Managing capability dismissal issues through ill health

When an employee has been absent for a long time it becomes a burden on employers to manage the absence and balance this with important business decisions.

Decision to Terminate

The emotional decision to terminate the employment of an individual on long term sickness can be a difficult one but in reality there could be a genuine need to determine whether they are actually capable of doing the job for which the organisation has invested time, training and money which forces the management to assess the situation. If the job can no longer be kept open, the employee who is deemed incapacitated should be told.

“**Capability**” in relation to an employee, is his/her capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

Sickness

An employee who is off sick for a prolonged period of time can be fairly dismissed if they are unlikely to be well and capable enough to return to work within a reasonable time frame. What amounts to a reasonable time depends on the nature of the job, the specific difficulties encountered by the employer in covering for the absence and the size and administrative resources of the employer. However, even where an employer is easily able to cover the absent employee’s work and even where it costs the employer nothing to keep the job open, an employer is not expected to have to keep the job open indefinitely.

There is no specific statutory provision giving an employee the right to time off work on account of sickness or the right to return after absence through sickness. Nor is there any specific statutory provision entitling an employer to terminate the employment of an employee who is absent from work for a long period on account of ill health. Indeed, compassion may well deter a caring employer from taking action to formalise the position by initiating capability dismissal procedures and; on the one hand, in doing so an employer may run the risk of an unfair dismissal action; on the other hand, in failing to do so, an employer exposes himself to the danger that he retains residual obligations to the Equality Act 2010 which means an employer has an obligation to make reasonable workplace adjustments which could be costly.

In any contract of employment there is an implied term of mutual trust and confidence. Also relevant is whether the employer has a formal sick pay scheme, which may form a part of the contract of employment. These express and implied terms of the contract and by statutory provisions relating to unfair dismissal and disability discrimination determine how this is governed therefore; an Employment Tribunal might come to the conclusion that a particular employer’s policy in dealing with sickness absence in a harsh or unsympathetic manner may be a breach of such an implied term.

**THE QUESTION IS CAN AN EMPLOYER DISMISS AN EMPLOYEE WHILE ON LONG-TERM SICKNESS FAIRLY?**

The answer is not a simple one.

In dealing with an employee who is on long-term sickness absence, firstly an employer should consider the following:

1. The opinion of the employee’s general practitioner, or of the Occupational Health medical consultant, to determine whether a return to work will be possible.
2. Would a phased return – working part-time or flexible hours – help the employee to get back to work?
3. The likelihood of a full recovery or will a return to the same work be inadvisable?
4. Could the employee return if some assistance were provided? Could some re-organisation or re-design of the job speed up a return to work?
5. Alternative, lighter or less stressful work available, with re-training if necessary.
6. Is there a requirement under the Equality Act to make a reasonable adjustment?

Only as a last resort once all other options have been considered should the decision be made to terminate employment. Before making a decision it is wise to consider actions such as reasonable adjustment, flexible working, job design, a phased return to work, etc. Employers wishing to dismiss an employee may have to satisfy an employment tribunal as to the fairness of the decision and must, as a minimum, follow the statutory dismissal and disciplinary procedure; where the reason for the dismissal has been demonstrated to be an acceptable one under the legislation, the final decision on whether it is fair or unfair will depend on whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

There is also a duty on employers to make reasonable adjustments to working conditions and the workplace so that a disabled person is not placed at a disadvantage.

Long term sickness absence may raise issues of disability discrimination under the related provisions of the Equality Act which make it unlawful for an employer to treat a disabled person less favourably than others unless he can show that the treatment in question is justified. Therefore under the Equality Act a person who has a physical or mental impairment which has a substantial and long-term adverse effect on his (or her) ability to carry out normal day-to-day activities is covered by the Act. Past disabilities are also covered if impairment that has a “long-term” effect which lasted for, or is likely to last for, at least 12 months. It also specifies certain conditions which can fall within the definition of a disability. These include progressive conditions such as cancer, multiple sclerosis or muscular dystrophy, or infection by HIV.

An employer dismissing a person who fell within the Act’s definition of a “disabled person”, whose illness prevented him/her from carrying out normal duties would almost certainly be dismissing for a reason relating to his disability and would be treating him less favourably than someone to whom the reason did not apply (a person who could carry out those duties). The employer would, therefore, have to demonstrate that this less favourable treatment was justified and that no reasonable adjustment could overcome the disadvantages imposed by the disability.

Long absence on account of sickness may on its own bring an employment contract to an end by “frustration” of the contract. In that case there would be no dismissal and therefore no possibility of the employee succeeding in a claim for unfair dismissal.

**CAPABILITY: SICKNESS**

Before an employer can justify dismissing an employee for long term sickness they must:-

1. Investigate the employee’s sickness and specifically find out how long it is likely to be before the employee will be able to return to work.
2. Arrange a meeting for the employee to respond to any information the employer has and put their point of view forward if they think their job should remain open longer.

**THE INVESTIGATION**

Key Point: When you contact a GP or consultant for a medical opinion on an employee’s health, make sure you tell them what the employee’s job entails before asking any questions.

As a general rule, employers should investigate but also consult with their employees about their future, seek medical advice and consider whether there is alternative employment within the organisation which the employee would be capable of undertaking.

The employer should then ask the employee to sign an authority to enable them to obtain copies of their medical records and ask them to attend a medical examination. The employee is under no obligation to agree to these, but as long as the employer has endeavoured to carry out these investigations any subsequent dismissal is unlikely to be unfair.

It is important that the employer bears in mind at all times that if the employee is deemed to be disabled under the provisions of the Equality Act, the employer is required to consider whether there are any reasonable adjustments that can be made to enable the employee to return to work. Both employer and employee need to be involved in these discussions: the employer best knows what he requires and the employee best knows his own restrictions. When commissioning a medical report the employer should ask Occupational Health/GP to consider whether the employee is disabled and whether there are reasonable adjustments which would enable the employee to return to work.

**THE MEETING**

1. Invite the employee to a meeting and let the employee know in advance that the decision could result in dismissal. Also, provide the medical evidence which the employer has obtained and inform the employee of right to bring a Union rep or work colleague to the meeting.
2. If the employer concludes that the employee is unlikely to be well enough to return to their job within a reasonable time the employer should consider whether there are any vacancies which can be offered which the employee could do now or in the near future or whether there are any reasonable adjustments which could be made to enable the employee to return to work.
3. If nothing can be done, dismiss on the grounds of capability and inform the employee of the right to appeal.

**NOTICE OF TERMINATION**

Statutory notice pay is one week’s pay for each complete year of service, up to a maximum of 12 weeks.

An employee who is dismissed while off sick is normally entitled to their statutory notice pay at their full normal rate of pay, even though they are likely to be unable to work their notice and even where they are not entitled to pay whilst off sick.

**WHERE THE EMPLOYER HAS CAUSED THE EMPLOYEE’S SICKNESS**

In some cases, the employee’s sickness absence may have been caused by the employer, for example due to an industrial accident or industrial disease. This does not mean that the employer cannot fairly dismiss, the employer will however be expected to investigate this and seek to resolve this before considering dismissal. If the employee is claiming damages for the injury in a Court case they will also be able to claim their loss of employment if they are dismissed.