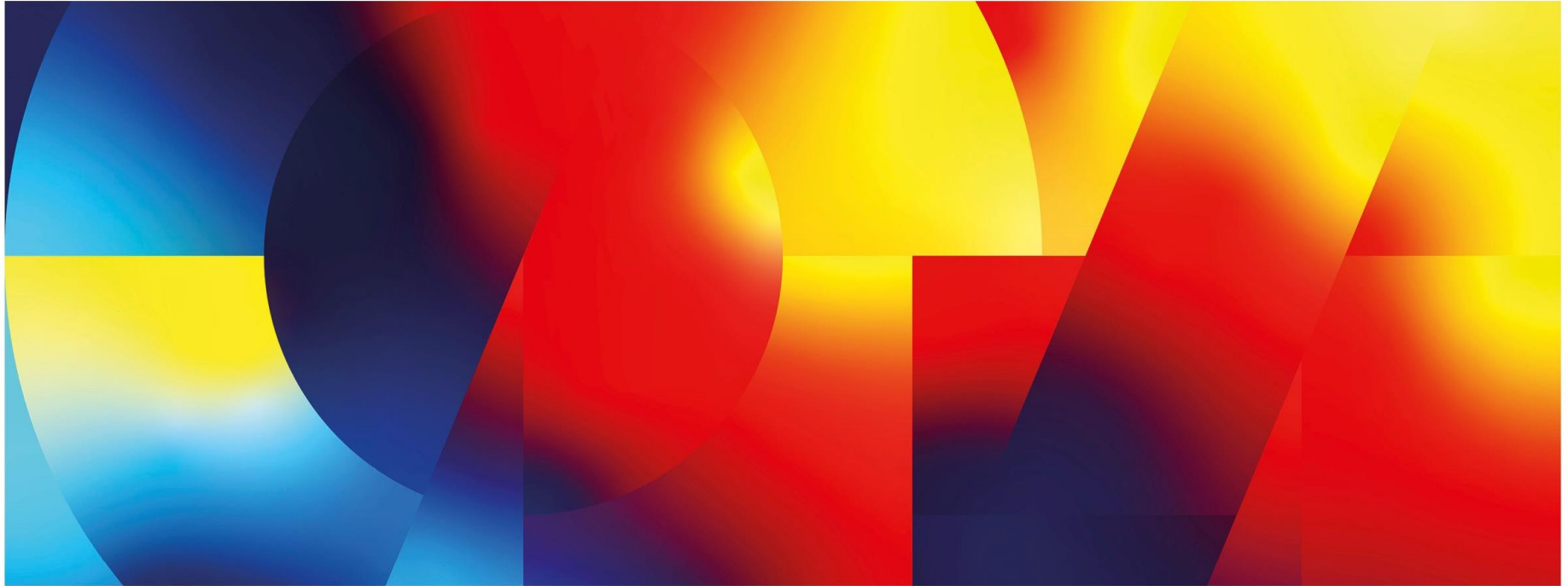


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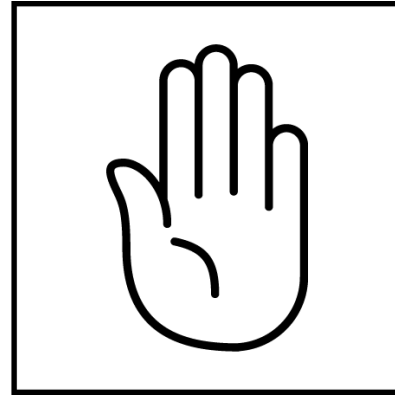
Graham Vials

ward
hadaway

Managing Long Term Sickness Absence



Housekeeping



Agenda

- Contractual sick pay including the position if an absence is as a result of an injury arising in school.
- Sickness absence policy and current position on Covid sickness absence.
- Long term vs short term sickness absence.
- What to do when an employee is off sick; including keeping in touch, medical advice, paper trail, conduct and disability issues.
- What to do when an employee returns to work including 'fit notes', 'may be fit' and reasonable adjustments
- Potential tricky areas including pregnancy related absence, holiday pay and refusal to co-operate with medical advice.
- What to do when absence becomes a problem- process, investigation, alternatives and adjustments, ill health retirement and medical suspension.
- Possible claims and proposals for reform.

Contractual Sick Pay

Contractual Sick Pay

- Main collective terms
 - Burgundy Book (teaching staff)
 - Green Book (support staff)
- Vary rare to find these terms do not apply.



Contractual Sick Pay

- Burgundy Book
 - Varying degree of entitlement – based on length of service
 - 100 days full, 100 days half – after four years service
 - Note that service may be continuous - includes all aggregated teaching service
 - Also note the "sick pay year". Not rolling. Entitlement resets 1 April each year
 - If dismissed whilst on nil pay (assuming sick pay exhausted) then must pay notice at full pay



Contractual Sick Pay

- Burgundy Book
 - 9.2 Where a teacher is still absent due to accident, injury or assault after the initial six months' period, the question of any extension of payment under paragraph 9.1 shall be considered. In the event of no extension of leave being granted under paragraph 9.1, the teacher shall be entitled to normal sick leave and pay, under the terms of paragraph 2.1 according to his/her length of service as prescribed by that paragraph.
 - 9.3 Absence resulting from accidents, injuries or assaults referred to in sub-paragraph 9.1 shall not be reckoned against the teacher's entitlements under paragraph 2 above, though such absences are reckonable for entitlement to Statutory Sick Pay.
 - 9.4 For the purpose of sub-paragraph 9.1 "absence" shall include more than one period of absence arising out of a single accident, injury or assault.

Contractual Sick Pay

8. **Conditions**

- Burgundy Book

8.1 A teacher shall not be entitled to sick pay unless:

- (i) notification is made to the employer as may be required, not later than the fourth working day of absence;
- (ii) a doctor's statement is supplied not later than the eighth day of absence;
- (iii) subsequent doctor's statements are submitted at the same intervals as they are required for D.S.S. (N.I.) purposes and on return to duty in those cases where the absence extends beyond the period covered by the initial statement and at similar intervals during a period of entitlement to Statutory Sick Pay;
- (iv) in the case of prolonged or frequent absence, the teacher undertakes any examination that the employer may require by an approved medical practitioner nominated by them, subject to the provisions of the Access to Medical Reports Act 1988 where applicable. The cost of the examination shall not be borne by the teacher. The teacher's own doctor may be present at such an examination at the teacher's request.
- (v) the teacher declares to the satisfaction of the employer his or her entitlement to benefits under the relevant Acts as well as any alteration in the entitlement to such benefits.

Contractual Sick Pay

- Green Book
 - Varying degree of entitlement – based on length of service
 - 6 months full, 6 months half after 5 years continuous service
 - Also note the continuous service - For the purposes of Occupational Sickness Scheme - continuous service will include continuous previous service with any public authority to which the *Redundancy Payments Modification Order* applies
 - Includes breaks in service up to 8 years



Sickness Absence Policy

Sickness Absence Policy

- Section 1 of the Employment Rights Act 1996 (ERA 1996) requires employers to provide particulars of "*any terms and conditions relating to ... incapacity for work due to sickness or injury, including any provision for sick pay*".
- This is included within the Green Book / Burgundy Book – but also within your policies.
- Having an effective policy in place will help schools to deal with absences consistently and effectively as well as putting employees on notice as to the standards of attendance and reporting that the school expects from them.

POLICY



Sickness Absence Policy

- Monitoring Absence
 - It is particularly important that schools and managers have an accurate picture of the level and patterns of sickness absence in school and separate departments so that any patterns or potential problems can be identified and applicable procedures invoked consistently.
- Disability absences – caution...
 - such absences should therefore only be taken into account if the employer is satisfied that all reasonable adjustments have been made and the taking into account of this data is a proportionate means of achieving a legitimate aim

POLICY



Sickness Absence Policy

- If the employer is responsible for the employee's ill-health, it will normally be expected to put up with a longer period of sickness absence than would otherwise be reasonable for the purposes of unfair dismissal law.
- In addition, the employer may wish to avoid compounding potential risk when it may already be at risk of a claim for personal injury.

POLICY



When employees call in sick

When employee's call in sick

- Who is the first point of call? Is this clear?
- Are staff trained to be sympathetic?
- Are staff aware of what to ask, or what not to ask?
- In most situations it will be appropriate to ask the employee the reason for their absence and the likely date of return.
- This information will help the school determine the likely impact of the absence (for example, whether temporary cover is required) as well as to assess whether the school might need to gather further information or put in place supportive measures.



When employees call in sick

- Where different departments are in contact with an employee, managers should ensure that a "joined up" approach is maintained so that the employee does not get contradictory messages.
- Care should be taken where special category data (previously known as sensitive personal data) is shared between departments.



When employees call in sick

- Evidence of incapacity
 - You should require evidence from the employee of their incapacity to work.
 - Normally self-certify for 7 days
 - Then doctor's certificate.
 - This is the "Statement of Fitness for Work" or "fit note" (Form Med 3).

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name

I assessed your case on:

and, because of the following condition(s):

I advise you that: 3 you are not fit for work.
 4 you may be fit for work taking account of the following advice:

If available, and with your employer's agreement, you may benefit from:

<input type="checkbox"/> a phased return to work	<input type="checkbox"/> amended duties
<input type="checkbox"/> altered hours	<input type="checkbox"/> workplace adaptations

5

When employees call in sick

- For the purposes of administering SSP, schools are not allowed to insist on a certificate for at least the first seven days.
- After that time, schools may insist on a Statutory Fit Note or other reasonable evidence (*section 14, Social Security Administration Act 1992 and regulation 2, Statutory Sick Pay (Medical Evidence) Regulations 1985 (SI 1985/1604)*)

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name

I assessed your case on:

and, because of the following condition(s):

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If available, and with your employer's agreement, you may benefit from:

<input type="checkbox"/> a phased return to work	<input type="checkbox"/> amended duties
<input type="checkbox"/> altered hours	<input type="checkbox"/> workplace adaptations

5

When employees call in sick

- Fit notes
 - A key feature of the fit note is (rather paradoxically) that it no longer contains an unconditional "fit for work" option, so an eligible healthcare professional can no longer use it to sign an employee back to work with a clean bill of health.
 - Instead, the employee may be declared "not fit for work" or "may be fit for work".
 - There may be situations where the school nevertheless suspects that the employee is not well enough to work. If in doubt, the school may wish to ask the employee to consent to examination by OHS
 - Not teachers may lose contractual sick pay if they unreasonably refuse.

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name: Mr, Mrs, Miss, Ms

I assessed your case on: / /

and, because of the following condition(s):

I advise you that:

you are not fit for work.

you may be fit for work taking account of the following advice:

If available, and with your employer's agreement, you may benefit from:

a phased return to work

altered hours

amended duties

workplace adaptations

When employees call in sick

- Fit notes
 - The general rule is that if the employee presents themselves as able and willing to work to their contract, the school cannot refuse to pay them pending such a report (*Beveridge v KLM UK Ltd* [2000] IRLR 765).
 - May need to consider medical suspension on full pay.

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name:

I assessed your case on:

and, because of the following condition(s):

I advise you that: 3 you are not fit for work.
 4 you may be fit for work taking account of the following advice:

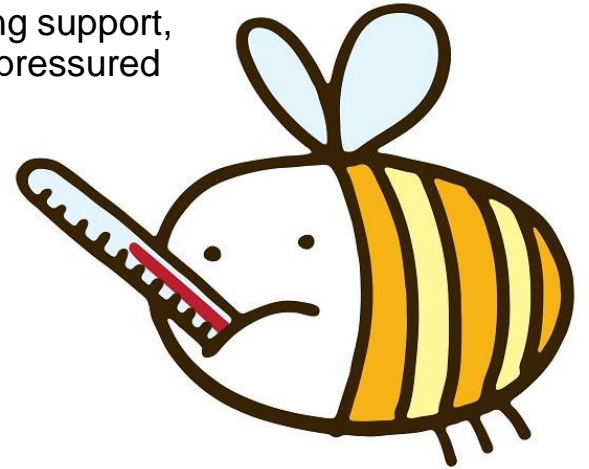
If available, and with your employer's agreement, you may benefit from:

<input type="checkbox"/> a phased return to work	<input type="checkbox"/> amended duties
<input type="checkbox"/> altered hours	<input type="checkbox"/> workplace adaptations

When an employee is off sick

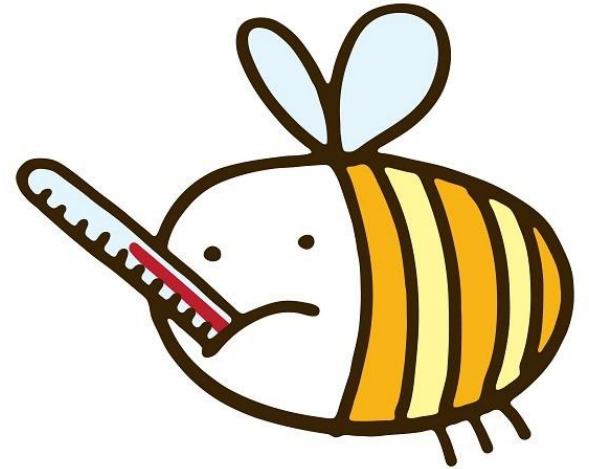
When an employee is off sick

- It is important for schools to maintain appropriate contact with employees on sick leave.
- The amount of contact will often depend on the employee's job and the size and culture of the school / Trust.
- A balance should be struck between demonstrating concern and offering support, and maintaining sufficient distance so that the employee does not feel pressured to offer help or feedback on office developments.



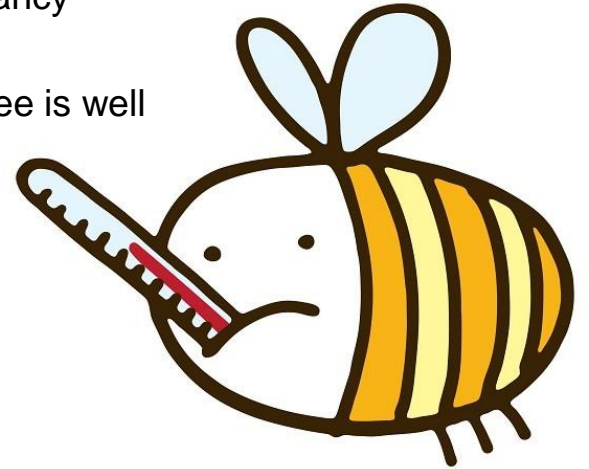
When an employee is off sick

- Contact could, for example, be limited to a regular telephone update conversation once a fortnight. However, schools should avoid overbearing or intrusive contact, or any other course of conduct that could cause distress.
- This risk may be increased if the employee is alleging that their illness is work-related, and especially if it is linked to workplace bullying.



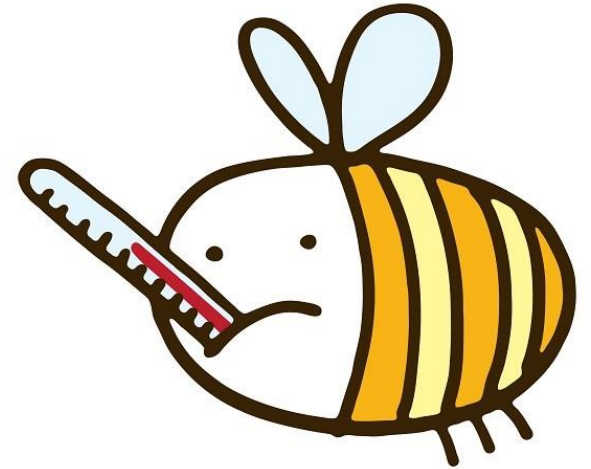
When an employee is off sick

- If an employee is off for a prolonged period it will, depending on the nature of their illness, usually be appropriate to send them newsletters and invites to any major events like a Christmas party.
- It would not be advisable to stop all contact for long periods, especially if there are time-sensitive issues which need to be resolved, such as a redundancy consultation or disciplinary proceedings.
- In such cases, an employer should take a view on whether the employee is well enough to discuss them and, if in doubt, provide them with the relevant information in writing in the first instance.



When an employee is off sick

- Employees who have been absent for long periods of time should be encouraged to contact their employer following any update on their medical condition.
- Schools should actively seek an update on the medical position. The onus is on the school to request updates, not on the employee to provide them (*Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471*)



When an employee is off sick

- Keep a paper trail
- It is essential to ensure that accurate and legible records are kept of all meetings and correspondence.
- If a school dismisses an employee who has been on long-term sick leave for capability and the employee subsequently brings a tribunal claim for unfair dismissal, one of the key issues to be determined will be whether the school acted reasonably in treating the capability of the employee as grounds for dismissal. Written records will usually be vital to proving this.



When an employee is off sick

- Managers should retain file notes of telephone conversations with absent employees, as well as records of telephone messages left.
- Ideally, telephone conversations and messages should be followed up with letters / emails summarising the steps taken to contact the employee and any action plans agreed, such as arranging to visit the employee at their house, or requesting that they provide copies of up-to-date sickness certificates.
- Letters should be written in a non-judgmental, factual style as they are likely to be disclosable in any tribunal proceedings.



When an employee is off sick

- Records should be stored confidentially, in accordance with any record-keeping policy and only used for the purposes for which they are collected.
- Consider the Information Commissioner's guidance as set out in the [Employment Practices Data Protection Code, Part 4: Information about workers' health and the associated supplementary guidance](#).
- For example, employers might consider storing documentation relating to the reasons for an employee's sickness or disability separately to anonymised data on sickness absences, or password protect.



Conduct during sick leave

Conduct during sick leave

- Being on sick leave does not release an employee from all obligations towards their employer.
- They are still obliged to obey lawful and reasonable orders, except to the extent that the employee's incapacity makes compliance impossible.
- However, this does not give an employer absolute control over the employee's activities, even where the employee is in receipt of full pay.



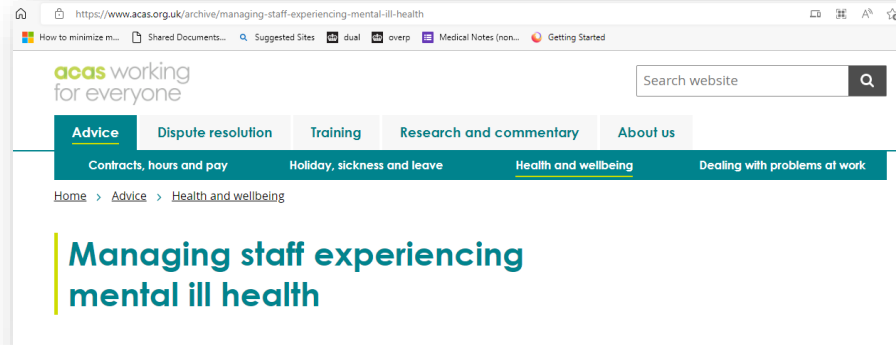
- Is the absence genuine?
- It will usually amount to misconduct or gross misconduct for an employee to dishonestly take sick leave when not genuinely unfit for work.
- The EAT has ruled that a doctor's note is not necessarily conclusive evidence of sickness for these purposes.
 - In *Hutchinson v Enfield Rolling Mills Ltd [1981] IRLR 318* the claimant and two other employees were seen by one of the directors during working hours attending a demonstration at a trade union conference. The claimant had, on the day before the demonstration, obtained a medical certificate signing him off work for seven days because of sciatica. He was dismissed on the grounds that, if he was fit enough to attend a demonstration, he was fit enough to work.
 - EAT said *"The employer is concerned to see that his employees are working, when fit to do so; and if they are doing things away from their business which suggests that they are fit to work, then that is a matter which concerns the employer."*

Conduct during sick leave

- Managers should avoid making snap judgments based on reports that a sick employee has gone on holiday, or has been seen playing sport or otherwise enjoying themselves while on sick leave from work.
- There is no legal requirement that a worker who is signed off sick must stay at home. In many cases, particularly those involving stress-related illnesses and/or depression, it might be medically advisable for a worker to try to undertake activities that will promote their return to good health and work, which are likely to include sporting and other leisure activities, or holidays.
- In any case, the fact that an employee is able on occasion to go out and enjoy themselves should not, of itself, be seen as evidence that they are fit for work or have been acting dishonestly.
- Neither is there any rule of law that an employee cannot go away on holiday, even abroad, while on sick leave. Gasp of shock....

Conduct during sick leave

- Dealing with mental health issues may require a greater degree of sensitivity and some managers may be less confident in how to handle an employee who is suffering with a mental health condition.
- Acas has produced a range of resources on mental health in the workplace, which may assist managers in this situation. This includes guidance for a manager who thinks a team member may be experiencing mental ill health.
- <https://www.acas.org.uk/archive/managing-staff-experiencing-mental-ill-health>



Returning to work

Returning to work

- Investigations into the reasons for an employee's absence should always be handled sensitively and are best initiated by way of holding a return to work interview.
- An employer's approach to return to work interviews should be applied consistently in order to ensure that individual members of staff do not feel "singled out" or make allegations that they have been treated in a discriminatory fashion.



Returning to work

- For employees who have been seriously ill and absent from work for longer periods, a return to work interview before their proposed return date will assist with establishing their fitness to return and reintroducing them to work.
- Managers and employees can work together to identify any adjustments which might make their return easier.
- Adjustments may be useful in rehabilitating an employee following long-term sickness absence, or absence due to injury or a recurring illness or disability.
 - Making appropriate adjustments would go towards discharging the employer's duties under the Equality Act 2010 in the case of a disabled employee and would also help show that the employer has behaved reasonably in relation to any subsequent dismissal.

- Examples of adjustments:-
 - **Phased return to work.** This could involve an employee coming back part-time for an initial period during which they become accustomed to the working environment at a slower pace. They could then begin to increase their working hours gradually back up to their usual rate.
 - **Varied start and finish times.** This adjustment might assist an employee with an illness or disability who might otherwise find it difficult to travel in rush hours, or an employee with a thyroid problem or ME who suffers from extreme tiredness and experiences difficulty with getting up in the morning.
 - **Alteration or reallocation of duties.** An employee's duties could be re-assigned to colleagues, either temporarily or permanently, where those duties have caused the employee difficulties.
 - **Purchasing equipment or software.** This can assist an employee to carry out their duties.

Returning to work

- It is generally advisable to agree with the affected employee that any adjustments will operate for an initial trial period, following which the parties should meet to review their effectiveness and discuss any changes.



Potential tricky areas

Possible problem areas / Tricky issues

- Pregnancy related absences.
 - The school must not take into account any absence related to pregnancy or maternity that falls within the protected period.
- Holidays and sickness absence
 - Primarily a support staff issue
- Elective treatment / cosmetic surgery
 - Sick leave / annual leave / leave of absence?
 - Whether the surgery or procedure is purely elective or cosmetic rather than actually for medical purposes?
- Disability related absences
 - Reasonable adjustments – have these been made?



When absence becomes an issue

When absence becomes an issue

- Schools are often wary of dealing with individuals who have been off sick for a prolonged period, especially where the cause of their sickness is not clear or they are awaiting diagnosis.
- However, schools should not allow the situation to drift until it reaches the point where the employee has been off for so long that dismissal starts to look like the only viable option. This can lead to problems under unfair dismissal and disability discrimination law.

When absence becomes an issue

- In a first formal meeting to discuss long-term absence, the employer is likely to want to explore the following issues:
 - The likely date of return (arrangements for future contact, further medical review and further meetings under the procedure).
 - Whether the employee has a disability.
 - Whether the employee perceives they can return to their previous job, without adjustments.
 - Whether the employee perceives they can return to their previous job, provided that adjustments are made.
 - What alternatives the employee may wish to explore: redeployment or application for ill health retirement.
 - The mechanics of a return to work / phased return.
 - Is medical advice necessary?

When absence becomes an issue

- An investigation is key.
- Establish the reason for absence so as to rule out or deal with any work-related cause or trigger.
- Consider whether an individual is likely to return to work in the foreseeable future. If so when?
- Obtain medical advice.
 - Consider requesting that the employee attends an examination with an independent specialist doctor or occupational health expert.
 - Special category data under GDPR.
 - Meet to discuss the report. Don't take at face value.



When absence becomes an issue

- Leading case East Lindsey District Council –v- Daubney [1977]
- *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health, it is necessary that he should be consulted and the matter discussed with him, and that in one way or another, steps be taken by the employer to discover the true medical position"*
- Where an employee refuses to co-operate with an employer's request to obtain medical information, the employer may dismiss fairly based on the evidence available to it. In Elmbridge Housing Trust v O'Donoghue [2004] EWCA Civ 939 it was fair for the employer to dismiss after 15 weeks' absence where the employer had waited in vain for eight weeks for the employee to consent to their obtaining medical evidence



When absence becomes an issue

- Medical Advice
 - An employer is entitled to take a medical opinion at face value.
 - However, in *CFS Management Services Ltd v Thomas [2012] UKEAT/0511/11* it was held to be unreasonable of an employer to rely on a medical report which was obviously flawed.
 - Where the employer obtains more than one medical opinion and the two opinions conflict, a reasonable employer would usually take steps to resolve this conflict.

When absence becomes an issue

- When arranging meetings...
 - If it is difficult for the employee to attend school, then should consider holding any meeting at the employee's home or at an alternative, neutral venue.
 - Where the employee is seriously ill or disabled, employers should consider permitting the individual to be accompanied by a friend or family member (even if this is not expressly permitted in any contractual policy).

Dismissal

- Where a school has reached the point where dismissal for ill-health is contemplated, it will usually have held at least two previous meetings with the employee.
- For an employee who has been on long-term sickness leave, schools should outline the length of their absence, the effect it has had on the school, and summarise any medical advice and the result of previous consultations with the employee regarding the duration of their absence and the possibility of any adjustments to their work or working environment.
- If dismissal is contemplated at this stage, the relevant evidence is likely to indicate that the employee will not be able to return to work in the near future, with or without adjustments, or that any adjustments are not reasonable in the circumstances.
- Early retirement by reason of ill-health may be an option for employees who are unable to continue working.
- Offer the right to appeal.



Possible claims

Possible claims

- Personal injury.
 - Negligence?
 - Health and Safety breach?
 - Discrimination?
- Unfair dismissal
 - Two years qualifying service
 - But watch out for discrimination risks – as these claims can be brought from day 1.

- Disability discrimination
 - Reasonable adjustments
 - Direct discrimination
 - Discrimination arising from disability
 - Indirect discrimination
 - Victimisation
 - Harassment
- Pregnancy related claims
 - Special protection under the *Equality Act 2010* and the *Maternity and Parental Leave Regulations 1999* (MPL Regulations)

Proposals for reform

- On 15 July 2019, the Department for Work and Pensions and the Department of Health and Social Care published a joint consultation. Major reforms to assist workers to return to work from sick leave and to stay in work:-
 - Employees returning from at least four weeks' sick leave to request that their employer make workplace modifications to assist their return to work. This right would extend to employees who are not disabled and therefore not covered by the duty to make reasonable adjustments under the Equality Act 2010.
 - Removing the concept of qualifying days for SSP and other SSP changes.
 - Requiring employers to give employees four weeks' notice that their SSP is due to end (which could act as a trigger for a discussion on what support the employee needs to return to work).
- But given the current political turmoil – who knows what will happen....

Questions and answers

Thank you

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