Briefing

Managing sickness absence

Abridged content for sample purposes

Business Disability Forum

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Introduction

Managing sickness absence

This is one of a series of briefings, published by Business Disability Forum, which provide practical guidance for employers on specific topics relating to the employment of disabled people. It will be particularly useful for personnel or human resources managers, occupational health advisers, line managers and employment agencies.

This paper provides practical guidance for employers on managing sickness absence. It outlines the law and provides best practice guidance on how to manage sickness absence. Three main types of sickness absence which require specific managerial procedures are:

- Long-term sickness absence – known length.
- Long-term sickness absence – unknown length.
- Periodic sickness absences.

Guidance is given below on how to record disability-related sickness absence and making reasonable adjustments both to reduce the level of absence and to accommodate absences which can include making adjustments to sick pay.

Reasonable adjustments and sickness absence

Whenever an employer is told or could reasonably be expected to know that an employee might have difficulty doing a job because of a disability, they should investigate reasonable adjustments to the working environment or arrangements that could overcome the barriers faced by that person. Reasonable adjustments can reduce the time off sick an employee takes.

However, it might also in some circumstances be a reasonable adjustment to accommodate a higher level of sickness absence from a particular disabled employee. Failure to make such adjustments could lead to unfavourable treatment of the person for because of their disability if, for example, they are disciplined or have their contract of employment terminated because of their attendance record.

It is important to remember that treating everyone the same does not mean that everyone is treated fairly. The law requires people to be treated differently according to their needs by making reasonable adjustments for them.

An employer who is concerned about an employee's sickness absence levels should always first discuss with the employee difficulties that they may be having doing their job. Then together the employer and employee should agree a plan of action that could include obtaining medical reports and identifying reasonable adjustments that might:

- Enable the employee to return to work or
- Reduce the number or length of absences or
- Help the employer to accommodate absences.

Remember that reasonable adjustments may prevent sickness absence in the first place, as well as enabling employees to carry out their jobs more effectively, e.g. adapted keyboards and voice- recognition software may help to prevent, or limit, repetitive strain injury (RSI).

Case management approach

Experiences of disability management in other countries such as Australia and Canada indicate that a case management or disability management approach to managing sickness absence results in:

- An increased rate of successful return after long-term absence.
- A reduction of costs associated with disability in the workplace.
- Improvements in employee morale.
- Increased productivity.

The crucial component is co-ordination of the many factors and personnel who may be involved. This is best accomplished by appointing a disability management co-ordinator.

The role of the disability management co-ordinator

The disability management co-ordinator is pivotal to the system, linking together opinions and expertise in assessment, operation and review (see 'key players' below). The human resources manager often takes this role.

A collaborative approach will be important, and there will be times when advisers need to work together as a team, especially on policy-making, in review and in resolution of disagreement. It is the co-ordinator who guides the process as a 'case manager'.

The disability management co-ordinator might:

- Identify individuals who need disability management or support in return-to-work.
- Work with the person through assessment, planning, decision-making and review.
- Protect the individual's rights, assure confidentiality and explain these to the individual.
- Manage assessment, and commission specialist advice where needed (including medical opinion).
- Brief advisers thoroughly.
- Co-ordinate the functional analysis of particular jobs, to include core competencies and capability standards required.
- Gather reports for cross-disciplinary review to interpret assessment.
- Identify adjustments, such as, equipment, changes to environment or modifications to the job- supported as appropriate by staff training.
- Manage the redeployment process.
- Document the process in relation to each individual
- Manage the termination of employment where necessary.

Key players in disability management

The disability management team could involve any, or all of the following:

- Disabled individual.
- Disability management co-ordinator (possibly fulfilled by the human resources or occupational health manager).
- Line manager and also, as appropriate:
- Occupational health specialist.
- Human resources manager.
- An Access to Work (AtW) adviser at your nearest Access to Work (AtW) Operational Support Unit who can offer a range of practical and financial assistance in identifying and supplying reasonable adjustments.
- Health and safety officer.
- General practitioner (GP).
- Specialist medical adviser or paramedic such as occupational therapist, physiotherapist or a psychiatric nurse.
- Ergonomics expertise – corporate approaches vary and may involve several departments. A specialist design consultant may be brought in.
- Trade union representative.
- Other employee representatives.

Each key player in the process should be aware of their legal responsibilities to the employee and to the employer.

Health assessment

It is advisable to obtain appropriate medical reports when an employee's attendance is causing concern. In order for an employer to obtain a medical report or records from an employee's doctor they must first give their consent under the Access to Medical Reports Act 1988.

Once consent has been given the letter to the doctor (preferably a specialist if the employee has one) should specifically ask:

- Why they are unable to work at present.
- How long they are likely to be absent.
- Whether their return to work could be facilitated by reasonable adjustments such as part-time working, a phased return to work or any particular equipment.
- Whether they are receiving any treatment or medication that might impact on their ability to return to work.

In order for the doctor to answer the letter fully, you will need to provide details about the job and the tasks the person is required to fulfil, e.g. standing or sitting for long periods, using a computer, shift work, lifting etc. Including the job description with the letter may be helpful.

Under the Access to Medical Reports Act 1988 the employee must be told that they have the right to see any report on them. The report cannot be sent to the employer until the employee has given their consent. They also have the right to ask the doctor to amend their report.

Remember, you do not need to see an entire medical history about the person. A person's medical history is extremely personal and could contain information that the person is reluctant to share and has no relevance to the current situation.

You should also ask the employee to see an occupational health adviser to whom the Access to Medical Reports Act 1998 also applies. If it is your normal practice for your occupational health adviser to request a report from the individual's doctor then ensure that the adviser asks the above questions.

The quality of the advice you receive from your occupational health adviser (or indeed from any doctor) will depend on the adviser's understanding of the individual's job. You should therefore provide them with a full job description and in particular:

- Specify the hours to be worked, the flexible hours possible and whether working from home is possible.
- State whether the employee is required to travel.
- Indicate physical requirements of the job, including strength and stamina.
- Describe the working environment including temperature, lighting and any other unusual or significant features of the environment.
- Note intellectual and emotional demands, including stress factors.
- Outline your expectations – the key outputs required for the job.
- Provide a record of sickness absences to date.

It might be helpful to issue medical advisers with a pro forma to make sure that the report covers the necessary ground. Questions could include:

- Is this person capable of carrying out the duties of this particular job?
- Is there any reason why this capability might change over time?
- Would any reasonable adjustments such as altering working hours or providing equipment enable the person to continue in this role?
- If the person cannot continue in their existing role would they be able to return to an alternative post and, if so, what type of job?
- Could medical intervention, change of medication or specialist rehabilitation help the individual work to their full potential?
- If they are unable to return to work now, is it likely they will be able to do so in the foreseeable future?

You cannot, however, insist that an employee visit a medical adviser unless there is an express term in their contract of employment requiring them to do so at your request. Where there is such a term in the contract, you must still first explain the nature, purpose and extent of the examination.

If there is no such term in your contracts of employment the employee might still agree to see your occupational health adviser if you explain that the purpose is to determine if reasonable adjustments could help them to do their job or return to work.

Management and medical responsibilities

Human resources managers often ask a doctor to assess fitness for work when the employment of a person with a medical condition may give rise to risks. This does not mean that the decision on employability is a medical responsibility. The doctor's role is to assess the risks and present them as clearly as possible.

It is then the employer's responsibility to decide on the acceptability of risks after reasonable adjustments have been made under the Equality Act 2010 equality and health and safety legislation. Specialist occupational physicians, however, may be able to assist employers in deciding the level of risk that is acceptable.

For more information about the use of occupational health specialists see the 'disability management' and the 'medical adviser' briefings.

Legal case study – Brown v South Bank University

This case illustrates the need for the employer's own medical adviser to be properly briefed so that an employee is not retired on medical grounds when a reasonable adjustment would have enabled the employee to return to work.

Ms Brown, who has multiple sclerosis, had been off sick for three months. When she was due

to return to work she was seen by the employer's medical adviser who had been told that Ms Brown's position required her to work five days a week. Ms Brown could not work for this length of time and so the medical adviser recommended that she take early retirement on ill-health grounds.

The tribunal ruled that Ms Brown had not left work voluntarily; she only had a choice between dismissal and early retirement. She had been unjustifiably treated less favourably because of her disability. The Tribunal did not accept the employers' claim that attendance at work five days a week was necessary.

This case was decided under the DDA but the same principles apply under the Equality Act 2010.

Individual and competent risk assessments

An employer may have health and safety concerns, particularly if an employee returns to work with a recently acquired disability. In these circumstances the employer will need to conduct an individual risk assessment to determine whether the individual's particular disability presents any increased risks either to themselves or others when working in a specific role or environment.

An individual and competent risk assessment will provide the means of ensuring that any genuine concerns about a disabled employee or prospective employee can be addressed in ways which are rational, proportionate to the level of risk, and which do not unduly disadvantage the disabled person.

Such risk assessments must always be specific to the particular individual, job-role and working environment concerned. A general policy of excluding or restricting the career opportunities open to people with particular impairments may well be direct discrimination which cannot be justified.

Experts consulted in order to carry out a risk assessment could include occupational health practitioners, health and safety consultants and ergonomists. Whether or not an employee can continue to work safely in a particular role is, however, always a management and not a medical decision.

The employer should take advice and then assess whether, with reasonable adjustments, any risk can be reduced to acceptable levels. Employers cannot abdicate responsibility for making such decisions to medical or other experts.

If health and safety is put forward as the reason for refusing to allow an employee to return from a period of absence, it must be shown to be proportionate reaction to the level of risk involved, and it must not be possible to overcome the health and safety risk by making reasonable adjustments. Only then will the unfavourable treatment of that employee, in not being allowed to return to work, be justifiable, otherwise the employer may be in breach of the Equality Act 2010.

For more information on health and safety, see the 'health and safety and the Equality Act 2010' briefing.

Recording sickness absence

Disability-related sickness absence should be recorded separately from other types of absences.

On sickness absence self-certification forms every employee should be asked if the absence was related to a disability. The form should clearly state who will have access to this information, e.g. human resources, the line manager, occupational health.

An employee may tell you about a disability for the first time on such a form and so it is vital that this is followed up with a discussion with that employee. This may result in medical reports being sought and reasonable adjustments being identified.

Details of a disability is sensitive personal data for the purposes of the Data Protection Act. The self-certification form should, therefore, ask the employee to consent to the information being passed to the people listed by signing the form. You should make it clear on the form that the information will not be given to anyone else without the consent of the employee.

Disability-related sickness absences should then be recorded separately from other absences, for example:

- Non-disability related sickness absence.
- Disability leave (see page 15).
- Study leave.
- Compassionate leave.
- Carer's leave.

Discounting disability-related sickness absences as a reasonable adjustment.

It might be reasonable in some situations depending on the individual circumstance to discount some or all disability-related absences when considering:

- Promotion.
- Training opportunities.
- Redundancy.
- Disciplinary procedures for poor attendance.
- Whether to reduce or end sick pay.

Remember that it may not be reasonable in every case to discount all disability-related absences. The following cases were decided under the DDA but the situations and principles are likely to carry over to the Equality Act 2010. In the case of Royal Liverpool Children's NHS Trust v Dunsby the Employment Appeal Tribunal (EAT) pointed out that the DDA does permit employers to dismiss employees for disability related absences where they are justified in doing so.

In O'Hanlon v HMRC the EAT noted that it was reasonable in this case for the employer to reduce the employee's sick pay by half and then to stop paying it because it had made all possible reasonable adjustments to enable Ms O'Hanlon to return to work. This case should, however, be contrasted with the case of Nottinghamshire County Council v Meikle (see page 17) where the employer had not made reasonable adjustments and so could not justify paying Ms Meikle half her sick pay after six months.

Recording disability related absences separately will make it easier to decide on when it would be reasonable to continue to pay sick pay and when an employer might be justified in ending sick pay or even the employee's employment.

Disability leave

Disability leave is not a legal term. It is, however, a useful way of categorising the type of leave an employee might need to adjust to changes in their life caused by a new or existing disability. Remember that time off for treatment or rehabilitation, which might be categorised as disability leave, is a reasonable adjustment that employers might have to provide under the Equality Act 2010.

Disability leave should facilitate rehabilitation, treatment for, or adjustment to, a disability and is for a fixed period, or periods, of time that the employer and the employee know about in advance. In other words, there is a fixed end date for the leave.

Disability leave is also suitable for absences of a short period of time that are needed on a regular basis.

The predictable and fixed nature of disability leave distinguishes it from disability-related sickness absence, which is unpredictable and for unknown periods of time. Recording such absences

as 'disability leave' as opposed to sickness absence means that it can be discounted where if

it is reasonable to do so when calculating the employee's entitlement to sick pay or triggering disciplinary proceedings for sickness absence.

Examples of disability leave:

- An employee attends a four-week residential course to be trained to use a new guide dog.
- An employee requires a period of adjustment and rehabilitation following an accident that has resulted in a mobility impairment (NB: this individual will have been on sick leave during initial medical care and treatment. Disability leave might be granted following discharge from hospital in order to allow time to adjust to the living environment).
- An employee needs three hours of physiotherapy every fortnight for a fixed and agreed period of time, e.g. Wednesday mornings for the next eight weeks.

Disability leave should be agreed on a discretionary basis with the person's line manager, according to the individual needs of the employee. The employee should be paid for all or some, of the leave agreed for as long as it is reasonable for the employer to do so.

The size and resources of the employer as well as the expertise and length of service of the employee will determine whether and for how long it will be reasonable for the employer to provide paid disability leave.

It should be noted that:

- If an individual is absent from work because they are waiting for reasonable adjustments to be made, this is not sickness absence or disability leave. This employee is willing to work, but is unable to because the employer has not fulfilled its duty to make reasonable adjustments.
- When an employee is absent awaiting redeployment the individual should be on full pay, even if it is following a period of long-term sickness absence if the employee is now fit and ready to work.

Reasonable adjustments

Sick pay

If an employee is paid sick pay while waiting for reasonable adjustments to enable them to return to work, and sick pay entitlement is reduced or runs out after a certain period, this may constitute unfavourable treatment for a reason arising out of the individual's disability.

A reasonable adjustment in this case would be to continue to pay full rate sick pay. The safer and best practice option is not to count this as sickness absence at all.

Legal case study – Nottinghamshire County Council v Meikle

Ms Meikle is a teacher with a visual impairment and some mobility problems. She alleged that her employer had treated her less favourably and failed to make reasonable adjustments for her, such as providing large print documents and a classroom with adequate lighting and electrical sockets for her equipment.

She started DDA proceedings against her employer in 1999, and then in June 1999 she went off sick with eyestrain. Unsuccessful attempts were made to resolve the problems while she was off sick until May 2000 when she resigned.

She brought a second claim to the tribunal adding to the ongoing failure to make reasonable adjustments and less favourable treatment, claims for constructive and wrongful dismissal.

The Employment Tribunal (ET) found that she had been treated less favourably and that there had been a failure to make reasonable adjustments for her under the DDA under 11 separate headings of complaint.

The Tribunal also found that the school failed consistently to implement adequate temporary measures pending discussion or implementation of the above adjustments and that they adopted a negative and unhelpful attitude to her difficulties.

The Tribunal, however, held that she had not been constructively dismissed for the purposes of either the Employment Rights Act (ERA) 1996 or under the DDA.

It also found that the employer was not in breach of its duty to make reasonable adjustments by failing to ensure that she remained on full pay while off sick. This was despite the fact that her employer's conduct was the cause of her absence. Finally, the tribunal held that putting her on half pay during her period of long-term sickness was not less favourable treatment for a reason relating to her disability. She appealed to the Employment Appeal Tribunal (EAT).

The EAT held that Ms Meikle had been constructively dismissed under both the Employment Relations Act (i.e. unfairly dismissed) and the DDA. The dismissal under the DDA was significant as there was no upper limit on compensation under the DDA (and this remains the case under the Equality Act 2010) as there is for unfair dismissal under the ERA.

Ms Meikle was off sick from June 1999 to May 2000 when she resigned. She received six months' full pay and then half pay. She argued that putting her on half pay placed her at a substantial disadvantage and that a reasonable adjustment to keep her on full pay should have been made. The Tribunal had rejected this assertion

The EAT, however, held that the employer had failed to make a reasonable adjustment by not continuing to pay her full pay and could not prove that this failure was justified.

It also went on to hold that putting her on half pay was also less favourable treatment for a reason relating to her disability. The employer accepted that it was less favourable treatment but argued that they were justified. Ms Meikle, however, maintained that had her employer made the adjustments she needed she would not have been off sick and so her employer would not have had a reason to put her on half pay. They could not rely on their own failure to make reasonable adjustments as justification for the less favourable treatment.

Nottinghamshire County Council appealed to the Court of Appeal but it upheld the EAT's decision.

This case was decided under the DDA but it is likely that the tribunal will come to the same conclusion under the Equality Act 2010 where reasonable adjustments have not been implemented to enable an employee to work.

Content has been removed for sample purposes. Pages 19 to 50 are available in the full booklet.

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