the previous warnings given), so that the employee has sufficient information to prepare his or her submissions in advance of the consideration of dismissal meeting;

- invite the employee to the meeting, setting out its date, location and timing, and explaining that the purpose of the meeting is to consider the employee's attendance record, and his/her submissions about his/her past and likely future attendance record;
- explain that one outcome of the meeting may be the employee's dismissal; and
- inform the employee of his/her right to be accompanied at the meeting.

b) Copies of any relevant documentation should be included with the letter, including any attendance procedure, the relevant medical evidence (e.g. OH reports) and previous correspondence, notes of previous warning interviews, etc.

c) The manager should ensure that the meeting itself complies with all the "best practice" requirements of arranging and holding a consideration of dismissal meeting, i.e.:

- the manager should begin by ensuring that those present at the meeting understand the background to the meeting and its purpose, and the procedure which is to be followed at the meeting;
- there should be a full consideration of the history of the employee's sick absences and their effect on the organisation, along with any action previously taken to address the situation, cross-referring to any relevant documentation;
- the parties should be given an opportunity to comment upon any of the steps taken to-date;
- the employee should then have an opportunity to put their case and outline any mitigating circumstances;
- if any significant new facts emerge then it may be necessary to adjourn the meeting whilst the employer investigates them. (For example, if an employee claims for the first time that their persistent absences are partly or fully attributable to an underlying medical condition then an employer should adjourn the meeting and obtain relevant medical evidence if it does not already have up-to-date medical guidance on the issue); and
- the employer should sum up the key points of discussion at the end of the meeting and let the employee know when they can expect a decision.

d) When deciding whether or not to dismiss the employee, the manager should judge each case on its merits, taking into account factors such as:

- the nature of the illness(es) and the likelihood of some/all recurring;
- the number and length of the absences and intervening periods of good health;

- the number of times/reasons why the attendance procedure has been triggered;
- the need to have the employee's work done and the impact of the absences on other employees and the business;
- consistency of treatment when compared to other employees with similar absence records (if any);
- the employee's length of service and overall sick absence history (e.g. has there been a sudden decline in an otherwise exemplary period of long service?);
- any mitigating circumstances; and
- whether in all the circumstances a reasonable employer could be expected to wait any longer.

e) *Appeal meeting*: if a decision is taken to dismiss the employee then he/she must be notified of their right to an appeal. Employees should be given a timescale within which to notify their employer of any wish to appeal and they should be asked to state their full grounds of appeal in writing. The employee should also be notified of their right to be accompanied to the appeal meeting and the employer must notify them of the appeal decision following the meeting. Where reasonably practicable, the appeal should be dealt with by a more senior manager than the person who conducted the first meeting.

#### 5.6) Common problem areas:

There are a number of common problem areas which managers need to be aware of when managing short-term sickness absence:

a) Managers should always consider whether an employee who, at first sight, appears to be having short-term, unconnected sick absences may in fact have an underlying medical condition which is causing these absences and whether, as a result, the employee should instead be managed as a long-term sick absence case?

b) Many company attendance procedures suggest that absences as a result of an accident at work should normally be discounted: whether or not an employer's procedure states this, an Employment Tribunal will be more sympathetic towards an employee who is dismissed for absences resulting (in part at least) from some fault on the part of the employer and so if a decision is taken to include absences resulting from accidents at work then the manager must record his or her reasons for doing so (e.g. carelessness on the employee's part);

c) If it's decided to include disability-related sick absences when issuing warnings and/or dismissing an employee because of an unacceptable level of sickness absence then the manager must be able both to justify this decision and ensure that there are no reasonable adjustments that would avoid the need to issue a warning/dismiss the employee. In addition, the manager should notify the disabled

employee in advance, before starting to count disability-related sick absences. Again, the manager must keep a written record of these matters. (Dealing with disability-related sick absences involves the need to consider various factors, further details about which appear in the **Appendix** to this guidance note);

d) Irrespective of whether an employee is disabled under the Equality Act 2010, an employer should consider making adjustments at any stage to an employee's current duties, and/or redeploying the employee to more suitable alternative duties, if this would help improve his/her attendance or avoid his/her dismissal. For example, such adjustments should be considered:

- as a means of avoiding the employee taking sick absence in the first place (e.g. as soon as it becomes apparent that the employee is struggling in his/her current role); and
- as soon as the employee commences a period of sickness absence: the emphasis should be on getting the employee back to work as soon as possible;

e) Managers should be on the look out for non-medical reasons for absences, such as:

- *work-related problems*, e.g. taking time off due to falling out with colleagues or because the employee feels aggrieved with management over an issue (e.g. as a result of an unsupported grievance or disciplinary issue);
- taking time off because of *domestic issues*; and
- *alcohol or drugs-related absences* – where drink or drug dependency is suspected as the underlying cause then it may be more appropriate to adopt a long term ill health procedure.

In each case management should work in partnership with the employee and any relevant medical and other specialist advisers to clearly identify and address the underlying problem.

f) ill Health Retirement – whilst typically associated with long-term sickness absence, management should not overlook the possibility that, depending upon the entitlement wording in their company's ill health retirement policy (if there is one), an employee who is incapable of rendering regular attendance due to frequent short-term absences which stem from an underlying medical condition may in fact qualify for ill health retirement.

g) ill Health Caused by Employer's Treatment:

Sometimes the employee's ill health may have been caused by the conduct of the employer (e.g. failing to ensure a safe working environment). This does not mean that a subsequent dismissal of the employee is thereby necessarily unfair, but a tribunal is likely to expect an employer to adopt a more lenient approach before implementing a dismissal. (Of course, an added incentive for the employer in avoiding the employee's dismissal in such circumstances is that this reduces the risk of a personal injury claim and, if one is brought, reduces any consequent compensation).

## Appendix

### Disability Discrimination and Short-term Sick Absence Management

#### 1) The meaning of “disability”:

In order to be protected against disability discrimination under the Equality Act 2010, a person must either currently have a disability or must have previously had a disability as defined in the Act.\*

According to Section 6(1) of the Equality Act, a person has a disability if he or she:

- a) has a physical or mental impairment, which has a
- b) substantial and
- c) long-term
- d) adverse effect on the person’s ability to carry out normal day-to-day activities.

All four elements of the statutory definition must be satisfied and it’s recommended that expert medical advice always be sought about an employee’s disabled status.

\*(However, both disabled and non-disabled people are protected against victimisation under the Equality Act, which also protects non-disabled people against discrimination or harassment by association and by perception. Further details can be provided upon request).

#### 2) Types of Discrimination:

2.1) The Equality Act makes it unlawful for an employer to discriminate against a disabled person in a number of ways, including:

- Discrimination arising from disability;
- Indirect discrimination; and
- A failure to make a reasonable adjustment.

#### 2.2) Discrimination arising from disability:

a) Section 15 of the Equality Act explains that A (e.g. an employer) discriminates against a disabled person B (e.g. an employee) if A unjustifiably treats B unfavourably because of something arising in consequence of B’s disability. (However, A won’t be liable if it can show that it did not know, and could not reasonably have been expected to know, that B was disabled).

b) Justification will require an employer to be able to show that its treatment of its disabled employee was a ‘proportionate means of achieving a legitimate aim’. It is for the employer to justify the treatment; it must produce evidence to support the assertion that the treatment is justified and not

rely on mere generalisations. Furthermore, if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment then it will be very difficult to show that the treatment in question was objectively justified.

c) In cases involving discrimination arising from disability there is no requirement for the disabled person to establish that their treatment is less favourable than that experienced by a non-disabled comparator. Instead, the focus is on whether the treatment amounts to a detriment, and – if so – whether it can be justified. This is potentially significant when it comes to the treatment of disability-related sickness absence, as is explained in paragraph 5.6 of the Code of Practice published in support of the Equality Act:

“...In considering whether a disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of his/her colleagues or any hypothetical comparator. The decision to dismiss him/her will be discrimination arising from disability if the employer cannot objectively justify it...”

d) In the case of *Hall v Chief Constable of West Yorkshire Police* [2015], the EAT confirmed that to establish a claim for discrimination arising from disability there need only be a "loose" causal link between the disability and any unfavourable treatment. It will be sufficient to show that the unfavourable treatment has been caused by an outcome or consequence of the claimant's disability; the employer's motivation is irrelevant. Employers have an opportunity to redress the balance and defend a claim by showing that either the unfavourable treatment was justified or else that they did not know or could not reasonably have known that the employee was disabled.

### 2.3) Indirect disability discrimination:

a) Indirect discrimination arises where an employer applies a provision, criterion or practice (e.g. an attendance policy) to its staff and which is not intended to result in anyone being treated less favourably, but which in practice disadvantages a group of people within the workforce who share a particular disability. In this scenario, where the relevant provision, criterion or practice disadvantages an individual within that group (e.g. because they incur a higher level of sickness absence due to their disability), then he or she will have a claim for indirect disability discrimination unless the employer can objectively justify the application of its provision, criterion or practice.

b) According to the Equality Act, the imposition by an employer of a particular provision, criterion or practice will be objectively justified if it can be shown to be a 'proportionate means of achieving a legitimate aim', i.e.:

- the aim of the provision, criterion or practice must be legal and non-discriminatory (e.g. achieving good attendance levels amongst its staff); and

- the means of achieving the aim must be proportionate: this involves a balancing exercise, weighing up the discriminatory impact of the provision, etc. on the individual as against the employer's reasons for applying it. Thus if there is a less discriminatory way of achieving the particular aim than applying the provision, criterion or practice in question, then the employer would have to adopt the alternative approach.

c) In reality, few claimants are likely to rely upon a claim for indirect disability discrimination alone if, as is likely in the majority of cases, the application of a disadvantageous provision, criterion or practice will also trigger the duty to make reasonable adjustments and the protection against discrimination arising from disability.

#### 2.4) The duty to make reasonable adjustments:

a) The duty to make reasonable adjustments is a cornerstone of the protection for disabled people under the Equality Act and requires employers to take positive steps to ensure that disabled people can access and make progress in employment. The duty applies in recruitment and during all stages of employment, including dismissal. In practice, the majority of employment-related disability issues concern the duty to make reasonable adjustments.

b) The Equality Act explains that an employer discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments, and that this duty imposes three requirements on an employer, namely that:

- Where a provision, criterion or practice applied by or on behalf of an employer puts a disabled person (e.g. a job applicant or an existing employee) at a substantial (i.e. more than minor or trivial) disadvantage in relation to a relevant matter in comparison with persons (e.g. fellow job applicants or employees) who are not disabled, then the employer must take reasonable steps to avoid the disadvantage;
- Where a physical feature of premises occupied by an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the employer must take reasonable steps to avoid the disadvantage; and
- Where a disabled person would, but for the provision of an auxiliary aid or service, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the employer must take reasonable steps to provide the auxiliary aid or service.

It's likely that the first of the above three limbs will be relied upon most often by a disabled employee who is seeking to challenge the imposition of an attendance procedure in respect of his/her disability-related sickness absences. However, it's also conceivable that the second and third limbs might be relied upon if, for example, the provision of an orthopaedic chair would reduce an employee's back-related sickness absence levels.

c) *When is an adjustment 'reasonable'?*

i) An employer will not breach the duty to make adjustments unless it fails to make an adjustment which is "reasonable": this is a fact-sensitive question. Whilst the Equality Act does not specify any particular factors that should be taken into account in determining whether an adjustment is 'reasonable', the Code of Practice explains that the following are some of the factors which might be relevant:

- the effectiveness of the proposed adjustment in preventing the substantial disadvantage;
- the practicability of the adjustment;
- the extent of any disruption caused in making the adjustment;
- the financial and other costs of making the adjustment;
- the extent of the employer's financial or other resources (it is more likely to be reasonable for an employer with substantial financial resources to have to make a more expensive adjustment);
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

ii) Ultimately the test of the 'reasonableness' is an objective one and will depend on the circumstances of the case. There is no objective justification defence available under the Equality Act in respect of an employer's failure to make reasonable adjustments: the proposed adjustments are either reasonable or they are not.

d) *Examples of potential reasonable adjustments:*

The Code of Practice lists various examples of potential reasonable adjustments which an employer might have to make, a number of which are relevant when managing disability-related sickness absence:

- allocating some of the disabled person's duties to another (e.g. a job involves occasional heavy lifting which is problematic for an employee with a bad back, and so the employer transfers this element of the work to a non-disabled colleague);
- transferring the disabled person to fill an existing vacancy (e.g. an employer should consider whether a suitable alternative post is available for an employee who becomes disabled (or whose disability worsens) and where no reasonable adjustment would enable the employee to continue doing their current job;\*/\*\*
- altering the disabled person's hours of working or training (e.g. permitting part-time working or different working hours to avoid the need to travel in the rush hour);

- assigning the disabled person to a different place of work or training, or arranging home working (e.g. relocating a mobility-impaired employee to a more accessible office);
- allowing the disabled person to be absent during working or training hours for rehabilitation, assessment or treatment;
- giving, or arranging for, training or mentoring;
- acquiring or modifying equipment (e.g. providing special equipment, such as an adapted keyboard for someone with arthritis); and
- allowing a disabled employee to take a period of disability leave (e.g. an employee who has cancer needs to undergo treatment and rehabilitation, and his employer allows a period of disability leave and permits him to return to his job at the end of this period);

\* n.b.1: In the case of companies in a Group structure, where staff are employed by the Group company, then it may be necessary to consider the possibility of alternative work anywhere within the Group in the relevant geographical area (or further afield, if the employee is prepared to move) if the individual cannot return to his/her normal job and if there are no vacancies within their normal Business Unit);

\*\* n.b.2: With regard to the example of transferring the disabled person to fill an existing vacancy, it's worth mentioning the following cases:

- In *Archibald v Fife Council*, the House of Lords stated that reasonable adjustments include allowing disabled persons to “trump [fellow] applicants for new jobs, even if a disabled employee is not the best candidate, provided that the disabled employee is suitable to do that work”;
- The principle set out in *Archibald* appears to have been adopted in *Waddingham v NHS Business Services Authority* [2015], in which an employment tribunal upheld a claim for failure to make reasonable adjustments, brought by a disabled NHS employee who failed to achieve the required score in a competitive interview for an internal post. The employee, whose existing position was at risk of redundancy, indicated that he wanted to proceed with the interview, despite having been signed off sick while he was receiving cancer treatment. The tribunal found that:
  - While it was necessary to have some form of assessment, the employer should have carried this out on the basis of existing data about his performance, including appraisals from previous posts;
  - However, it was not necessary to lower the pass mark to accommodate the employee's impaired performance at interview;

- The failure to appoint the employee to the role also amounted to discrimination arising from his disability: he was unsuccessful because of his poor performance at interview, which had been adversely affected by his condition. Rejecting a justification argument, the tribunal doubted whether there could be a legitimate aim of selecting the best candidate for the job, in a context where a disabled candidate can lawfully be given more favourable treatment than a non-disabled candidate. A more appropriate aim may be to appoint a person who could perform to the required standard.
- However, the principle established by the *Archibald* case has its limitations: in *Wade v Sheffield Hallam University* [2013], the Employment Appeal Tribunal held that it would not have been a reasonable adjustment for the employer to waive its requirement for a disabled candidate to undergo a competitive interview process and meet the core competencies of the job: it could not be a reasonable adjustment for the employer to appoint someone to a role where the person failed to meet the essential requirements of the job);
- The Code of Practice refers only to an "existing vacancy". However, depending on the circumstances employers might be required to redeploy a disabled employee even where no vacancy exists:
  - Creating a new role: in *Southampton City College v Randall* [2006], the EAT upheld a Tribunal's decision that it would have been reasonable for an employer to devise a new job which took into account the employee's disability. In this case, the employer was undertaking a reorganisation and accepted that it had "a blank sheet of paper" so far as job specifications were concerned;
  - Swapping with another employee: In *Chief Constable of South Yorkshire Police v. Jelic*, the EAT upheld an Employment Tribunal's decision that:
    - swapping the Claimant's role with an existing role that was already filled by another police officer was capable of being a reasonable adjustment. Whilst the Tribunal recognised that the current post holder would have to be consulted before being transferred, it found that he could have been ordered to move whether he liked it or not, since the police force was a 'disciplined service'; and
    - swapping jobs was not equivalent to 'bumping' for redundancy purposes, because the person being transferred was not losing his job but was instead being given another role. It was also not the same as creating a role, as the post already existed.

It therefore now appears that swapping people between jobs to accommodate disabled employees might constitute a reasonable adjustment in certain circumstances. For example, if an employer

has a contractual right to transfer staff between roles then it should arguably consider re-deploying disabled employees into both vacant and filled posts, although an employer is not normally under a duty to create a new post to accommodate a disabled employee. Furthermore, it's always worth asking colleagues if they would be prepared to swap roles to accommodate a disabled colleague, and it would be prudent for employers to provide documentary evidence to substantiate that they have considered this adjustment.

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