

From HR Zone
Charles Price

Barrister Charles Price explains how to deal with short term absences without facing claims for discrimination or unfair dismissal.

We have all experienced working in an office where morale has suffered due to the same few culprits always taking 'sickies', but the financial costs to business of absenteeism is of far greater concern. A recent report by the CBI estimates that the total annual cost of absenteeism to business was £13 billion a year. Employers should, however, tread carefully when tackling the problem of persistent short term absences as not only will the hasty boss face unfair dismissal claims, but also discrimination claims and the unlimited compensation awards ascribed to them.

How a tribunal can be satisfied that a fair dismissal has taken place

An employer can only tolerate so much persistent absenteeism and will eventually dismiss, but in order to do so fairly, they must firstly identify one of the potentially fair reasons listed in S.98(2) ER Act, namely capability, conduct, redundancy or contravention of a statutory enactment. Alternatively, the reason must be such as to fall within the residual category of 'some other substantial reason of a kind such as to justify the dismissal of an employee' (SOSR).

Both 'conduct' and 'capability' as reasons for dismissal have caused problems when applied to cases of dismissal for persistent short-term absences. Dismissal as a result of absences caused by genuine sickness or disability has generally been treated as falling under capability. Where there are unauthorised absences, the reason for dismissal is generally conduct.

However, in certain cases it has been stated that an employee who is frequently absent because of a genuine illness may be fairly dismissed for SOSR. The attendance procedure has been seen as a valid method of ensuring reliability of staff.

Secondly, the tribunal must consider whether the employer acted reasonably in dismissing for one of the above reasons. In dismissals for absenteeism, there is a range of reasonable responses open to an employer. If the decision to dismiss falls outside the band of reasonable responses, the dismissal will be unfair.

In 1997 ACAS published an advisory handbook, *Discipline at Work*, which gives assistance to tribunals in deciding whether the employer's response fall within the range of reasonable responses open to an employer and provides useful guidance to employers on how to handle persistent short-term absenteeism.

It states that:

- Absences should be investigated promptly and the employee asked to give an explanation
- Where there is no medical evidence to support frequent self-certified absences, the employee should be asked to consult a doctor to establish whether medical treatment is necessary and whether the underlying reason for absence is work-related
- If, after investigation, it appears that there were no good medical reasons for the absences, the matter should be dealt with under the disciplinary procedure

- Where absences arise from temporary domestic problems, the employer in deciding appropriate action should consider whether an improvement in attendance is likely
- In all cases the employee should be told what improvement in attendance is expected and warned of the likely consequences if this does not happen

- If there is no improvement, the employee's age, length of service and performance, the likelihood of a change in attendance, the availability of suitable alternative work and the effect of past and future absences on the business should all be taken into account in deciding appropriate action.

In the leading case of *International Sports Co Ltd v Thomson* (1980 IRLR 340) the Employment Appeals Tribunal outlined what is required where there is an unacceptable level of intermittent absence:

- A fair review by the employer of the attendance record and the reasons for absence
- An opportunity for the employee to make representations
- Appropriate warnings of dismissal if things do not improve.

If there is no adequate improvement in the attendance record, the EAT ruled that a dismissal will be fair.

Procedures to assist the employer:

Return-to-work interviews are invaluable to the employer in identifying why an employee has been away and will assist in working out a trigger point if action is to be taken. If the reason for absence is for personal reasons such as a relationship break up it will be more difficult for the employee to rely on that reason again and suggests that an improvement will occur.

If the absentee identifies a drink or drugs problem then those respective policies may supersede any procedures on handling short-term absenteeism.

Reviewing the employee's record and reason for absence may bring to light an underlying medical condition. If it does, employers would be well advised to seek proper medical opinion in order to determine the extent and likely duration of the condition and whether, and if so how soon, treatment will bring the absenteeism down to an acceptable level. Particular consideration should be given to whether the condition amounts to a disability under the DD Act.

With longer term absences a domiciliary visit by an Occupational Health expert is advisable and consultation with someone who has knowledge of the Disability Discrimination Act.

Impact of the Disability Discrimination Act (DDA)

Where ill health is the reason for absence, employers must bear in mind the provisions of the DDA because an employee's illness may fall within the definition of a disability under the Act. In this context, persistent short-term absences may be the result of a recurring condition or symptomatic of an underlying condition that amounts to a disability.

The meaning of 'disability'

For the purposes of the Disability Discrimination Act a person has a disability if he or she has 'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities' - S.1(1). The definition has been expanded through case law and schedules to the Act and for that reason an expert is required to give advice. The DDA identifies two ways in which an employer might discriminate against a disabled employee. By virtue of S.5(1), an employer discriminates against such an employee by treating him or her, for a reason related to his or her disability, less favourably than he treats employees to whom that reason does not apply. This is subject to the possibility that an employer may argue that the treatment was justified.

Reasonable adjustments

Further, by virtue of S.5(2), an employer also discriminates against a disabled employee when he fails, without justification, to comply with the S.6 duty to make a reasonable adjustment to working arrangements that place the employee at a disadvantage. S.6(3) gives a number of examples of steps that it might be reasonable for an employer to take. Of particular relevance to sickness absences are:

- Allocating some of the disabled person's duties to another person
- Transferring the disabled person to fill an existing vacancy
- Altering the disabled person's working hours
- Allowing the disabled person to be absent during working hours for rehabilitation, assessment or treatment.

Many experienced lawyers have come unstuck because they have represented an employer who considered all of the above but the tribunal believed that more should have been done. Therefore, it is crucial to obtain expert advice if an individual is off work persistently and the root cause is a purported medical problem.

By Charles Price, barrister No5 Chambers
www.charlesprice.net

* * *

Related articles:

- [Fighting the fraudulent sickie. By Sarah Fletcher](#)
- [Chasing sickness: Getting the return to work interview right.](#)
- [If we took a holiday... By Sarah Fletcher](#)
- [Does sick pay encourage sickies? By Sarah Fletcher](#)
- [Ask the expert: Refusal to prove absence is genuine](#)