Ruth Seddon HR

Ill Health (Capability)

Dealing with an employee who is off sick for long periods, or for one continuous, long period is complex and requires a particularly careful procedure, which must be well documented by the employer. Particular care will be required to avoid disability discrimination claims if the employee has a long-term condition meeting the definition of disability under the Equality Act 2010. The existence of any permanent health insurance (PHI) scheme or a pension scheme providing for ill-health retirement will be relevant. Achieving a fair dismissal for long-term ill health can take some time.

Preliminary issues

1. ensure the absence and the reason for it is properly and accurately recorded, whether the absence is one long, continuous period or whether there are long periods of absence but also short attempts to return to work.
2. be aware of the absence possibly being because of a condition amounting to a disability under the Equality Act
3. be aware that a different approach may be necessary if the absence(s) are pregnancy-related
4. whether the employer has a capability policy or procedure which will need to be followed; if there is, the employee should be provided with a copy/access to it.
5. whether the employer has an automatic 'trigger' point for a review of a long-term absence (likely if there is a written policy or if there is a recognised trade union) or whether there is management discretion to identify when an absence needs to be addressed, for example because it seems to the employer that the employee may be unlikely to return in the foreseeable future
6. whether there is a pension scheme allowing for early retirement due to ill health
7. whether there is a permanent health insurance scheme in place
8. how the employer has treated other employees in the past in similar circumstances
9. identify the effects/impact of the absence on the employer, as these can be a factor when considering dismissal; identifying the actual problem at an early stage once the absence has become long-term can be useful in the discussions with the employee and in defending any subsequent unfair dismissal claim

Some general principles in managing sickness issues of this type are:

1. employee and employer should keep in regular contact with each other
2. the employee must be kept fully informed if there is any risk to employment
3. if the employer wishes to contact the employee's doctor, he must notify the employee in writing that they intend to make such an application and secure the employee's consent in writing
4. where the employee states that he wishes to have access to the report, the employer must let the GP know this when making the application and, at the same time, let the employee know that the report has been requested. The employee must contact the GP within 21 days of the date of application to make arrangements to see the report. Otherwise he loses the right to do so

5. on the basis of the GP's report, the employer should consider whether alternative work is available. The employer is not expected to create a special job for the employee concerned, nor to be a medical expert, but to take action on the basis of the medical evidence
6. where there is reasonable doubt about the nature of the illness or injury, the employee should be asked if he would agree to be examined by a doctor to be appointed by the organisation
7. where an employee refuses to cooperate in providing medical evidence, or to undergo an independent medical examination, the employee should be told in writing that a decision will be taken on the basis of the information available and that it could result in dismissal
8. where the employee is allergic to a product used in the workplace, the employer should consider remedial action or a transfer to alternative work
9. where the employee's job can no longer be held open, and no suitable alternative work is available, the employee should be informed of the likelihood of dismissal
10. where dismissal action is taken, the employee should be given the period of notice to which he is entitled by statute or contract and informed of the right of appeal

Process

An outline of the process is as follows:

1. consultation with the employee
2. making allowances where absence is the employer's fault (eg accident in work)
3. medical investigation
4. occupational health assessment if applicable
5. consider disability issues
6. consider alternative employment
7. consider early retirement under the pension scheme (if there is one)
8. consider the permanent health insurance (PHI) scheme (if there is one)
9. following a clear procedure for dismissal

Note: this is general guidance only and I strongly advise taking advice from me on individual cases as they can be complex and involve unforeseen risks at any point.

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