A PRACTICAL GUIDE TO
SICKNESS ABSENCE, DISABILITY AND DISMISSAL

A Practical Guide from the 2TG Employment Group | Autumn 2020

Introduction

1. Persistent sickness absence causes 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."*

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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 for the rest of an individual's life 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" (Paragraph C3 of the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability). The application of the test is to be judged on the facts at the time of the alleged act/s of discrimination, 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 the individual directly, for example). However, when considering the issue of constructive knowledge under s.15(2) EqA, the question is always what might the employer reasonably have been expected to have known? Even if therefore it is possible to identify further enquiries which the employer ought reasonably to have undertaken, it is always necessary to go on to consider ultimately what those enquiries would have revealed; if the enquiries in question would not have revealed any further relevant information (because, for example, the individual would have continued to suppress information relevant to their disability) the employer will not be liable (see *A Limited v Z* [2019] IRLR 952).

8. It is not uncommon for employers to make enquiries as to an employee's state of health via an independent occupational health provider. In those circumstances, the question arises as to whether an employer will be fixed with knowledge of information relating to

disability conveyed to that occupational health provider but not directly to it? The answer will depend on the scope of the initial consent provided to the occupational health provider by the employee in question as to the disclosure of information. Where an employee consents only to occupational health providing his or her employer with an opinion as to fitness for work (and not as to the disclosure of the information upon which that opinion is based), the employer will *not* subsequently be fixed with knowledge provided by the employee to occupational health as to his disability in the course of any occupational health assessment undertaken for that purpose (see *Q v L* UKEAT/0209/18/BA).

9. 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

10. 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.

11. 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.

12. 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 in *Griffiths v Secretary of State for Work & Pensions* UKEAT/0372/13 (2014) in the EAT. 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" or as a "requirement to maintain a certain level of attendance at work in order not to be subject to disciplinary sanctions". This was a point made expressly by the Court of Appeal in

Griffiths when overturning the earlier decision of the EAT in that case (see *Griffiths v Work and Pension Secretary* [2017] ICR 160).

13. 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). It was initially thought that use of this comparator provided another reason why claims for failure to make reasonable adjustments reliant upon the application of a sickness management policy in general as the relevant PCP, must fail. The argument being that if, under such a policy, 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. However, it is now clear, following the Court of Appeal's decision in *Griffiths*, that for the purposes of undertaking the comparative exercise required by s.20 EqA, one must ask simply whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that both are treated equally (because for example a sickness management policy applies to them both in the same way) and may both be subject to the same disadvantage when absent for the same period of time, does not eliminate the disadvantage if the PCP bites harder on the disabled than the able bodied. Accordingly, a disabled employee whose disability increases the likelihood of absence from work on ill health grounds will be subject to the requisite comparative disadvantage because they will find it more difficult to comply with the requirement relating to absenteeism under any such policy.

14. Alternatively, if the PCP is identified more broadly (such as "a requirement to attend work consistently"), any difficulties associated with undertaking the above comparative exercise can be avoided; a disabled employee in this context 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 instead the focus will be on the fourth matter, namely what, if any, step/s it is reasonable for an employer to take to remove that disadvantage.

15. 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 whether taking any particular step would be effective in preventing the substantial disadvantage in question, the practicability of the step, 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. The latter three factors will 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 transferring a disabled employee to fill an existing vacancy, altering a disabled employee's hours of work, 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.

16. Some difficulty has arisen in determining what in principle can amount to a "step" for the purposes of s.20 EqA. For example, in *Carranza* (supra), an issue arose as to whether an employer ought reasonably to have disregarded an earlier warning for absence when deciding whether to dismiss. The EAT rejected this argument, doubting whether the mental processes in disregarding a warning in these circumstances could amount to a "step" within the meaning of s.20 EqA. Rather, it reiterated that "steps" in this context relates to the practical actions which can be taken to avoid the relevant disadvantage. The broad nature of the s.20 duty is further illustrated by the approach adopted by the Court of Appeal in *Griffiths*. In that case, the Court of Appeal made clear, any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. This is not to say, however, that the duty to make reasonable adjustments is unlimited. It will not, for example, extend to matters which would not assist in preserving the employment relationship such as requiring an employer to offer ill health retirement (see *Tameside Hospital NHS Foundation Trust v Mylott* UKEAT/0352/09).

17. 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.15 claim of discrimination arising from disability.

(4) Discrimination arising from Disability

18. 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.

19. 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).*"

20. 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.

21. 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). As was stated by Underhill J in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, it is not unreasonable for a tribunal to expect some evidence of the impact on an employer of the continuing absence of an employee who is on long term sickness absence when determining the point at which their dismissal becomes justified and what kind of evidence is appropriate will depend on the facts of the individual case.

The Interplay between Disability Discrimination and Unfair Dismissal

22. Once a Tribunal has made a finding of disability discrimination in the treatment of an absent employee, how likely is it that the tribunal will also find any resulting dismissal unfair?

23. 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

24. Exceptionally, an extended absence may frustrate the contract of employment, such that no dismissal occurs in law. Outside those circumstances, 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 circumstances for the purposes of section 98 (4) of the ERA.

25. Not all sickness-related dismissals fall under the capability umbrella; whether a particular dismissal does or 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 the reason for any resulting dismissal can potentially be categorised as capability falling within the ambit of section 98 (2) (a) of the ERA. Where factors other than pure capability are at play, the reason for any resulting dismissal may also, or more properly, fall within section 98 (1) (b) of the ERA (SOSR) – see *Wilson v Post Office* [2000] IRLR 834 (employee with multiple unrelated sickness absences but capable for work not dismissed on capability grounds). 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 2019 (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)

26. 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.

27. 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 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] ICR 670.

28. 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*".

29. 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 dangers 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 (§13):

> "*Where an employer chooses 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

30. 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* [1977] IRLR 181. As an example of what could amount to exceptional circumstances for these purposes, see *Eclipse Blinds v Wright* [1992] IRLR 133. In that 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 to the employee which would have caused serious damage to her mental

health.

31. 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, the issues for consultation 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, especially 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.

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

(7) Alternative employment

33. In its advisory booklet, "Managing Attendance and Employee Turnover", ACAS indicates that dismissal of an employee on long-term sickness absence 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* [1975] 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 required to consider alternative employment outside the immediate vicinity of the employee's current workplace.

(8) Ill-Health Retirement

34. 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 no unfair dismissal where the employer did not consider ill-health retirement, 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

35. 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. In cases of intermittent *unconnected* short-term absences the employer is generally not under such an obligation, as any such investigation is unlikely to be fruitful – see *Lynock* (above) at 673D-E of the judgment of Wood J.

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

37. 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 specific issues, which are likely to include 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 is also wise for an employer to remain neutral and to avoid appearing to favour a particular outcome, for example by asking leading questions or providing a partial chronology of events in any referral form.

Common problems

Unclear, inconsistent or conflicting medical evidence

38. It is very often the case that medical evidence 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?

39. 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. Indeed, based upon the EAT's decision in *Liverpool AHA (Teaching) Central & Southern District v Edwards* [1977] IRLR 471, employers are not under any duty to evaluate the content of medical opinion unless it is plainly erroneous as to the facts or based upon no or no adequate examination.

40. It does not of course follow that employers are absolved from scrutinising medical evidence with care. If, for example, a medical report is incomplete because it fails to address a specific question as instructed, it is 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 is 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

41. 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 giving their consent to the obtaining of a medical report or 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 will be taken on the information available and that it could result in dismissal.

(10) Substantial fairness

42. 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 *BS v Dundee* (above) and *Monmouthshire County Council v Harris* UKEAT 0032/14 and UKEAT/0010/15.

43. 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, for example by providing evidence of complaints made by other employees and of the inability of the employer to obtain cover during absence for policy reasons. The failure to do so may not be fatal, but will likely weaken the employer's evidential position considerably. For example in *Bolton St Catherine's Academy v O'Brien* [2017] ICR 737, the Tribunal found 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). The majority of the Court of Appeal expressed sympathy with the school's contention that the impact of the lengthy absence of an important head of department was self-evident, but nevertheless upheld the claims both of unfair dismissal and disability discrimination.

44. It should be borne in mind that a dismissal can still be fair where the employer has through its 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 (above). Such facts are relevant but not conclusive. In such circumstances the employee is likely to be in a position to bring a civil claim for damages for personal injury.

45. 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 *BS v 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*".

46. As to the relevance of contractual sick pay arrangements, *Coulson v Felixstowe Dock & Rly Co* [1975] IRLR 11 makes clear that dismissal whilst entitled to sick pay will not necessarily be unfair. Dismissal upon the exhaustion of entitlement to sick pay will correspondingly not necessarily be fair (see, e.g., *Hardwick v Leeds Area Health Authority* [1975] IRLR 319). The existence and nature of such a scheme is only one factor which may be taken into account; it 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; if in doubt, cite multiple reasons
- 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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