

# technical factsheet 151

## Dealing with sickness

This area is governed largely by the contract and by case law on sickness, however the Disability Discrimination Act 1995 may impact on the way the employer deals with the employee, and provision for Statutory Sick Pay is made for all employees and workers under the Statutory Sick Pay (General) Regulations 1982 as amended.

Staff sickness may be a considerable burden on a business, leading to additional costs in using temporary staff or paying overtime, and increasing the workload for other staff. While all employers would want to support members of staff who are unwell, if sickness absence is not managed, particularly where the employer pays sick pay, at worst the benefit may be abused, or absences may be extended unnecessarily.

In dealing with sickness, we need to make a distinction between long term absence and short term frequent absence and absence related to disability, as to some extent the employer's approach needs to be different. There are a number of general issues which are relevant to all aspects of sickness covered below, before a practical guide is given on dealing with sickness within an organisation.

### Disability discrimination

This area of law applies to employees and to workers. However, in practice the major issues in relation to absence tend to concern employees as they are required to provide continuous service. Most employees on long term sick leave, and some who are frequently absent for short periods, may qualify as disabled. This imposes extra duties on the employer. It is unlawful for an employer to discriminate against a disabled employee or job applicant by treating that person **less favourably** than s/he treats, or would treat, others for a reason relating to his or her disability - that treatment is defined below.

The duty placed on an employer is twofold:

1. not to discriminate against a disabled person, and
2. to make reasonable adjustments to accommodate the disabled person.

### Who qualifies as disabled?

This definition goes far beyond the traditional perception of disability.

A disabled person is someone who has:

- 'A physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.
- It covers any normal physically related illness which has a substantial effect on the person, e.g. heart conditions, angina, epilepsy, diabetes type 1, and medical evidence of the condition will need to be produced
- It also covers mental conditions ranging from schizophrenia or manic depression to anxiety disorders; reactive and clinical depression can also be regarded as a disability. The law used to require that the mental illness was clinically recognised, this is no longer necessary but it is particularly important here that the employee produces clear medical evidence of his/her condition.
- It can cover disorders which recur, although the person may not suffer any symptoms in between attacks, such as serious asthma and epilepsy
- Learning disorders such as dyslexia are now recognised as a disability.
- There are some conditions which are automatically regarded as disabilities, even though the employee may not currently be suffering any or many symptoms; these are HIV AIDS, multiple sclerosis and cancer,
- Some conditions are expressly excluded, including alcoholism, voyeurism and kleptomania
- In order for the disability to be seen to be substantial, it must have lasted or be predicted to last **at least one year**, or for the rest of the person's life.

### **What activities must be affected?**

It is not necessarily activities at work that must be affected. It is essential in order to satisfy the definition that the employee should have substantial difficulties in his or her everyday life. The physical or mental disability **must** impact on one of the following; mobility, dexterity; physical co-ordination; memory and the ability to learn or understand; continence; hearing; speech or eyesight; the ability to lift everyday objects and the perception of the risk of physical danger.

### **The first duty - do not discriminate.**

In an employment context, it is unlawful to discriminate against a disabled person i.e. treat them unfavourably, in

- Making the arrangements for deciding who to employ.
- The terms on which you offer that person employment.
- Refusing to offer that person employment.
- The terms which you give the employee, compared with employees already working for you.
- The employment opportunities afforded the disabled person, namely promotion, transfer, training or the receipt of any other benefit e.g. facilities and services, which plainly includes fringe benefits - this also applies where you refuse to afford these opportunities.
- Dismissing him/her or by subjecting him/her to some other detriment.

### **The second duty - to make reasonable adjustments**

The Act places a specific duty upon the employer to make reasonable adjustments to work arrangements and the working environment so as to accommodate disabled persons. Where any employer is faced with a disabled employee then there will be a fundamental duty to make a **full and proper assessment** to enable it to decide what steps it would be reasonable to take to prevent a disabled person from being at a disadvantage. This will apply with a disabled job applicant, but also where an existing employee is, or becomes, disabled. This may involve an employee who has been absent long term coming back on reduced hours or duties until s/he is able to fully perform the role.

The duty arises where the arrangements made for the work or the way the work is done, or the physical features of the premises or the equipment place the disabled employee at a significant disadvantage compared to persons without that disability.

As far as physical features are concerned, the Act places a specific duty upon the employer to make reasonable adjustments to work arrangements and the working environment so as to accommodate disabled persons. Examples of reasonable adjustments include altering premises, allocating some of the disabled person's duties to another member of staff, altering the disabled person's working hours, transferring the disabled person to fill an existing vacancy etc. However, the employer is only required to make reasonable adjustments, bearing in mind its size and its resources.

### **The defence**

It is never lawful to directly discriminate on grounds of disability e.g. to have a rule not to employ epileptics. However, less favourable treatment for disability related reasons can be justified where the employer can make a reasonable argument for it. The net effect is that if the employer can explain his/her treatment of the employee eg a decision to dismiss the person, by reference to economic imperatives, health and safety of the employee or fellow employees, or general impracticality, it may be possible to defend the action. If the employer can show that, despite any adjustments that it might reasonably be expected to make, the disabled employee cannot be taken on or retained without significant difficulties, it may be justified in refusing to employ or in dismissing the employee.

### **Medical records and information**

It is essential in every business to carefully record and monitor absence in relation to every employee and employer. Without this, it is impossible to take any effective action to tackle absenteeism.

Additionally, good medical evidence is crucial to every decision to be made about a person on grounds of sickness. Most employers provide expressly in contracts and policies that employees must see a company doctor or nominated specialist where they need information about the employee's medical condition. If the employee wilfully refuses to cooperate with the employer's reasonable attempts to get information, it has been held by some tribunals to be gross misconduct. It is certainly the case that, if the employee refuses to undergo a medical examination, the employer is entitled to take action on the basis of the evidence it has.

There are particular rules about GP records (because they often contain much extraneous detail and are much more personal in nature) - the employee is entitled to withhold consent to disclosure of them in the first place, or to review them before disclosure and to require amendment.

It is crucial that employers keep all medical information secure, and ensure that any personal details are only disclosed to management where this is strictly necessary. All medical records are subject to the Data Protection Act.

### **Documentation**

Employers should require the employee to notify his/her line manager as early as possible on the first day of absence. Once the employee has been absent for one calendar week, on the eighth day of absence s/he must provide a doctor's certificate stating the reason for the absence.

### **Return to work interviews**

These are a valuable tool as an opportunity for communication between employer and employee and also a disincentive to casual absenteeism. Additionally, they encourage proper recording of sickness absence. The line manager should speak to the employee on his or her return, and record the reason for absence, checking that the employee is fit to return. Employers suffering absenteeism problems will often use such interviews on each occasion of absence, others may decide to talk directly to the employee in this way only when there has been a longer absence of a few days or more.

### **Sick pay**

There is no right to sick pay other than statutory sick pay (SSP) which must be paid by the employer after 3 days absence, and is refunded by the state. Many employers choose to provide sick pay, usually for employees only, in addition to SSP. This is sometimes a contractual right, and sometimes at the discretion of management. Sick pay is a valuable benefit and is useful in attracting and retaining staff, however it can lead to abuse and encourage absenteeism. It is therefore particularly important for employers with generous sick pay schemes to manage absence in a pro-active way in accordance with the principles below.

### **Long term sickness**

An employee is usually regarded as long term sick when s/he is absent for 6 weeks or more. All employers should have a policy on such matters. The employee will have provided a reason for absence by way of doctor's certificate and s/he may also provide additional medical information or can be required to do so. Where an employer provides sick pay it is not normally possible to terminate employment on the basis of incapacity during that sick pay period. However, depending on the ability of the business to cover for the absent employee, and how key the post is, the employer is often in a position to consider termination where there is no immediate prospect of the employee returning to his job. Many long term sick employees will be covered by the Disability Discrimination Act and therefore it is essential that the employer considers all and any reasonable adjustments which may permit the employee to return to work in some capacity.

An appropriate course of action, therefore, is for the employer to require detailed medical information once the employee has been absent for a lengthy period. The employer will require details of the extent of the incapacity and a prognosis. Any reasonable adjustments that could be made are considered in consultation with the employee, and a decision is made as to whether the employee can come back to work in the foreseeable future. If so, then action will be taken to ensure that this takes place as soon as possible. If not, then the employer will consider termination on the basis that the employee is incapable of providing work to the business.

### **Short term frequent absence**

This is where the employee is absent for one or a few days at a time and this occurs on a number of occasions. In many ways this kind of absence is more difficult for an employer to deal with than long term sickness, as it is unpredictable and difficult to cover.

It is possible, where absences are single days, that the employer suspects that the employee is not genuinely ill and is either attending interviews or taking a 'duvet day'. Where such absences have a clear pattern eg Fridays, Mondays or the day after a bank holiday, the employer is entitled to treat the matter as a case of misconduct in the absence of a compelling explanation. Otherwise, it would be more sensible, even in the case of single day absences, to deal with it according to the procedure below. Although some meetings are described as formal and others informal, it is still wise for employers to take careful notes of what is said and agreed at each stage of the procedure.

### **'Trigger Point' – informal investigation**

All employers should have a point at which they start to tackle short term sickness. Some employers use the Bradford Factor, which is a measure of the frequency of absence, and details of this can be found at <http://www.incomesdata.co.uk/studies/bradford.htm>. Others will have a rule of thumb that, once an employee has been absent on eg four occasions within 12 months, then his or her line manager will arrange a meeting to discuss it. It may be unwise to publicise this, as some employees may well 'work up' to the limit, regarding two or three days of sick absence as akin to an entitlement.

This meeting will be an informal one, designed to determine whether there are any health issues of which the employee is aware. It also has the effect of warning employees who are not genuinely ill that further absenteeism will have formal consequences.

If sporadic absence continues, the employer will arrange a formal meeting at which the employee will again be asked whether there are any medical issues of which the employer should be aware. S/he will be told that if absences continue, the employer will organise a medical examination and report, designed to determine the reasons for the absence. Often, the employee's attendance record will improve at this point, and if this does not occur, s/he will be required to see a doctor. The employer will act in accordance with any information in this report, particularly if the employee has a medical condition which means that s/he is disabled. If the report indicates that there is no medical condition, the employer will require an improvement in attendance and if this is not forthcoming, will follow either the statutory dismissal procedure (see factsheet 153) or whatever procedure is laid out in its own employee handbook.

Ultimately the employee will need to reach an acceptable standard of attendance at work or a dismissal for incapacity is likely, on the basis that the level of unreliability cannot be tolerated within the organisation.

### **Sickness during disciplinary process**

It is quite common for employees who are subject to disciplinary proceedings to go sick just before meetings are due to take place. Where the employer pays contractual sick pay in addition to SSP, it is common to insert a clause in the contract to the effect that sick pay will not be paid if formal proceedings of this nature have been commenced. If the employer is contractually obliged to pay sick pay, there is little that can be done, other than to wait for the employee to return.

### **Sickness during maternity leave**

Where a woman is sick during her maternity leave, the employer is not able to take any action, as this would be seen as a detriment which she has suffered by reason of her pregnancy. Once she has returned from maternity leave, she is treated exactly as other employees are, from that time onwards.