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# PERFORMANCE RELATED PAY AND BENEFITS

**Binder Bansel-Partner, Employment**  
**2 July 2019**



# Overview

- Absence from work – pay/benefits?
- Pay while at work – full/pro rata?
- Benefits while at work – full/pro rata?
- Phased return
- Stable or full return



# Multistage assessment

- It is important to document each stage of the process as appropriate what has been discussed and agreed
- Agree with employee the current degree of work, work duties and any reasonable adjustments (RA)
- Medical or OH evidence
- Continue to keep these under review and ideally agree these with the employee.



# General principles

- Paragraph 16 and 17 of ETD.
- *‘The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combatting discrimination on grounds of disability.*

*This Directive does not require the recruitment, promotion, maintenance employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide a reasonable accommodation for people with disabilities.’*

- Balancing of policy considerations for the facilitation of employment and promotion of disabled persons work rights against the reasonable needs of the business have sufficiently capable employees.



# General principles

- Para 6.33 of the EHRC Code of Practice confirms there may be cases where modifying performance related pay arrangements for a disabled worker is appropriate.
- Particularly so if there are cases where pay arrangements are based on performance or productivity.
- It may be an RA to agree to pay at an agreed rate, for example an average hourly rate taking into account the disabled workers additional breaks or other disadvantage.
- Need to consider how you balance the general principles to ensure that there is no discrimination in relation to provision of pay and/benefits for a disabled worker.



# Absences from work

- Consideration of continuation of pay and/or benefits.
- O'Hanlon v HMRC – generally unlikely to be an RA to maintain pay while an employee is absent from work.
- Do similar principles apply to the consideration of benefits for the same period of absence?
- Note-not necessarily the case if in fact the reason for the absence is of an earlier failure to make RAs.
- Can employee argue that the reason for the absences of work and therefore losses of pay and benefits are due to an earlier failure to make an RA?
- Consider policy objectives behind the legislation which is to facilitate and retain disabled persons in the workplace. Arguably, maintaining pay and benefits while the employee is absent does not further the policy objective.



# Pay while at work

- Consider the nature of the RA.
- Is the disabled employee no longer able to perform the full extent of their duties, work their full hours or in some other way perform less than their contractual obligations?
- If employee is moved to an alternative role is it a reasonable adjustment to maintain them on the same level of pay?
- G4S Cash Solutions v Powell – maintaining full pay could in limited circumstances be a reasonable adjustment even if the role being carried out is at a lower rate.



# Pay while at work

- Tend to be fact specific
- If agreed to work part time/reduced hours as a RA more likely to be accepted that the rate of pay should be pro rated accordingly



# Phased return to work

- Consider the effect on pay and/or benefits
- Agree the degree of the phased return/extent of disability
- Consider is there a substantial disadvantage due to disability. If so, the employer is under a duty to consider RAs
- This can include considering the effectiveness of the adjustment removing the substantial disadvantage, the cost and resources
- If it is agreed that a RA should be made probably safer to agree while the employee works towards full duties there might be a RA for the period of the phased return to full/stable return
- Lack of current full return is disability related?
- Agree any pay and benefits adjusted parameters/duties/method of evaluation of performance during any period of phased return



# Stable/full return

- If employee returns to full duties or has a stable return (less than full duties) less likely to be a challenge to full benefits
- Contrast with a phased return as the employees no longer being evaluated as to the degree of capability as to hours/performance/duties.
- *Eg* RA to pro rate pay if working a certain percentage of the hours.
- Pro rate benefits including performance related benefits accordingly.
- NB: Subject always to any other RA that can be made to enhance the employees' performance/ attendance at work/performance related benefits.



# Questions





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