DEALING WITH SICKNESS AND PROBLEM EMPLOYEES

Sickness absence

Why is sickness absence an important issue for employers?

- ACAS estimates sickness absence cost UK business £600 per employee or over £11 billion each year.
- Absence causes pressure on other employees and impacts productivity.
- Good sickness absence procedures can help reduce absence levels.
- Good absence procedures applied fairly demonstrate that an employer cares about the welfare of its employees, helping motivation and loyalty.

What can be done in advance of sickness absence issues?

- Well drafted contracts and a good sickness absence policy can both help reduce problems related to sickness absence:
  - Good absence procedure applied fairly demonstrates that an employer cares about the welfare of its employees, helping motivation and loyalty.
  - In general employees are entitled to Statutory Sick Pay after three days' absence, but whether an employee also gets salary when off sick is up to the employer.
  - Sick pay should always be dealt with in employees' written contracts.

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• If it is not then there is a legal presumption that the employee is entitled to salary when off sick.

• Details of sick pay are one of the written “particulars of employment” that the Employment Rights Act 1996 requires employers to give to their employees.

**Sick pay - options for employment contracts**

There are 3 main options:

• No salary paid when off sick.

• Salary payable at the employer’s discretion. There are two main limitations on this:
  
  (i) Discrimination must be avoided; and
  
  (ii) An employer must not exercise a contractual discretion capriciously or perversely

• Fixed periods of salary, often on a rolling twelve month basis. Two possible pitfalls:

  (i) Many contracts have differing fixed periods tied to length of service, but beware age discrimination; and

  (ii) Fixed periods can leave open the argument that the employee should not be dismissed before the fixed period of sick pay has been exhausted.

• Wherever salary is paid when off sick, it should be a condition for payment that the employee complies with sickness absence procedures.

**Sickness absence policies**

• There is no legal requirement that an employer has a written policy dealing with sickness absence but it is advisable.

• Employer’s policies often include statements of intent or aspiration as well as detailed procedures. These are best kept separate to the employment contract itself to avoid arguments about breach of contract if they are not followed to the letter in a particular case.

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A sickness absence policy can deal with matters like:

(i) who to contact when off sick;
(ii) return to work interviews;
(iii) self certification and medical certificates;
(iv) employees agreeing to medical examination at the employer’s expense in appropriate cases, including access to employee’s medical records;
(v) procedures for warnings and targets for improved attendance;
(vi) disabilities and reasonable adjustments (more about this later);
(vii) assistance for employees from any employee health or counselling service; and
(viii) when dismissal for poor attendance will be considered.

Steps to help reduce sickness absence

- Monitoring. Keep records of all employees’ sickness absences and the reasons.

- Through monitoring identify any pattern of absence for a particular employee or any indication of an underlying health problem or disability.

- Keep in touch with employees off sick, although be sensitive particularly where stress or similar is reason for absence.

- Ask for self certificates and then doctor’s certificates, the latter usually after seven days’ absence.

- Conduct a return to work interview after every period of sickness absence and keep a record of what is discussed.

- A return to work interview need not necessarily be lengthy, but will often deal with:
  (i) why the employee was absent;
  (ii) whether the employee saw a doctor and any treatment they had;
  (iii) whether the problem is expected to arise again;
(iv) if there is anything at work that contributed to the absence; and

(v) if there is anything the employer can do to help prevent it in the future.

The Disability Discrimination Act 1995

- The Disability Discrimination Act 1995 (“the DDA”) protects employees against various forms of discrimination and harassment on grounds of or for reasons relating to disability.

- The DDA also requires employers to make reasonable adjustments to practices, policies, procedures and physical aspects of their premises which put disabled employees at a disadvantage, the duty to make “reasonable adjustments”.

- An employee can make a tribunal claim under the DDA irrespective of whether or not his or her employment is ongoing. If successful the tribunal’s award will be for any economic loss plus injury to feelings.

- Whether a particular employee is covered by the DDA is an issue that can only be determined by the Tribunal. Medical evidence and opinion is likely to be relevant but in most cases the decision is one for the Tribunal to make on a case by case basis.

- The test applied is whether the employee has a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities.

Examples of disability discrimination

If an employee is covered by the DDA then there are a number of ways that this can impact on how sickness absence and other issues need to be handled. This is a complex area and these notes do no more than touch on a few key issues. The following are all potential examples of unlawful disability discrimination.

- Refusing to employ a disabled job applicant because of concern they might not be up to the job.

- Applying poor performance procedures to an employee whose performance problems are caused or contributed to by an employee’s disability.

- Denying promotion or access to opportunities like training.

- Not paying a disabled employee who is off sick for a disability related reason, although recent case law suggests that provided an employer treats disabled and non disabled employees in the same way regarding sick pay this is very unlikely to be unlawful.
- Not being flexible, e.g. allowing a disabled employee time off for medical appointments, providing special equipment in the workplace, varying work times to account for travel difficulties, permitting home working etc.

- Dismissing an employee who is off sick for disability related reasons.

Disability discrimination – pitfalls

Dealing with employees who are covered or potentially covered by the DDA is undoubtedly one of the most challenging issues for employers, for reasons including the following:

- The broad scope of potential discriminatory acts (see above).

- All employees (and even job applicants) are covered irrespective of length of service.

- In many cases it will be far from clear whether a particular employee is covered.

- An employer can in certain circumstances discriminate against an employee even without knowing that he or she is disabled.

Disability discrimination – justification

The good news for employers is that most types of discrimination can be justified:

- Justification is a legal defence. Where a tribunal considers that on the face of it an employer’s action or inaction is disability discrimination it may also decide that in that particular case the discrimination was justified.

- To succeed with the justification defence, an employer needs to show that the discriminatory act was “a proportionate means of achieving a legitimate aim”.

- This will depend on the particular circumstances of the case which unfortunately means that in many cases neither side in a DDA dispute can be 100% certain of success at a tribunal hearing.
Employers can defend a refusal or failure to make “reasonable adjustments” on the basis that the adjustment argued for was not reasonable in the circumstances.

The only types of discrimination that cannot be justified are harassment and direct discrimination, meaning treating someone less favourably than other employees or subjecting them to hostile or degrading treatment purely because they are disabled.

Disability discrimination – how to succeed with the justification defence

A tribunal will, depending on the nature of the discrimination, take into account:

- Efforts made by the employer to discuss issues or problems at work arising out of the employee’s disability with the employee, in a sensitive manner, as and when they arise.
- Efforts made by the employer to seek advice and input from the employee’s GP, anyone treating the employee or any internal or external employee health service.
- The business reasons for the discriminatory treatment. For example, was there a real need for the business to improve the employee’s performance? Was the employee’s performance having a significant impact on the business?
- The extent to which the employer considered alternatives to the discriminatory treatment both itself and in conjunction with the employee.
- For reasonable adjustments cases the cost of the adjustment in question, the disruption it would cause to the business and to other employees and the extent to which the employer investigated more “reasonable” alternatives.
- The most important points in terms of defending a claim is to document any of the above steps that are taken, even those that don’t involve the employee, and to have a properly thought and reasoned business case for what has taken place.
- For example, in the case of an employee who has been dismissed because his or her disability meant that he or she could no longer do the job well enough, there should be solid evidence of the performance problems and the impact on the business, a paper trail showing consultation with the employee over a period of time, documented consideration of any sensible alternative to dismissal and of any sensible adjustment that might be made, all before a dismissal process is commenced.
**Dismissals for sickness / poor attendance**

Although cases differ, employee sickness absences can often be divided into “long term” and “short term”. Employees can be fairly dismissed for either:

- **Short term** means absences that are intermittent and often for a variety of different reasons.

- **Long term** means one or more long period of absence for one reason, or one underlying reason.

- Before dismissing an employee in either type of case, the employer should obtain medical advice as well as consulting with the employee.

- Medical advice and discussion with the employee will help indicate if the DDA applies.

- In long term absence cases the employer should be seeking to establish how long the employee is likely to remain off sick for and whether they are likely to be able to work effectively when they return.

- The employer should only make a decision when it has made all reasonable efforts to get this information. The decision to dismiss needs to be justified in light of this information balanced against the needs of the business.

- In short term absence cases, as well as medical advice and consultation with the employee, the employee should be given a clear indication of how their attendance needs to improve, time to improve and warnings that if there is not an improvement dismissal will be considered.

- In an unfair dismissal claim, as for a DDA dismissal claim, the Tribunal will consider the procedure that was followed, the impact on the business of the absence, its size and resources and the extent of consideration of alternatives to dismissal.

- Fully documenting the process followed and records of the impact on the business will help defend any claim.
Dealing with Problem Employees

Problem with employees come in all shapes and sizes and so there is no one single correct approach. Misconduct and poor performance are common problems, although these labels cover many different types of situation. The following are some pointers for dealing with misconduct and poor performance:

- Have a bespoke, well drafted conduct code.

- Address conduct and performance issues as and when they arise.

- Principles of natural justice apply to disciplinary procedures.

- Misconduct and poor performance (capability) are both potentially fair reason for dismissal.

- For poor performance use monitoring periods, targets for improvement and offer training and support.

- In both types of case, document all discussions even informal ones.

- In both types of case, before deciding to dismiss, consideration must be given to length of service, mitigating factors and alternatives to dismissal.

- At present for almost every type of dismissal the statutory dismissal and disciplinary procedure must be followed, although this legislation is expected to be repealed.

- In certain circumstances, and after proper procedure, personality dismissals are possible.

Potential Risks / Costs

- Unfair dismissal: up to around £75,000.

- Disability discrimination: uncapped.

- Failure to provide written employment particulars: £1,340.

- Failure to follow statutory dismissal and disciplinary procedures: automatic unfair dismissal and compensation uplifted by 10 – 50%.
How Simpson Millar LLP Can Help

- Provide contracts dealing with sick pay and providing written employment particulars. These can also address protecting intellectual property and preventing poaching of clients and misuse of confidential information by former staff.

- Provide bespoke policies on sickness, conduct and performance, as well as a number of other areas (IT, discrimination and harassment, health & safety etc.)

- Ensure compliance with statutory disciplinary and dismissal procedures.

- Ongoing advice on capability, misconduct and employee grievance procedures.

- Provide compromise agreements and advise on how to persuade difficult employees to take them.

- Defend tribunal claims in the most commercially aware and cost effective way possible.

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