

Playing the waiting game

Employers need to take a sympathetic approach where an employee suffers from ill health. What happens, however, when the employer reaches the 'point of no return'? How do they ensure any subsequent dismissal is fair, and how long do they need to wait before dismissing? This article advises on the correct process to follow where an employee is absent through ill health on a repeated or long-term basis.

How long must the employer wait before a dismissal for ill health becomes fair?

The principle underlying the fairness of a dismissal for ill health is whether the employer can be expected to wait any longer and if so how much longer before the employee returns to work after a period of absence: *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373. The employment tribunal must consider the nature of the illness, the likely length of the continuing absence and the need for the employer to have the work done. In long term absence the employer should consider whether an individual is likely to return to work in the foreseeable future.

In the case of short term intermittent absences the employee should be monitored and an interview should raise any concerns over attendance. If there is no improvement a formal warning should be issued and a timescale set with suggestions for improvement. However, the *ACAS Guidance on Discipline and Grievances* at work emphasises that procedures should be used to encourage employees to improve rather than just as a way of imposing punishment.

Sympathy, understanding and compassion

The approach and decision of the employer to dismiss must be based upon sympathy, understanding and compassion and will be assessed by the following criteria:

- ◆ The likelihood of recurring ill health or some other illness arising;
- ◆ The length of various absences and the spaces of good health between them;
- ◆ The need of the employer for the work done by the particular employee;
- ◆ The impact on others who work with the employee;
- ◆ The importance of a personal assessment in the ultimate decision;

- ◆ The extent to which the employer has made it clear that the point of no return may be approaching;
- ◆ The employer must not take a disciplinary approach; and
- ◆ The approach of the employer should be one of understanding (*Lynock v Cereal Packaging Ltd* [1988] IRLR 510).

The investigation must be based on an informed medical position and should try to resolve any conflict with the employee. The last question is whether the employer can be expected to keep the employee's job open any longer.

Suggestions of alternative employment or tasks

The onus is on the employer to suggest alternative employment or tasks for the employee in accordance with the GP's advice. Dismissal should be a last resort because ill health dismissals are always difficult to justify as the employment tribunal will have sympathy with employees who are ill.

Medical reports should be up-to-date and give a clear prognosis. However strong the medical evidence the employer should always consult with the employee rather than assume the expert's opinion is decisive.

If dismissal is contemplated the employer should write to the employee informing them of this fact and inviting them to a meeting. The letter should give details of the absence, summarise and enclose the medical evidence. The letter should say that the purpose of the meeting is to consider the employer's attendance record/sickness absence and that the outcome of the meeting may be dismissal.

In the meeting the history of absence should be outlined and the employee should have the opportunity of stating their case and to outline any mitigat-

ing circumstances. Meetings may be adjourned if new facts emerge, for example awaited medical evidence.

Consultation with doctors and access to medical reports

The question of ill health is a decision for the employee and a doctor and the decision on capability of performance is a decision for the employer. A well drafted contract will require the employee to comply with reasonable instructions including rehabilitation suggestions.

The employer should consult with a doctor before they make an informed decision: *East Lindsay District Council v Daubney* [1977] IRLR 181. Where the medical condition is unclear the employer should request the employee to undergo a medical examination. Dismissal on unclear medical evidence will be unfair: *Crampton v Dacorum Motors Ltd* [1975] IRLR 168. If the employee is not informed that unless he or she is passed fit by a doctor chosen by the employer dismissal is likely to be unfair: *O'Brien v International Harvester Co of Great Britain* [1974] IRLR 374.

Access to Medical Reports Act 1998

Under s 3(1) of the Access to Medical Reports Act 1988, an employer cannot apply to a medical practitioner for a report without the employee's consent. A medical report under this Act means a report from a medical practitioner who is or has been responsible for the clinical care of an individual. The employer must obtain the consent before applying to the GP or doctor for a medical report. Any notification must give the employee the right to withhold his consent to the making of the application and his right to have access to the report before and after it is supplied

and the right to request amendment of the report where he or she considers it misleading or incorrect.

When will the decision to dismiss be fair?

Dismissal is likely to be fair if medical advice is taken and the employer acts upon it fairly after adequate investigations: *Ford Motors Co Ltd v Nawaz* [1987] IRLR 163. The medical evidence in the GP's sick note (now 'fit note') must be accepted as genuine unless other evidence undermines it: *Merseyrail Electrics 2002 v Taylor* [2007] All ER (D) 44 Nov. Dismissal was fair after a doctor changed his view on being shown video evidence: *Merseyrail Electrics 2002 v Taylor* [2007] All ER (D) 44 Nov.

Continuous intermittent absences

If the employee has continuous intermittent absences then it may be unnecessary to consult at the time of the dismissal. In the case of intermittent absences:

- ◆ there should be a fair review by the employer of the attendance record and reasons for it;
- ◆ appropriate warnings, after the employee has been given an opportunity to make representations; and
- ◆ if there is no adequate improvement in the attendance record in most cases there will be a sufficient reason to dismiss (*International Sports Co Ltd Thomson* [1980] IRLR 340).

If there is a sufficient investigation but monitoring and consultation up to dismissal is absent, provided the employee has been warned the dismissal may fall within the reasonable range of responses and be fair: *Rolls Royce Ltd v Walpole* [1980] IRLR 343.

Consultation with the employee

The employer must consult and discuss the matter with the employee to discover the medical position before it dismisses the employee on the grounds of ill health.

The following course should be adopted:

- ◆ to meet and discuss the matter where by the employer will inform themselves upon the true medical position;
- ◆ discussion and consultation will bring

to light facts and circumstances of which the employer was unaware; and

- ◆ the employee may wish to obtain their own medical advice which may have the effect of changing the medical opinion of the employers' medical advisers (*East Lindsay District Council v Daubney* [1977] IRLR 181).

The purpose of the meetings that form part of the sickness absence procedure is to establish:

- ◆ how the employee is feeling; and
- ◆ the medical advice that the employer has received.

If the employee refuses to cooperate with the employer's process, this may be held against the individual: *Callagan v Glasgow City Council* [2001] IRLR 724.

The onus is on the employer to maintain contact with the employee and it is not for the employee to take the initiative to provide information to the employer: *Mitchell v Arkwood Plastics (Engineering) Ltd* [1993] ICR 471. Contact could be limited to regular telephone updates. However the employer should be careful they are not accused of harassment under the Protection from Harassment Act 1997 or an infringement of the Human Rights Act 1998.

The point of no return

When the employer decides that the point of no return has been reached what are the factors that must be taken into account when deciding whether the dismissal will be fair or not? These are:

- ◆ the nature of the illness and the job;
- ◆ the needs and resources of the employer;
- ◆ the effects on other employees;
- ◆ the likely duration of the illness;
- ◆ how the illness was caused;
- ◆ the effect of sick-pay and permanent health insurance schemes; and
- ◆ alternative employment – *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373.

An epileptic colliery worker who attacked fellow employees was fairly dismissed when he rejected advice to retire under the pension scheme: *Harper v National Coal Board* [1980] IRLR 260. Larger employers will more easily be able to find a replacement than smaller employers because the work cannot be

easily undertaken by other employees: *Tan v Berry Bros and Rudd Ltd* [1974] IRLR 244. If the absence disrupts others employees this will be relevant to the fairness of the dismissal: *Pascoe v Hallen and Medway* [1975] IRLR 116. If the employee does not say when he or she is likely to return then the employment tribunal is likely to find the dismissal fair if the employer can show that they had great difficulty of managing without the employee: *Luckings v May and Baker Ltd* [1974] IRLR 151.

A checklist for the employer

The following checklist should be followed by the employer in dealing with employees who are absent on the grounds of ill health:

- ◆ Refer to sickness or absence procedures in the contract of employment.
- ◆ Investigate the nature, extent and likely duration of the illness by obtaining relevant medical evidence.
- ◆ Consider whether the employee is disabled under the Disability Discrimination Act 1995.
- ◆ Consider whether reasonable adjustments to the employee's duties or workplace would facilitate their return to work.
- ◆ Consider the importance of the employee and/or the post occupied to the business compared to the impact their continued absence is having on the business and the difficulty and cost of continuing to deal with their absences.
- ◆ Send a letter when disciplinary action or dismissal is contemplated.
- ◆ Review the medical evidence to ensure that it is up to date.
- ◆ Hold a meeting with the employee and confirm any subsequent decision to the employee in writing.
- ◆ On dismissal ensure the employee's contractual and statutory entitlements are met.
- ◆ Hold an appeal if requested.

Employers must be proactive in monitoring the well being of their workforce. If they follow the guidance contained in this article they will improve their chances of avoiding employment tribunal claims.

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