Sickness absence, disability and dismissal

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1. Persistent sickness absence will cause difficulties for all employers. The aim of this short Practical Guide is to consider sickness absence in the context of an employer's duties under the Equality Act 2010 ("EqA") to disabled employees and, further, the law relating to unfair dismissal. It is hoped that the guidance given here will be useful to those advising employers on how best to deal with the practical challenges of dealing with persistent sickness absence while avoiding related litigation.

Disability Discrimination

2. An employer of a disabled person is likely to be keen to manage the relationship so as to strike a lawful balance between the needs of the business and the needs of the employee. The EqA places particular duties on employers of those who are disabled and it is important that, when faced with the challenge of managing sickness absence, these duties are complied with.

(1) Disability

3. Section 6(1) EqA provides:

> *"A person (P) has a disability if –*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

4. The word *"substantial"* means *"more than minor or trivial"* (s.212(1)). The phrase *"long term"* means lasted or likely to last for at least 12 months or, if the impairment has ceased to have a substantial adverse effect, the effect is likely to recur (Schedule 1, Part 1, paragraph 2); and, in this context, *"likely"* means "could well happen" rather than the higher threshold of "more likely than not". The application of the test is to be judged on the facts at the relevant time, not by later facts ascertained through hindsight.

(2) Claims relating to Sickness Absence

5. When managing sickness absence, an employer of a disabled person will, typically, face two types of potential claim:

(1) A claim of discrimination arising from disability under s.15 EqA, which provides,

> *"(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim"*; and/or

(2) A claim of discrimination by reason of a failure to make reasonable adjustments under s.20 EqA. This provides that, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

6. The focus of the two provisions is different (s.15 is about making allowances for disability whereas s.20 is about affirmative action) but, in many cases, the two forms of prohibited conduct will be closely related.

7. First, the state of an employer's knowledge, actual or constructive, about an employee's disability is relevant to both types of claim. If an employer proves that it did not know, and could not reasonably have been expected to know, that the particular employee had a disability, a claim under s.15 or s.20 will not succeed (see s.15(2) and Schedule 8, para 20, EqA). An employer will not, however, be able to "turn a blind eye" to evidence of disability: it should consider whether an employee has a disability even where one has not been formally disclosed (not all who meet the definition of disability will think of themselves as a "disabled person") and it should find out whether sickness absence is caused by a disability by making reasonable enquiries (with occupational health, for example).

8. Secondly, both types of claim require a balancing exercise to be undertaken. To avoid (or defend) a s.15 claim, the employer's treatment of the employee must be a proportionate means of achieving a legitimate aim whereas, under s.20, the employer must make *"reasonable"* adjustments for the disabled employee. A proper and clear assessment must be undertaken as to the proportionality between the discriminatory effect of the challenged provision or treatment and the reasonableness of the need of the employer to proceed in the way it wishes to or has done. A tribunal faced with either type of claim will be required to conduct a *"critical evaluation"* of the relevant considerations and to demonstrate a proper understanding of the needs of the business (see *Secretary of State for Justice v Prospere* UKEAT/0412/14/DA (2015)).

(3) Duty to Make Reasonable Adjustments

9. A tribunal considering a s.20 claim will be required to adopt the structured approach laid down in *Environment Agency v Rowan* [2008] ICR 218, namely to identify: (1) the provision, criterion or practice ("PCP") at issue; (2) the persons who are not disabled with whom comparison is made; (3) the nature and extent of any substantial disadvantage suffered by the employee; and (4) what, if any, step it is reasonable for the employer to take to avoid that disadvantage.

10. The first matter to consider, then, is the PCP which is said to put the disabled person at a substantial disadvantage. The phrase "*provision, criterion or practice*" is not defined in EqA but is generally construed widely so as to include, for example, formal or informal policies relating to sickness management and, most basically, a requirement to attend work consistently.

11. It should be noted, however, that where a sickness management policy has been specifically drafted so as to cater for disability and is more lenient towards those who are absent for a disability-related reason (by, for example, relaxing "trigger points" for action), such provisions are unlikely to amount to PCPs for the purposes of s.20 because they do not apply to non-disabled employees and a substantial disadvantage in comparison with them cannot, therefore, be established. This was the insuperable difficulty faced by the claimants in *Royal Bank of Scotland v Ashton* [2011] ICR 632 and *Griffiths v Secretary of State for Work & Pensions* UKEAT/0372/13 (2014). If an employee is treated at least as well as a non-disabled sick employee absent for the same amount of time but not for disability-related sickness, he cannot be at a disadvantage, let alone a substantial disadvantage. The focus, then, should be on a PCP which actually causes disadvantage, not on a measure which itself is really a partial adjustment, aimed at alleviating the disadvantage (see, *General Dynamics v Carranza* [2015] IRLR 43). That is why it is likely to make more sense, in a sickness management case, to define the PCP broadly, as in "a requirement to attend work consistently".

12. The second matter is the appropriate comparator. If considering the management of sickness absence, this is likely to be a non-disabled employee who is absent for sickness reasons for the same amount of time but not for disability-related sickness (*Ashton*, supra); and it is likely to be difficult, in such circumstances, to identify any substantial disadvantage suffered by the disabled employee (the third matter) because all employees are likely to be treated the same under a generic sickness

management policy. If the PCP is identified more broadly, however, (such as "a requirement to attend work consistently"), a disabled employee is likely to find it easier to prove that he is placed at a substantial disadvantage compared with those who are not disabled (who are less likely to require persistent absences) and the fourth matter, namely what, if any, step it is reasonable for an employer to take to remove that disadvantage, may be considered.

13. EqA does not specify any particular factors that should be taken into account in deciding what is a "*reasonable adjustment*", but the Equality and Human Rights Commission's "*Code of Practice on Employment*", which was issued in 2011 and which accompanies the EqA ("the Code"), helpfully suggests some factors which might be taken into account. These include the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. These will all be of particular significance when considering what steps it might be reasonable to take in relation to sickness absence: the cost of alternative cover and the difficulties involved in re-distributing work may be significant. The Code goes on to give some examples of steps that it might be reasonable for an employer to take and, in the context of managing sickness absence, it is of note that these include allowing a disabled employee to be absent during working hours for rehabilitation, assessment or treatment and allowing a disabled employee to take a period of "disability leave" for treatment or rehabilitation. Ultimately, however, what is reasonable will depend on all the circumstances of the individual case.

14. In light of the difficulties a disabled employee who is subject to a sickness management procedure may face when proving that he has been substantially disadvantaged compared with a non-disabled (sick) employee, a disabled employee may prefer to bring a s.20 claim of discrimination arising from disability.

(4) Discrimination arising from Disability

15. An employer has a duty not to treat a disabled employee unfavourably because of something arising in consequence of their disability, unless its treatment is a proportionate means of achieving a legitimate aim: s.15 EqA. It is important to recognise that there is no need, when dealing with such a claim, to compare a disabled person's treatment with that of another employee: it is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

16. Section 15 is of obvious significance when considering the management of sickness absence. The Code gives the following example:

> *"An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave)."*

17. In this example, it would be irrelevant to consider whether other employees would have been dismissed for taking three months of sick leave. The question is solely whether the employer's decision to dismiss the disabled employee in such circumstances was a proportionate means of achieving a legitimate aim, ie the decision will have to be objectively justified.

18. It is for the employer to prove objective justification. While securing consistent attendance at work is highly likely to be considered a "*legitimate aim*", tribunals will expect employers to provide cogent evidence to support an assertion that their unfavourable treatment of an employee (eg by giving a warning or, ultimately, by dismissing an employee) was a proportionate means of achieving that aim. Relevant factors might be the way in which an individual's absence is impacting on the business unit (consider, for example, whether staff been called in or required to work additional hours, whether any targets have been missed or whether any clients have been lost) and the financial cost of their absence (including sick pay, occupational health costs and the employer's costs of, eg, paying overtime to other staff).

The Interplay between Disability Discrimination and Unfair Dismissal

19. Once a Tribunal has made a finding of disability discrimination in the treatment of an absent employee, to what extent is it inevitable that the tribunal will also find any resulting dismissal unfair?

20. From a constructive unfair dismissal point of view the EAT has made clear, albeit in the context of sex and race discrimination respectively, in *Shaw v CCL* [2008] IRLR 284 and *Amnesty International v Ahmed* [2009] IRLR 884, that whilst a finding of discrimination is also likely to amount to a breach of the implied term of trust and confidence this does not automatically follow. As a result, if a tribunal assumes from the mere fact of a finding of unlawful discrimination that a constructive unfair dismissal

has occurred this will be an error of law. The same reasoning applies to an actual dismissal situation – see *Heinz v Kenrick* [2000] IRLR 144. In that case the EAT emphasised that the Tribunal ought not to have proceeded on the basis that any dismissal on the grounds of disability was, without more, automatically unfair; separate consideration must always be given to those matters usually relevant for the purposes of section 98 (4) of the ERA. Accordingly a discriminatory dismissal will not necessarily be unfair and vice versa.

Unfair Dismissal

(5) Determining the reason for the dismissal

21. The first step, when dealing with a claim arising out of the dismissal of a sick employee, is to ascertain the reason or the principal reason for that dismissal as this will influence the tribunal's subsequent approach to the question of fairness in all the circumstance for the purposes of section 98 (4) of the ERA.

22. Not all sickness related dismissals fall under the capability umbrella; whether a particular dismissal does or does not will depend upon whether there is a single underlying medical condition connecting the absences which ultimately lead to the decision to dismiss. For example, where an employee has a single period of absence as a result of a long term health condition then the reason for any resulting dismissal can potentially be categorised as capability falling within the ambit of section 98 (2) (a) of the ERA. By contrast, where an employee has a series of unconnected absences for various different minor illnesses the reason for any resulting dismissal ought more properly to fall within section 98 (1) (b) of the ERA and ought to be SOSR – see *Wilson v Post Office* [2000] IRLR 834. In a limited number of cases involving *"absence for no good reason which may call for disciplinary action"* (see Appendix 4 to the ACAS Guide to Discipline and Grievances at Work 2015 (the Guide)), effectively suspected "skiving", the reason may also be conduct. In borderline or uncertain cases, a Respondent would be well advised to plead all potentially applicable reasons in the alternative in any Response.

(6) Procedural requirements

Applicability of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (COP)

23. Before considering the specific procedural requirements relevant to sickness absence related dismissals, a question arises as to whether the COP applies so as, for example, to warrant the provision of a sequence of warnings. The question is an important one since Tribunals are obliged to take the COP into account where relevant and a finding of breach of the COP by the employer may lead to the Tribunal ordering an uplift on any compensation awarded.

24. At first glance, given the title of the COP, it would seem surprising if an employer was obliged to follow it before deciding to dismiss an employee following a period of sickness absence. Especially since the foreword to the COP states that *"it provides practical guidance to employer's employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace."* That the COP is not apposite where dismissal is for reasons relating to sickness absence was recognised by the EAT in *Lynock v Cereal Packaging Limited* [1988] 670.

25. It would seem therefore that the COP is applicable only to the suspected skiving cases referred to above. Where an employer is instead faced with a situation involving an employee whom it is accepted has been genuinely absent because of illness or injury, the employer need only have regard to the recommendations set out in Appendix 4 to the Guide, entitled *"Dealing with absence"*.

26. However, it is important to note that where an employer choses a particular procedure to follow, even if that procedure is not appropriate to the circumstances of the case because, for example, it is a disciplinary procedure designed to deal with cases of misconduct rather than cases of sickness absence, the requirements of that procedure must be complied with. The danger of doing otherwise are highlighted by the EAT's decision in *Messier-Dowty Limited v Butler* UKEAT/713/99. In that case Judge Clark stated,

> *"Where an employer choses to apply his own disciplinary procedure, even if inappropriately, if he then does not follow that procedure it is open to an Employment Tribunal to find that the dismissal is unfair."*

Consultation

27. It is well settled that in cases of genuine sickness absence an employer must consult with the employee concerned prior to taking the decision to dismiss unless there are wholly exceptional circumstances – see *East Lindsey Council v Daubney*. As an example of what could amount to exceptional circumstances for this purposes see *Eclipse Blinds v Wright* [1992] IRLR 133. In this case the decision to dismiss was found to be fair

despite the lack of any consultation where there was evidence to suggest that consultation would have risked disclosing medical evidence which would have caused serious damage to the employee's mental health.

28. Assuming consultation is required, what should this involve on a practical level? The EAT has been reluctant to lay down any hard and fast rules, acknowledging that what is required will vary depending on the facts of the individual case. However, in terms of the issues to be consulted on this should include the medical evidence, the employee's opinion on his/her medical condition to check in particular for any change in circumstance since the medical evidence was obtained and whether they consider themselves to be disabled, what can be done by the employer to assist the employee to return to work and in particular potential reasonable adjustments, alternative employment and entitlement to ill-health benefits. The importance of the employee's views as to the timing of his return to work was acknowledged in *BS v Dundee City Council* [2013] CSIH 91. At the same time the Inner House of the Court of Session made clear that this was a factor which could operate both for and against dismissal. Employees should therefore be aware that if they are unable to give any indication as to when a return to work is likely this may well provide a firm foundation for any subsequent decision taken by the employer to dismiss.

29. In terms of the timing of consultation, employers should ensure discussions continue periodically throughout the duration of the absence in question right up until the decision to dismiss is taken so as to be able to react to any change in circumstance but should be conscious of the need to strike a balance between too much and too little contact, especially in cases concerning absence for mental health reasons and work related stress.

(7) Alternative employment

30. In its advisory booklet entitled "Managing Attendance and Employee Turnover" ACAS indicates that dismissal of an employee on long term sickness should be a last resort, once all other options have been considered. Such options would obviously include alternative employment. Employers should therefore seek to evidence all the steps they take to try to find such work and the employee's response to any proposals put forward. Significantly, there is no obligation on an employer in the context of an unfair dismissal claim to create a new job – see *Merseyside and North Wales Electricity Board v Taylor* [975] ICR 185 – and it may be enough to offer alternative employment at a lower level on a reduced salary if this is all that is available – see *British Gas Services Ltd v McCaull* [2001] IRLR 60. However, large companies and government departments are likely to be treated as national employers such that they ought potentially to consider alternative employment outside the immediate vicinity of the employee's current workplace.

(8) Ill Health Retirement

31. The EAT in *First West Yorkshire Ltd v* Haigh [2008] IRLR 182 held that where an employer provides an enhanced pension on retirement through ill health, prior to dismissing an employee for capability reasons, the employer should take reasonable steps to ascertain whether that employee is entitled to the benefit of ill-health retirement. This does not mean that an employer must consider ill-health retirement in every case. Whether or not consideration of ill health retirement prior to dismissal is required depends upon whether there is any real reason to think that a particular employee is or might be eligible for it - see *Matinpour v Rotherham MBC* UKEAT/0537/12. On the facts of that case, there was therefore no unfair dismissal where the employer did not consider ill-health retirement when the employee consistently maintained that he would be fit to work eventually and medical evidence, whilst not identifying a return to work date, indicated that a return might be possible in the near future.

(9) Medical evidence

32. In view of the EAT's comments in *Daubney* to the effect that before an employee is dismissed on grounds of ill-health, steps should be taken by an employer to discover the true medical position, the question arises as to whether an employer is always obliged to obtain medical evidence. It is clear from the case law that in cases of persistent short term absence the employer will be under no such obligation – see *Lynock* supra at 673D-E of the judgment of Wood J. Such an approach clearly makes sense, as any such investigation is unlikely to be fruitful.

33. Assuming, however, that medical evidence is required, what form should this evidence take? In any particular case, an employer may have as number of options. For example, a first stage referral to occupational health, a second stage request for a report from the employee's GP through occupational health or a third stage may involve seeking a specialist opinion from a treating specialist. What may be required in any particular case will depend not only on the nature of the illness

but also on the recommendations made by other professionals such that it may be deemed to be unreasonable to have failed to obtain a specialist opinion if such was expressly recommended by occupational health or by a GP.

34. As to what the medical practitioner should be asked to address, this will largely depend on the circumstances of the individual case. However, from an unfair dismissal perspective rather than providing the medical practitioner with a general instruction to prepare a report on an individual employee's condition which carries the risk that the medical evidence will not provide the employer with all relevant information, in any letter of instruction the medical practitioner should be asked to focus on the nature of the illness, the expected period of absence/prognosis and the type of work an employee will be capable of undertaking on his/her return. It would also be wise for an employer to remain neutral and to avoid appearing to favour a particular outcome by for example asking leading questions or providing a partial chronology of events in any referral form so as to avoid any suggestion that a decision as to the employee's future had already been taken.

Common problems

Unclear, inconsistent or conflicting medical evidence

35. It is very often the case that medical evidence which is obtained is difficult to understand and apply because it is unclear and fails to answer all the questions posed by an employer or because it contains conflicting statements. Alternatively, it may be that medical evidence obtained from two different sources conflicts. What should an employer do in such circumstances?

36. The EAT in *Daubney* made clear that it is not the function of employers to turn themselves into some sort of medical appeal tribunal to review the opinions and advice of their medical advisers. In fact, as a result of the EAT's decision in *Liverpool AHA v Southern District* [1977] IRLR 471, it would seem that employers are not under any duty to evaluate medical evidence unless it is plainly inaccurate or based upon an inadequate examination.

37. This does not however mean that employers are absolved from all further responsibility simply by obtaining medical evidence. If medical evidence is incomplete because it fails to address a specific question as instructed, it would be reasonable to expect the employer to go back to the medical practitioner in question for further input. Similarly, where medical evidence is unclear or self contradictory, it would be reasonable to expect an employer to go back to the medical practitioner to highlight the problem and seek clarification and if the problem remains, potentially to seek a second opinion. As to the situation where medical evidence from two different sources conflicts, it may be reasonable to remit the matter to the first medical practitioner to see whether the subsequent evidence changes their original opinion or to seek a third opinion. In either case the employer should be careful to ensure that the medical practitioners have access to all relevant material as if a medical expert fails to conduct a proper investigation the employer will be saddled with that lack of investigation – see *Ford Motor Co v Nawaz* [1987] ICR 434.

Employee's failure to co-operate

38. Another common problem facing employers seeking to obtain medical evidence is what to do in circumstances where an employee refuses to co-operate with the process. It is important to remember that an employer cannot force an employee to co-operate by for example give their consent to the obtaining of a medical report or by undergoing a medical examination. Absent an express contractual power, any attempt to do so could potentially amount to a breach of the implied term of trust and confidence and so found a claim for constructive unfair dismissal – see *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308. Instead, as is made clear by Appendix 4 to the Guide, the employer should inform the employee in writing that a decision would be taken on the information available and that it could result in dismissal.

(10) Substantial fairness

39. In determining this issue, the basic question according to *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301 is whether, in all the circumstances, the employer can be expected to wait any longer and if so, how much longer? The answer to this question will depend on the nature of the illness, the likely length of the continuing absence, the need for the employer to have done the work which the employee was engaged to do and the feasibility of engaging a temporary replacement. In the case of a disabled employee, an employer must also have exhausted all potential reasonable adjustments. The failure to refer to the balancing exercise required by *Spencer* is likely to be an error of law – see *Dundee* supra and *Monmouthshire County Council v Harris* UKEAT 0032/14 and UKEAT/0010/15.

40. It is good practice for an employer to ensure that business need is evidenced and not merely asserted especially in cases of long term sickness absence by for example providing evidence of complaints made by other employees and of the inability of the employer to obtain cover during absence for policy reasons. However, the failure to do so may not be fatal. For example in the recent case of *Bolton St Catherine's Academy v* O'Brien UK EAT 0051/15 the EAT rejected the Tribunal's finding that the employing school ought to have adduced evidence of the impact of their teacher's absence (for example detail of the lessons missed, staff rotas, timetables or financial statements) and indicated that the Tribunal ought to have considered that issue from a common-sense point of view. The impact on a business of persistent short term absences may well similarly be self-evident.

41. It should be borne in mind that a dismissal can still be fair where the employer has through it conduct caused the illness which led to the absence – see *McAdie v Royal Bank of Scotland* [2007] IRLR 806 – and even when there that conduct includes an earlier failure to make reasonable adjustments – see *Monmouthshire County Council* supra. Such facts are relevant but not conclusive.

42. What is more, the mere fact that an employee has worked for a particular employer for a lengthy period of time is not automatically relevant. As was made clear in *Dundee*, the critical question in every case is whether the length of an employee's service and the manner in which he or she worked during that period, yields inferences that indicate the employee is likely to return to work as soon as he or she can.

43. As to the relevance of contractual sick pay arrangements, *Coulson v Felixstow Dock & Rly Co* [1975] IRLR 11 makes clear that dismissal during the currency of such arrangements will not necessarily be unfair nor will dismissal upon the entitlement to sick pay necessarily be fair. The existence of such a scheme is only one factor which may be taken into account and is likely to be relevant to any argument as to business need.

(11) Tips and trips

- Be alert to the need to correctly categorise the reason for the dismissal – not all sickness absence related dismissal fall under the capability umbrella
- Categorisation of the reason for dismissal will affect the application of the COP and will determine the applicable procedural requirements
- Don't underestimate the importance of the employee's own views as to the timing and likelihood of their return to work
- Consider alternative work outside the immediate geographical area and even at a lower rate of pay
- Seek clarification or an alternative opinion when faced with unclear or conflicting medical advice and ensure medical practitioners from whom advice is sought are provided with all relevant facts

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Recent cases include:

Ukeh v Ministry of Defence: Acting for the respondent in this claim of race and sex discrimination brought by a doctor serving as an Officer in the Army and arising out of her time at Sandhurst. All claims were dismissed by the ET, a decision which was upheld on appeal to the EAT.

Royal Free Hampstead NHS Trust v Shah: Acting for the respondent in this claim arising out of dismissal for gross misconduct (clinical negligence) and alleged race discrimination. The EAT upheld the respondent's appeal on the ET's failure to apply the range of reasonable responses test.

T v X NHS Trust: Acting for the respondent in this complex whistleblowing, constructive dismissal and disability discrimination claim, brought by a paediatric nurse.

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Recent cases include:

DWP v Coulson: acting for the Respondent in this claim for unfair dismissal arising out of alleged misconduct relating to breach of data protection policies. Successfully appealed the Tribunal's decision in relation to contributory fault.

Anthony Neary v (1) Service Children's Education (2) MOD (3) St John's School: concerning the Tribunal's territorial jurisdiction to consider claims for disability and age discrimination

Parminder Kaur Sahota v (1) Home Office (2) Rick Pipkin: as to whether a woman undergoing IVF treatment was to be regarded for the purposes of a sex discrimination claim as in a comparable position to a pregnant woman. One of the first English cases to consider the impact of the ECJ's decision in Mayr v Backerei und Konditorei Gerhard Flockner OHG on domestic law.

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