Introduction to Employment Law

Managing sickness absence

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1. Why is absence management important?

Ineffective management of sickness absence in the workplace can cause difficulties and potentially liabilities for an employer. It takes up a considerable amount of management time in working out the best way forward for those employees taking lots of short-term absences or on long term sick. Managers who regularly deal with sickness absence may find themselves being a key witness if the employee goes on to bring a tribunal claim.

Employers can also be impacted financially by sickness absence, particularly if the absence causes deadlines to be missed which in turn could damage customer service and the reputation of the employer. It impacts the wider workforce as it can reduce morale among the colleagues who are covering the work of the employee off sick. An employer may also have to consider hiring temporary employee to cover the gap in their workforce.

From a liability perspective, if an employer doesn't manage sickness absence effectively, they could find themselves faced with an employment tribunal claim e.g. for unfair dismissal and/or disability discrimination. If unsuccessful in defending such claims, an employer could be made to pay out compensation. For an unfair dismissal claim, this would be the basic award and the compensatory award (currently capped at £105,707 or 52 weeks gross pay, whichever is lower). For any successful discrimination claims, there is no limit on loss of earnings and there may be an additional injury to feelings award made. Employer will also have legal costs and further management time associated with defending any tribunal claims.

Therefore, not managing sickness absence effectively can be very costly and timely for an employer.

2. What an employer should consider

Employees do not have a statutory right to take time off work where they are sick or injured but employees may have a contractual right to this type of absence in their employment contract. In the absence of an express contractual term, an employee will likely be able to argue that there is an implied term (either through custom and practice or on the basis that an employee should not be required to work if unfit to do so).

Employers should also be mindful of other statutory obligations such as its health and safety obligations and its common law duty to provide a safe place to work. In addition, there is an implied contractual duty of mutual trust and confidence between an employer and employee so this will also need to be considered when dealing with absent employees.

The law relating to unfair dismissal and discrimination prevents an employer from dismissing an employee who has taken sick leave (the employer must follow a fair procedure and act reasonably in the circumstances) and prevents an employer from treating an employee with a disability less favourably or unfavourably because of their disability or something arising in consequence of their disability.

It is a legal requirement under section 1 of the Employment Rights Act 1996 for an employer to provide the employee any particulars relating to "incapacity for work due to sickness or injury, including any provision for sick pay". This information can either be in a single written statement (typically the employment contract) or the statement can refer out to a reasonably accessible document e.g. the staff handbook.

Many employers will have a sickness absence policy in place and such policy will enable employers to manage absences effectively and consistently. A sickness absence policy also ensures that employees understand what is expected of them and any specific reporting requirements they need to follow if they are going to be absent from work. Employers should ensure that whoever the employee reports to when they are absent, this individual or team has appropriate training so they understand the employer's reporting process and how to deal sensitively with employees who are reporting in as absent.

Employers should also consider what processes they have in place to monitor absence and this can be useful to identify patterns of absence and address any potential problems early on.

There is an express right under statute for an employee to receive Statutory Sick Pay ("SSP") if they meet certain conditions but no common law right to receive pay under a contract while an employee is off sick. The Social Security Contributions and Benefits Act 1992 and Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) (both as amended) set out the SSP scheme.

The SSP scheme allows absent employees (who meet the eligibility criteria) to be paid a weekly payment for up to 28 weeks in any period of incapacity for work (or connected periods). In order to receive SSP, the employee must provide a notification to their employer and submit evidence of their incapacity. Typically employees will self-certify up to 7 days and then provide fit notes for any periods longer than 7 days.

To receive SSP, the individual must:

- Be an employee and have worked for the employer before going on sick leave
- Must be incapable to work for at least four days or more in a row (this includes non-working days)
- The individual's average earnings must be at least £123 a week (this is the rate as at November 2023)
- The individual must notify their employer about their sickness (following any relevant reporting procedures) within seven days of the first day of sickness.

The weekly rate of SSP increases every April in line with any annual increase in CPI. The current rate is £109.40 per week.

A lot of employers offer enhanced or contractual sick pay over and above the SSP rate e.g. paying full pay for up to 12 weeks or 3 months in each 12-month rolling period. Contractual sick pay can go towards discharging the employer's SSP obligations and can therefore be offset against the relevant SSP amount each day that contractual sick pay applies.

Some employers may offer health-related insurances such as private healthcare or permanent health insurance. Permanent health insurance ("PHI") is a type of insurance that will provide employees with all or some of their salary if they have a long-term condition which makes them unable to work. PHI can sometimes be referred to as income protection or a group income protection scheme. PHI will usually have strict criteria that an employee must meet before the scheme kicks in. The scheme may apply until the employee can return to work or until they reach retirement age (or death). Employers will need to be mindful of any PHI scheme in place if they are considering dismissing an employee on long-term sick who is receiving benefits under the PHI scheme as dismissing could give rise to unfair dismissal and/or disability discrimination claims.

3. Types of sickness absence

Sickness absence takes many forms.

<u>Short-term absence</u>

A short-term absence usually takes the form of a minor one-off absence (e.g. toothache, colds, migraines etc) or minor absences that occur more regularly (e.g. an employee may be off minor strains/injuries a couple of times a year or they may be off every few weeks with a migraine).

Long term absence

A long-term absence is where an employee is off for a lengthy continuous period of time usually because of a particular condition.

Unauthorised absence / AWOL / non-genuine / elective

An unauthorised absence or an 'absent without leave' / AWOL absence is where an employee fails to turn up to work or fails to notify their employer of the absence or the reason for the absence is false / misleading. AWOL absences can be unpredictable and it is important employers monitor such absences to see if there is any patterns emerging. A wilful absence is where the employee is absent from work and has a non-genuine reason for the absence.

4. Short-term and long-term absences

Short-term absences

Short-term absences are typically minor one-off absences or minor absences that occur more regularly. Employers should conduct a return-to-work meeting with the employee on their return to work. This gives the employer an opportunity to raise concerns and explore the underlying reasons for the absence. It may also discourage employees from taking frequent sickness absence (particularly if the employee is taking a lot of wilful absence). These meetings can also allow an employer to identify if there is a recurring pattern of absence.

Employers may have return to work meetings built into their absence policy and the employer should check this for any timescales. Usually a return to work meeting will be held as soon as an employee returns from the absence.

An employer may also wish to consider carrying out a return to work risk assessment, particularly if the employee's workplace presents health and safety risks.

An employee can 'self-certify' their absence up 7 calendar days. If an employee is absent for more than 7 calendar days, they are required to provide evidence behind their absence. Typically this will be a 'statement of fitness of work' or more commonly known as a 'fit note' from their GP. The fit note will detail if the employee is 'fit for work' or 'not fit for work' or if they 'may be fit for work' with some adjustments. The fit note provides evidence of incapacity for statutory sick pay purposes. If the fit note details that the employee 'may be fit for work', it allows the GP to suggest alterations to the employee's duties, hours or working patterns which the employer can consider.

Long-term absence

If the employee is off work for a prolonged period of time (usually continuous), then this will be a long-term absence. An employer will need to consider if the employee has an underlying condition causes the absence which could be a disability. The employer will usually make an assessment by taking into account any medical evidence.

If the employee's condition is likely to be considered a disability, then the employer has a duty to make reasonable adjustments. Employer's will very often make a referral to an occupational health provider to understand the severity of an employee's condition, how long they are likely to remain off work for and whether the employer can make any adjustments to facilitate the employee's return to the workplace.

Where an employee is off sick for a long period of time, the employer will need to conduct a series of meetings with the employee. These meetings should be conducted sensitively and should consider the following:

- How the employee is feeling and any views they have on any return to work
- Any reasonable adjustments that can be made
- Any medical evidence and dates for any reviews of the employee's condition and/or operations
- The effect of the employee's absence on the business
- Any alternatives the employee may wish to consider if viable e.g. redeployment
- Possible termination of employment (at an appropriate stage when HR has been consulted and potentially legal advice has been sought)

When conducting these meetings, employer should consider giving employees the right to be accompanied, especially if the outcome of the meeting could be a warning or dismissal. In appropriate cases, the employer should also consider holding the meetings at the employee's home or at an alternative venue and/or allowing a friend or family member to accompany a seriously ill or disabled employee.

Similar to when an employee returns to work from a short-term absence, an employer should consider conducting a return-to-work interview with an employee returning from long-term sick. This interview will assist in establishing the employee's return to work and how to best reintroduce them into the workplace. An employer may consider a phased return where the employee returns on a part-time basis for a period of time before going back to their full-time hours. An employer will need to continue to identify whether any reasonable adjustments are required and how best to manage the return from long term sick sensitively.

5. Disability discrimination and duty to make reasonable adjustments

Disability discrimination

When considering a long-term absence, employers need to be mindful of whether the employee is disabled as this could increase the risk of a claim for discrimination on the grounds of disability if the employee is dismissed due to long term absence.

An employee will be considered disabled if they have a physical or mental impairment that has a substantial and long-term effect on their ability to carry out day-to-day activities (section 6(1) Equality Act 2010).

Types of disability discrimination include:

- Direct discrimination (section 13 Equality Act 2010) – occurs where "because of disability", an employer treats an employee less favourably than the employer treats or would treats others. An example would be not promoting an employee because they are disabled.

- Indirect discrimination (sections 6 and 19 Equality Act 2010) – occurs where an employer applies to an employee a provision, criterion or practice ("PCP") and the employee has a disability. The employer applies or would apply that PCP to other employees who do not have the employee's disability. The PCP puts or would put those with the employee's disability at a particular disadvantage when compared to other employees and the PCP puts or would put the employee at that disadvantage. The employer cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim. An example would be having a rest break policy which says everyone has to take a lunch break at the same time with no other breaks. This could put an employee with diabetes at a particular disadvantage as they need to take breaks to eat snacks between meals to help manage their diabetes. A PCP will not be indirectly discriminatory if the employer can show that it is objectively justified.

- Discrimination arising from a disability (section 15 Equality Act 2010) – occurs where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. For example, the employee takes disability related absence and is disciplined or dismissed because of that absence. The absence is something that arises in consequence of the employee's disability.

- Harassment (section 26 Equality Act 2010) – occurs where the employer engages in unwanted conduct relating to disability and the conduct has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

- Victimisation (section 27 Equality Act 2010) – occurs where an employer subjects an employee to a detriment because either the employee has done a protected act or the employer believes that the employee has done, or may do, a protected act. A protected act includes bringing proceedings under the Equality Act 2010 or alleging that the employer or someone else has contravened the Equality Act 2010.

- Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010) – an employer has a duty to make reasonable adjustments where a disabled employee is put at a substantial disadvantage in relation to an employer's provision, criterion or practice, a physical feature or where a disabled person would be at a substantial disadvantage if they weren't provided with an auxiliary aid.

<u>Reasonable adjustments</u>

Where an employee is disabled, the employer has a duty to accommodate the needs of that employee which includes making reasonable adjustments. Reasonable adjustments are not just any adjustment requested by the employee but one that is reasonable in the circumstances.

In the case of *Salford NHS Primary Care Trust v Smith* UKEAT/0507/10, the Employment Appeal Tribunal commented that the purpose of a reasonable adjustment is "primarily concerned with enabling the disabled person to remain in or return to work with the employer" or "to enable disabled people to play a full part in the world of work". The following will be considered:

- The extent to which the adjustment would have ameliorated the disadvantage
- The extent to which the adjustment was practicable
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities
- The financial and other resources available to the employer
- The availability of external financial or other assistance
- The nature of the employer's activities and the size of the undertaking

The EHRC Employment Statutory Code Of Practice (para 6.33) includes some examples of adjustments that might be considered reasonable:

- Adjustments to premises e.g. making a doorway bigger or providing a ramp for wheelchair access
- Providing information in accessible formats e.g. Braille or an audio format
- Changing hours of work
- Changing place of work
- Changing duties e.g. assigning different duties or transferring some duties to another employee
- Amending procedures for testing or assessment

- Amending or acquiring equipment e.g. an adapted keyboard
- Allowing a disabled employee to take time off ('disability leave')
- Amending disciplinary or grievance procedures
- Amending redundancy selection criteria

When deciding discrimination claims, the tribunals must take the Code into account where relevant.

6. Ongoing considerations and medical evidence

Throughout the absence or absences, employer should consider:

- Whether the absence is genuine
- Identifying the cause of the absence and whether it is work related
- Determining what support measures the employer can implement (if any)
- Identifying any patterns of absence
- Arranging absence cover and support for the employee's colleagues / wider team
- Determining if an employee is likely to return to work
- Identifying whether termination of employment is an option including any consideration of insurance benefits in place e.g. PHI

Medical evidence will be key when dealing with sickness absence and can be used when managing both short-term and long-term absences. For short-term absences, medical evidence can help identify if frequent absences relate to the same issue which could identify an underlying medical condition and for long-term absences, medical evidence will help an employer assess any return to work and whether any adjustments need to be made.

The onus is on the employer to take reasonable steps to ascertain the medical position, rather than the onus being on the employee to volunteer medical information (beyond their duty to submit fit notes etc).

An employer may need to seek medical evidence from more than one health professional. This could include an occupational health physician or a specialist doctor retained by the employer. Alternatively, or in addition, it could be the employee's GP or consultant. If the employer opts for the latter, the employer needs to be mindful of safeguards under the Access to Medical Reports Act 1988 which sets out procedural steps for obtaining medical reports from a medical practitioner for employment purposes, including checks in connection with recruitment as well as investigations in connect with sickness absence.

7. Dismissal / alternatives to dismissal

If an employer doesn't address or effectively manage an employee either having lots of short-term absences or an employee on long term absence, this can have significant impacts for the employer. For example, the employer may be paying out for temporary cover to ensure the employee's work is covered, the employee continues to accrue holiday during sickness absence and general staff morale may be down if colleagues are having to pick up the work of the employee off sick.

If the employer is contemplating dismissal following giving the employee warnings, the employer should write to the employee. When writing, the employer should provide the following information:

- Confirm to the employee that it is contemplating dismissal
- Invite the employee to attend a meeting
- Include details of the employee's absence or absences
- Include a summary or enclose any medical evidence relied on by the employer

Where the employee has had a lot of short-term absence and their absence levels have simply become unacceptable, the letter should state this and include reasons why alongside details of the absences and any steps taken by the employer to date to manage the absences. In long term sickness scenarios,

the employer will need to make clear to the employee the length of absence, the effect it is having on the business and also summarise or enclose any medical evidence relied on by the employer (this may include occupational health reports / opinions).

It is advisable for the employer to meet or speak with the employee before issuing the letter to ensure there are no objections about the proposed arrangements for the meeting. Employers should remember the statutory right to be accompanied and ensure the employee is aware of the right where applicable. Employers also need to be mindful as to the venue of the meeting and also whether it is appropriate in the circumstances to allow a friend or family member accompany the employee, particularly if they are disabled.

At the meeting, the employer has an opportunity to hear from the employee. The employer should ensure that no definite decisions are taken before the meeting and that there are no internal records to indicate a decision has been reached before speaking with the employee. The employer needs to avoid the outcome looking like it is predetermined as this could potentially result in an unfair dismissal.

If the employee cannot attend the meeting due to absence and persistently does this, the employer should consider adjourning the meetings pending medical evidence (employers should check the process in their sickness absence / capability processes in relation to this too).

If the employer considers that it will be unlikely that the employee will attend the meeting or a reconvened meeting, then the employer may decide to make a decision and move forward without a face-to-face meeting. The employer should do this with caution and check any policies, particularly contractual policies. Employers should also consider allowing an employee to submit written submissions if they cannot attend the meeting.

If the employer reaches the conclusion that dismissal is the only option, the employer will need to set out the reason for the dismissal. For short-term absenteeism, the reason for the dismissal will likely be 'some other substantial reason' or it might be a conduct dismissal if the employee has persistent unauthorised absence without valid reason. For long-term absences, the reason for the dismissal will likely be capability. Where dismissing for capability reasons, particularly where the employee has a disability, the employer will need to consider whether it has a duty to make adjustments to address any substantial difficulties caused by the workplace arrangements. However, this would depend on what is reasonable in the circumstances and whether any adjustment would help the employee return to work.

To try and minimise the risk of a disability discrimination claim, the employer should consider whether any adverse action it takes against the employee is as a result of poor performance and whether this can be objectively justified. The employer will need to be able to show that it has a legitimate aim and that it has acted proportionately in the way it has treated the employee.

If the employer dismisses and the employee appeals, the appeal should be carried out by an independent and more senior manager than the disciplinary manager.

If the employer dismisses due to capability, the employer must try to ensure the dismissal was fair and that it acted reasonably in dismissing. This will involve the employer considering the nature of the illness and the likelihood of returning to work and any business requirements of the employer. The employer will also need to consider medical evidence when making the decision to dismiss. A further consideration for the employer is whether they could have kept the employee's job open for any longer. Assessing this will be based on the particular circumstances of the employee's illness and their role / duties. The Tribunal would generally expect a larger employer to wait longer as arguably they have more resource to cover the absence.

The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to ill health / capability dismissals. The non-statutory guidance that sits alongside the ACAS Code is clear that when an employer is dealing with absence where the employee is absent for a genuine reason, the guidance in Appendix 4 should be followed with ACAS's advisory guidance on managing attendance and

employee turnover. ACAS are clear that if the absence is not for a genuine reason, then this should be dealt with by the employer as a disciplinary issue, in which the ACAS Code would then need to be followed. It is best practice for an employer to follow the steps set out above even if the ACAS Code does not apply.

8. Tricky areas and how to effectively overcome them

Return to work where the employee remains signed off

Sometimes an employee may wish to return to work before the expiry of their fit note. This could present a health and safety risk to the employee and / or their colleagues.

An employee's GP may be willing to provide a letter to confirm that the employee is ready to return to work earlier than expected but will often charge a fee to the employee for this type of letter.

An employer will need to consider the health and safety risks of the employee returning early and any evidence from their GP or the employee that suggests they are fit to return to work again. If no evidence is provided by the employee or the employer has significant concerns about an early return to work, then the employer may take the view that the employee cannot return until the expiry of their fit note.

Holidays and sickness absence

Employees on long-term sick must be paid for statutory holiday entitlement.

Holidays will continue to accrue during sickness absence. In *Stringer and others v HMRC; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214*, the ECJ confirmed that if an employee is prevented from taking holiday due to sickness, they must be allowed to take it following their return to work even if it means carrying it over to next year. In *NHS Leeds v Larner [2012] IRLR 825*, the Court of Appeal confirmed the Stringer case and the principle that workers can carry forward leave of up to 4 weeks into the next leave year.

The ECJ in *KHS AG v Schulte [2012] IRLR 156* confirmed that there is a limit to the length of leave to be carried forward. In the UK, 18 months from the end of the relevant leave year is considered a sensible period of carry-over where an employee is off on long-term sick and the case of *Plumb v Duncan Print Group Ltd UKEAT/0071/15* confirmed this. Following Brexit, there may be a desire to reverse the current entitlement of workers on long-term sick or maternity leave to carry-over unused holiday entitlement to another leave year.

In the case of *Pereda v Madrid Movilidad SA [2009] IRIR 959*, the ECJ confirmed that a worker on sick leave before a period of pre-arranged holiday, has the right, at their request to take their holiday at a later date when they are not off work for sickness. Interestingly there isn't a requirement for the absent employee to show that they couldn't take the holiday due to illness for the right to apply. If an employee complains that their holiday has been affected by sickness, an employer has two main options:

- Reinstate the holiday for the affected days and allow holiday to be carried over to the next leave year.
- Allow the employee to reschedule the holiday.

In the case of *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and others [2012] IRLR 779*, the ECJ held that a worker who becomes unfit for work during a period of statutory holiday must be entitled to reschedule the period of unfitness for work. This follows the *Pereda* case which confirmed that if a worker is unfit before holiday, then they can take their holiday at a later date with *ANGED* going one step further and confirming that it is the same position if during holiday.

Notice pay

Unless the employee's employment contract provides otherwise, rights during a notice period will be the same as if the employee was not under notice. Employees have the right to SSP (subject to the normal qualifying criteria) and the right to contractual sick pay (if they have not already exhausted their entitlement).

There are also additional statutory rights where an employee is unable to work their notice due to sickness:

- If the employer gives the statutory minimum notice period to terminate a contract, the employee would be entitled to receive full pay for their notice period. This would still be the case if the employee has exhausted their SSP / contractual sick pay and any such sums would however count towards their entitlement to full pay.
- If the employer gives contractual notice which is at least 1 week more than statutory notice the employee is not entitled to any pay during their notice period assuming SSP / contractual sick pay is exhausted.

Pregnancy related illness

If an employer dismisses an employee or subjects them to a detriment as a result of pregnancy / maternity-related illness during the protected period is unlawful. The 'protected period' currently last from conception until the end of the employee's maternity leave. Any aggregated sickness absence must therefore not be taken into account related to pregnancy / maternity that falls within the protected period and employers should ensure they are excluding this type of sickness absence from any triggers in their sickness absence policies.

Sickness after end of maternity period can be treated in the normal way e.g. post-natal depression but an employer would still need to ensure no dismissal is unfair (if it reached that point).

Any pregnancy-related absence in the last 4 weeks before the expected week of childbirth will automatically trigger statutory maternity leave and maternity pay the following day. Any entitlement to SSP will stop at this point.

Data protection issues

Personal data related to health falls under the category of special category data and is afforded higher protection under the UK GDPR. The UK GDPR will apply when processing personal data which includes (but is not limited to) processing sickness absence forms, recording return to work meetings or interviews, investigation meetings about absence, results of a fitness to work assessment to determine suitability for continued employer and information about an employee's disability or impairment.

If an employer wants to collect and use data related to employees' health, the employer must be clear about why they want to collect and use the personal data and the employer must have justifiable reasons for processing. Such reasons may include being able to assess and make reasonable adjustments.

Under the UK GDPR, the employer will need to identify which lawful basis under Article 6 of the UK GDPR they are relying on to process the health personal data. In addition to an Article 6 lawful basis, the employer also has to identify a special category condition under Article 9 of the UK GDPR and also potentially a condition in Schedule 1 of the Data Protection Act 2018.

An employer should ensure their workforce privacy notice is clear as to what health data might be collected and how this could be processed by the employer, including the legal basis under the UK GDPR for doing this. If an employer discovers that they need to use the health data for a new purpose (not already detailed in the privacy notice) then the employer will need to consider if the new purpose

is compatible with the first purpose, whether consent needs to be sought from the employee or whether the employer has a legal obligation set out in law.

In terms of retaining health personal data belonging to employees or former employees, employers shouldn't keep it for longer than needed. Ideally an employer will have a retention policy which sets out clearly the retention period in relation to employee health personal data.

Employers should also consider whether they need to undertake a data protection impact assessment ("DPIA") to identify and minimise any data protection risks associated with processing employee health data. The obligation to conduct a DPIA arises whether the employer is about to start processing which is likely to result in a high risk. The Information Commissioner's Office ("ICO") recommends that employers do carry out a DPIA when processing employee health data given the sensitive and intrusive nature of this information.

The ICO employment practices code on data protection is a useful source for employers and provides guidance on dealing with employee health information alongside good practice recommendations in relation to handling health related personal data.