Disability Law Service

advice and legal representation for disabled people

Disability and sickness absence

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Disability and sickness absence

Introduction

Most employers monitor sickness absence, through a variety of methods – one common monitoring tool is known as 'The Bradford factor'. An employer is entitled to require good attendance at work, and the law recognises this in that capability, which includes health, is a potentially fair reason for dismissal under the Employment Rights Act 1996.

However, the Equality Act 2010 ('the EA') does give some protection to disabled workers (ie, those who meet the definition set out in section 6 of that act, namely, those who have a mental or physical impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities), whose absence is caused by their disability.

Since this factsheet refers to both 'employees' and 'workers', it is important to understand the difference between these two types of employment status. Both employees and workers have to provide personal service to the employer, but, broadly speaking, there is no ongoing obligation in an employer/worker relationship to provide/accept work beyond the engagement being undertaken. There are other legal tests applied to determine employment status, and this can sometimes be difficult to determine – you may need to seek specialist advice on this point.

‘Employee’ is used below when referring to rights only enjoyed by employees, but where the term ‘worker’ is used, this refers to both employees and workers.

The distinction between employees and workers is relevant for the right to claim unfair dismissal (see below) but the protection against disability discrimination given by the EA is wide, and covers both worker and employees, that is, all but the genuinely self-employed.

There is no qualifying period to attain rights under the EA - you are covered from the very start of your employment, and job applicants are also covered (this contrasts with the right to claim unfair dismissal – see below).

Sickness and pay

Assuming that a worker earns at least £111 (gross) per week (rising to £112 in 2015/2016), they will be entitled to be paid statutory sick pay (‘SSP’) after the first three days of a sickness absence (the first three days are known as ‘waiting days’). You are only entitled to be paid SSP for ‘qualifying days’, ie, days on which you normally would have been required to work under your contract.

If you only work part time, you may not qualify for SSP in your first week of absence. For example, if you work 2 days a week, you would only become entitled to SSP on your second week of absence (from Day 4 onwards). You would only qualify for 1/2 rate of SSP for that week. If you remain sick for all of the following week (Days 5 – 6), then you would be entitled to full SSP (£87.55pw) at the full rate for that week, as you would be incapable of work for all of your qualifying days.

Workers who have continuously worked with an organisation for a period of 3 months before becoming incapable of work can claim SSP, subject to the above requirements, for the whole of the period of incapacity for work, unless they receive written notice that the contract has been brought to an end. Those workers who do not have 3 months continuous work can claim SSP for the duration of any assignments they had agreed to accept.

SSP lasts for 28 weeks, after which a worker who is still unwell will be able to claim Employment and Support Allowance ('ESA'). There are strict criteria to qualify for ESA, laid down by the Department for Work and Pensions, and you may need to take specialist advice as to whether you are likely to qualify or not (please see our separate factsheet on ESA).

Your employer should notify you when your SSP is about to run out; normally they do this at about the 23rd week of your absence by sending you form SSP1. You will need this form to register your claim for ESA, but if your employer has delayed in sending SSP1, you should claim ESA in any event so as not to lose benefit.

There are complicated rules around waiting days and 'linked' periods of absence – you may need to take specialist advice if, for example, you work irregularly or have several short term absences over a short period of time.

For employees, the fact that SSP has ended does not mean that your employment has terminated, unless your employer has also taken steps to do this (please see the section on 'Capability proceedings' below). For workers, it is a question at looking at the duration of any engagement entered into, and whether the employer has given written notice to terminate that engagement.

Contractual sick pay

In some situations, an employer will also pay contractual sick pay to its employees – a typical example of this is when an employer pays 3 months' full pay and then 3 months' half pay from the start of a sickness absence. In these cases, the employer 'tops up' any SSP or ESA entitlement to the correct contractual amount.

Generally, entitlement to contractual sick pay will be based on terms set out in a written contract of employment, but occasionally it might be the case that there is no written contract but the employer always pays sick employees an amount over and above SSP – entitlement to contractual sick pay may then be implied by custom and practice.

An employer is obliged in law to provide written particulars of employment for employees (not workers),

and those particulars should include whether the employer provides sick pay.

Certification of sickness absence

You are entitled to 'self-certify' a sickness absence for the first 7 days of that absence (which includes non-working days), but thereafter must be covered by a 'fit note' (formerly known as a 'sick note') from your GP or specialist. If there is no valid fit note provided to your employer for the period after the first 7 days, your employer is entitled to treat the absence as an 'unauthorised absence' and may withhold sick pay.

It is important to understand that, for employees, the contract of employment remains in force during the period of sickness absence. This means that you have to comply with all reporting provisions set out in the contract (including during the period of self-certification), and your employer is entitled to maintain reasonable contact with you during your absence, including contacting you at home. The contract may also contain a requirement that you agree to an occupational health referral once there has been a certain length of absence.

Government's 'Fit for work' scheme

From April 2015, it is envisaged that either a GP or an employer will be able to refer an employee for a 'Fit for work' assessment once an absence has reached, or is

likely to reach, 4 weeks. Consent must be sought for this referral.

Once consent has been given, there will be an assessment by an occupational healthcare professional, usually over the telephone, of the absent employee's health and circumstances to create a 'return to work plan'. The aim of this new service is to keep sickness absences as short as possible, and to address as quickly as possible the sort of help that an employee may need in order to get back to work (see section on 'Returning to work after a sickness absence' below).

With the employee's consent, the return to work plan may be shared with the employer or GP.

At the time of writing, it seems that it is envisaged that the return to work plan can provide evidence of sickness in exactly the same way as a fit note can, and that you may not therefore need a separate fit note to cover the period detailed in the plan, if the plan acknowledges that you are not fit for work. Problems may arise, however, if the plan does not accord with the employee's estimation of their ability to return to work, or that of their GP's – in this case, it would probably be better to also seek a fit note for the relevant period.

Further details on this new service can be found at https://www.gov.uk/government/publications/fit-for-work-guidance-for-employees

Returning to work after a sickness absence

Once your fit note has expired, and another has not been issued, you are deemed fit for work and there is no need to for you to obtain a further confirmation from your GP that you are now fit. Sometimes a GP will issue a 'conditional fit note', ie, a statement that you are fit for work subject to certain limitations or adjustments being put in place.

If it is not possible for the employer to accommodate those adjustments, and you are not fit for work without them, or if there is no agreement on the changes, then the employee or worker must be treated as not fit for work.

However, if it is reasonable (an objective test, taking into account all the circumstances) for the employer to make the adjustments to allow a *disabled* worker to return to work, and they fail to do so, then that worker could make a claim under the Equality Act for a failure to make reasonable adjustments. Please be aware there is a **3 months minus 1 day** time limit for making any claim under the Equality Act. (We have a separate factsheet on Reasonable Adjustments in Employment, available on our website.) They may also be able to argue that, as it is the employer's failure that is preventing them from returning to work, they should be paid their normal pay from that point onwards (in the case of a worker, this would only be the case if they were still within a period of work that they had agreed to undertake). If an employer agrees to make adjustments for a disabled worker, and then delays in doing so, again, the disabled worker would

have an argument that they should be paid in full for the work they should have been doing under the contract.

GPs often recommend a ‘phased return to work’, where hours are built up gradually over a period of time. For a disabled worker, this may be a reasonable adjustment, as long as it is the effect of their disability that is preventing them from fully returning to work.

If a worker does return on a phased return, then the employer is only obliged to pay them for the hours actually worked during the period of the phased return, unless there is anything in the contract to the contrary. For a disabled worker, it is not a reasonable adjustment for the employer to pay full pay during a period of reduced hours.

Once a worker is undergoing a phased return to work, they are no longer deemed to be incapable of work, and therefore this time does not count as sick leave, even if they are, for example, only working half days during the phased return.

It is good practice for employers to refer a returning worker to their occupational health team shortly before, or at the point of, a return to work after a lengthy sickness absence.

A phased return is one type of possible reasonable adjustment – but the worker is also entitled to ask for other reasonable adjustments when the continuing effect of a disability puts them at a disadvantage vis-à-vis a workplace requirement or physical feature of the premises.

Can an employer count disability-related absence as sickness absence?

(Generally, it would only be employees who are subject to absence management procedures – this is because workers are usually on short term contracts, terminable by notice, there is no 'open-ended' employment relationship and there is no right to claim unfair dismissal. This section therefore refers to 'employees'.)

The short answer to this question is yes, under the law as it currently stands.

Many disabled employees are under the impression that an employer cannot use against them any absence occasioned by their disability. Whilst some workplaces may have a policy of discounting some or all of a disability related absence, this is not an automatic requirement under the Equality Act.

Recent case law has established that it is *not* a reasonable adjustment for an employer to give higher 'trigger points' for absence management to a disabled employee, compared to a non-disabled employee. This is because of the technical, legal requirements of section 20 of the Equality Act, namely that, for the duty to make reasonable adjustments to arise, the disabled person has to establish that a 'provision, criterion or practice' of the employer puts them at a substantial disadvantage

compared to a non-disabled person. Case law has established that the correct comparison in this case is a non-disabled person who has been off work for the same length of time, who would presumably also be subjected to the same absence management procedures – hence no substantial disadvantage to the disabled employee can be established.

However, an employer does still have to proceed carefully when instituting absence management proceedings (also known as capability proceedings) in the case of a disabled employee. This is because section 15 of the Equality Act prohibits discrimination arising in consequence of a disability. Both absence management, and dismissal, would constitute the 'unfavourable treatment' required to gain protection under this section (there is no need for a comparator here) – such unfavourable treatment would be unlawful unless the employer could justify it as a 'proportionate means of achieving a legitimate aim'. It is this section of the Equality Act that requires an employer to give particular attention to the individual disabled employee's situation and consider, for example, the likelihood of an imminent return to work, the reasons for the absence, the nature and extent of the absence in the context of the requirements of the workplace, whether reasonable adjustments can be made to improve attendance – in short, whether it would be proportionate in the particular circumstances to refrain from taking the unfavourable action. Effectively, this is a 'balancing exercise'.

Therefore if a disabled employee is dismissed (or a worker's contract terminated) for a disability-related absence, they may be able to bring a claim for discrimination arising in consequence of disability but the success of the claim will depend on whether the employer can justify the dismissal in all the circumstances.

If an employee is dismissed for a health reason, or for their capability to do their job due to a health reason, the employer has to follow certain procedures in order for the dismissal to be a fair dismissal. These are known as 'capability procedures'.

Capability proceedings

In contrast to the wide protection against discrimination given by the EA, only employees are protected from unfair dismissal. (If a worker's contract is terminated for a disability-related reason, they would have to bring a claim of unfavourable treatment under s15 of the EA, as set out above, or possibly a claim of direct disability discrimination if a non-disabled worker's contract would not have been terminated in the same circumstances.)

In addition to being an employee, it is necessary to have a qualifying period of 2 years' employment before the right not to be unfairly dismissed can be claimed.

Capability to do the job, including health, is a potentially fair reason for dismissal under s 98(2) and (3) of the Employment Rights Act 1996.

However, even if health, including a long term sickness absence, is the reason for the dismissal, an employer still has to act fairly and reasonably in all the circumstances. Case law has established that this means making thorough enquiries as to when the employee is likely to return to work (this may not always be necessary if the employee themself is saying that they will never be fit to return to work or it is clear that they will never be fit to return to work); inviting the employee to a meeting to discuss their absence, having, if applicable, having warned their employee that their employment may be at risk and offered them the right to be accompanied at a meeting to discuss this; considering all the circumstances, including the duty to make reasonable adjustments and business needs, and offering the right of appeal if a decision to dismiss is taken.

The Acas Code of Practice on Disciplinary and Grievance Procedures (available at www.acas.org.uk/dgcode2009) is relevant here. Although strictly speaking it is concerned with matters where 'fault' is involved, it does set out good practice in terms of following fair procedures and it embodies the principles of natural justice. It is also accompanied by guidance (www.acas.org.uk/Acas-Guide-on-discipline-and-grievances_at_work), which specifically addresses (Appendix 4) dealing with absence.

There is no set period in law after which an employer can automatically take steps to terminate employment due to sickness or disability absence – the issue is, what is reasonable in the particular circumstances? The length of contractual sick pay provisions may provide some guidance as to how long an employer may support a sickness absence, but this is not definitive. Generally, the longer the sickness absence, including a disability-related absence, the more likely it is that the employer will be able to prove a fair dismissal.

In exceptional circumstances, an employer might be able to argue that the employment contract has been 'frustrated' due to a lengthy sickness absence and this has made the performance of the contract impossible, such that the contract terminates by operation of law and not by dismissal. However, in the case of a disabled employee, it would not be possible for an employer to succeed on this argument unless they had made all reasonable adjustments to enable the employee to return to work.

A dismissal for a disability-related reason can be both unfair and discriminatory, if the employee has completed a two year period of employment. If the employee has not been employed for two years, a dismissal for disability-related reasons can still be discriminatory.

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