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No. 53

HR Broadcast – Employee Absence - When can I take action?

Perhaps one of the most difficult problems for employers, even those with HR departments, is how to handle frequent or prolonged staff absence. When is the right time to act and how to do so to avoid arguments of discrimination or constructive dismissal?

It is quite common for employers, often larger employers, to have a statement or policy dealing with what degree of absence in any particular year might automatically trigger the company disciplinary policy. For many this will be too rigid and there could well be circumstances where employees have been absent for less than the trigger period but where the absence is particularly significant and where the employee might need to be replaced.

There is no rule of law or procedure which states that action cannot be taken while an employee is absent on sick leave. Indeed, it may be essential to do so particularly where the future length of an employee's absence is unclear. An employer may be best served by asking the absentee to agree to disclosure of medical records and also for an independent report to be prepared, possibly by an occupational health specialist, at the expense of the employer, which might give some indication of prognosis and future length of absence.

On rare occasions there could be circumstances where contacting the employee while he or she is off sick could cause potential problems. I stress this would be unusual but a very recent case indicates a pitfall for employers where the employee is off work because of work related stress. An employee, who, coincidentally, was recognised by the employer as being disabled, and off sick as a result of alleged bullying and intimidation by phone from the line manager and managing director.

The company Chief Executive wrote to the employee with the intention of holding a meeting to investigate the allegations but also raised recently discovered performance issues. The employee resigned and claimed constructive dismissal on the basis that raising such issues while she was off sick amounted to a breach of trust and confidence entitling her to resign. She also raised discrimination matters including harassment. The Employment Appeal Tribunal found no disability related breaches but did agree that there had been a constructive dismissal because there was no need for the employer to raise performance issues in these circumstances. To raise performance issues in the same letter would add to the distress already suffered by this employee

This case does not set any kind of general rule that an employee may not be contacted while he or she is off sick. It just emphasises that an employer must think very carefully about mixing grievances and performance issues at the same time. If the employee had been absent for a quite different reason then it might have been perfectly proper for the employer to write raising performance matters.

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It would also be wrong to infer from this case decision that the Appeal Tribunal takes a soft line regarding absence. If an employer believes that an employee is exaggerating their reasons for absence, that they are not really sick, and the employer can prove that that is the case, the Appeal Tribunal has stated in another case that exaggerated reasons for absence amount to dishonesty and could warrant dismissal for gross misconduct.

Employers must also consider the consequences of an employee being disabled. As a reminder, the definition under the Equality Act 2010 refers to a person who has a physical or mental impairment which has a substantial and long-term adverse effect on the individual's ability to carry out normal day-to-day activities. 'Long term' means that the condition has lasted or is likely to last at least 12 months. Therefore all manner of conditions could satisfy this definition and some are automatically regarded as amounting to a disability, e.g. cancer.

If an employer suspects or accepts that an employee might be disabled then they must consider reasonable adjustments. A reasonable adjustment could mean amending the trigger points at which an absence disciplinary process might be started. It might mean accepting that a disabled person will suffer from more absence than a person without a disability.

Employers should have clear written policies on sickness procedures and absence rules. These should state that the employer may request medical evidence and will require the employee's co-operation.

Employers should maintain detailed records of individual absence and the reasons in order to justify action in the future. There should be regular contact with the absent employee to investigate progress, estimated time of return to work and whether that will need to be a phased return.

From the employer's point of view, some employees would need to be replaced quickly for the sake of the business. That may mean employing somebody on a temporary basis however difficult that may be. A dilemma may arise where an employee genuinely has a significant reason for absence but where the employer must replace the employee because of the importance of that employee to the business, particularly where there is no alternative cover. Again, there is nothing to prevent the employer taking positive action but great sensitivity is needed in how this is managed. History of absence, prognosis and the importance of the particular job function to the employer are all factors which must be weighed up. Obtaining professional advice, medical and, if necessary, external HR advice could be highly significant in determining whether an employer has acted fairly.

Although matters need to be very carefully handled, thorough investigation before any disciplinary action is considered, is as necessary in respect of sickness absence as it would be in an allegation of dishonesty.

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There may also be circumstances in which an employer may need to satisfy itself that the employee is fit to return to work. Take the example of an employee injured at work who claims he is fit to return. The employer has a duty of care to its employees and that would include ensuring that the employee is fit to return to a particular kind of work. That in turn might require the independent opinion of an external professional.

The risk to the employer of getting it wrong can be considerable. An argument of disability discrimination could result in significant damages, there being no cap on such damages. In respect of constructive dismissal the consequences are the same as for unfair dismissal. The individual must have worked for two years in order to qualify and there is a statutory limit on the amount of compensation payable.

The starting point on reviewing your own situation is to consider your contract of employment and any policy statements dealing with sickness absence. If you do not have such statements then we would be pleased to help.