

Here are some of the common questions we are asked about absence by disabled people. This booklet is complimentary to our factsheet for employers on Managing Absence.

### **Should my impairment related sickness be disregarded?**

It is good practice for impairment related sickness to be recorded **separately** from non impairment related sickness. This should be linked to a reasonable adjustment approach where your employer liaises with you to identify effective adjustments that will enable you to make a successful return to work. Employers should also make reasonable adjustments to their absence monitoring procedures so that disabled employees are not unfairly disadvantaged. An example of this would be allowing 'Disability Leave' for someone who is undergoing an impairment related operation.

Case law under the former Disability Discrimination Act around disregarding impairment related absence was mixed. The new Equality Act 2010 has introduced 2 new forms of discrimination which may be helpful for disabled people facing absence related issues. These are:

**Detriment arising from disability:** treating a disabled person unfavourably because of something connected to their impairment where the organisation cannot show that what they are doing is objectively justified i.e. "a proportionate means of achieving a legitimate aim". But the employer could also argue that they did not know, or could not reasonably know, that the person was a disabled person.

**Indirect discrimination:** doing something to someone in a way that has a worse impact on them and other people who share a particular protected characteristic than on people who do not have that characteristic, unless objectively justified. This could happen when your workplace has a rule or policy that is aimed at everybody, but that especially disadvantages disabled people. Employers would have to show that their blanket application of the policy was 'a proportionate means of achieving a legitimate aim'.

Employers still have a duty to make reasonable adjustments to a 'provision, criterion or practice' where a disabled person is otherwise being placed at a 'substantial disadvantage'. So this could include amending a policy to disregard some absence.

In many circumstances an employer will argue that disregarding all of an employee's impairment related absence would be unreasonable if the absence has been very long and they are unlikely to be able to return to work in the foreseeable future, even if adjustments are made.

We recommend a common sense approach which is based on an understanding of the reasons for absence and the person's situation, alongside proactive attempts to implement workable adjustments with the employee in question.

### **What sorts of reasonable adjustments should be made if my absence is impairment related?**

This depends on the nature of your job role and the barriers that you would experience on your return. There is no exhaustive list of specific adjustments for this situation, but common ones for disabled people returning from impairment related absences would include consideration of:

- Access to work scheme – e.g. funding for travel support, support workers or workplace equipment/changes.
- Phased return to work.
- Reduced or flexible hours.
- Redeployment (last resort).
- Any other negotiated arrangements that result in an employee being able to carry out their role effectively.

### **How often should my employer stay in touch with me? How can I stop them from hassling me?**

ACAS guidance to employers states that they should keep in regular touch with sick employees. It does not give a benchmark for this. This should be done sensitively and in an agreed way, and not in a manner that leaves you feeling harassed. The idea is that people who stay in touch with their workplace are more likely to return to work in the long run. It helps people to keep in touch with developments in the organisation. Also this process assists your employer to implement adjustments which will help you to get back working again.

You may be required to keep in touch with your line manager in an agreed way. If the person who is keeping in touch with you is someone who you believe has harassed you in the past, or who contributed to your illness, then it would be advisable to ask for an alternative member of staff e.g. someone in HR or a union rep to be the go-between person.

### **What happens if I am too unwell to attend a final stage sickness absence review meeting? Can they go ahead and dismiss me if I do not go?**

If they have followed correct procedure up until now then the answer is probably yes. Please see pages 21 and 72- 76 of the ACAS guide to Disciplinary and Grievances listed in the useful resources section at the end of this booklet.

This guide is what Employment Tribunals use to decide whether an employer's behaviour has been reasonable when dealing with absence management issues. Page 21 gives guidance on failure to attend disciplinary meetings, although this is different to an absence management review. Pages 72-76 in appendix 4 deal specifically with absence management and outline the steps an employer should follow when dealing with longer term absences, especially if this results in dismissal.

If you have already tried to postpone this meeting once then that could be an issue, as employers are only expected to deal with one postponement and the meeting should go ahead if it happens a second time. Usual reasons for requesting postponement would be that you or your representative can't make the date specified i.e. unforeseen circumstances.

ACAS (**08457 47 47 47**) say that at a final stage, it would be acceptable for the meeting to go ahead without you – in a way this would then justify their reasons for dismissal if you are unable to attend. Provided your employers have followed the steps outlined in appendix 4 of the Code mentioned above (i.e. they have sought medical advice, kept in regular contact and looked at adjustments to assist you back) and complied with the Equality Act (i.e. made all reasonable adjustments possible and looked for alternative work for you), then they could go ahead and dismiss as you are not fulfilling your contract. Under the new Equality Act they would also have to show that they have not subjected you to unfavourable treatment that cannot be objectively justified.

You could of course appeal and then take this to an Employment Tribunal if you are not satisfied with the outcome. It would then be up to the Tribunal judge to say whether their process had been fair and reasonable. A Tribunal claim must be made within 3 months of the date your employment ended.

You could put in a written submission to the meeting – ideally backed up with a letter from your doctor or consultant - stating that you are not well enough to attend, but that you will be able to return to work within a reasonable time frame (which would usually be regarded as being within several weeks). You could mention that other options are being explored, e.g. Access to Work in-work support. A reasonable adjustment could be that they wait for this time to elapse before reconvening the meeting. Another option would be to ask for a sabbatical / career break – it would be up to your employer to decide whether this is reasonable under the circumstances. Employers would have to consider the impact on their business of putting these measures in place.

### **Is it acceptable for my manager to request a medical report whilst I am off sick?**

Yes. This is fairly common practice when people are off sick - your employer is probably wondering whether you are going to be able to return to work and fulfil the requirements of your role. They should be involving you at every stage and checking whether there are any adjustments that could be made to facilitate you to come back to work. You do not have to agree to the report being done, but the employers can then construe what they wish from this and it may not be good. Also you can ask to see the report before it goes out and can ask for certain parts to be removed if you are not happy with this. This is in line with the Access to Medical Reports Act 1988. Guidance on this can be found on the Department of Health website at:

[http://www.dh.gov.uk/en/Managingyourorganisation/Informationpolicy/Patientconfidentialityandcaldicottguardians/FAQ/DH\\_065886](http://www.dh.gov.uk/en/Managingyourorganisation/Informationpolicy/Patientconfidentialityandcaldicottguardians/FAQ/DH_065886)

Good practice would be that the employer only asks the doctor questions that are relevant to your job role – ideally they would send your doctor a copy of your job description and person specification and ask them to comment on the implications of your current condition on your ability to carry out your role. Also to find out what adjustments if any they could recommend to assist you back to work and what the likely date of your return could be. The introduction of so called ‘fit notes’ instead of ‘sick notes’ will follow this approach...

### **What processes must an employer go through in order to fairly dismiss someone on grounds of medical capability?**

Before dismissing on grounds of medical capability there are several steps an employer should follow for a dismissal to be reasonable – these include:

- keeping in regular contact with the person,
- getting up to date medical evidence,
- looking with employees at all possible adjustments to return to their existing job,
- and then redeployment to another post if this is not possible.

Employers do not have to create a new job role for the person, but they should look to see whether any other vacancies within the organisation would be suitable.

If a return is not possible then some employees may be able to negotiate terms on dismissal that are over and above their contractual and statutory rights. If the employer offers this – known as a ‘compromise agreement’ - this would prevent the employee from taking a Tribunal claim against them in the future.

### **Should I go for ill-health retirement as opposed to dismissal on grounds of medical capability?**

It is quite hard to get retired on ill health grounds because of the cost implications for the employer and pension trustees, and there are strict rules. But for the employee it is a financially better option if you are not well enough to continue to do your current job and are happy to stick to the conditions.

You need to be aware that most pension schemes will not allow you to do your own job again up until your usual retirement age or your pension will be stopped. A few schemes go further than this and insist that you cannot do any form of work again. Others will allow you to do a different form of work from your old job, but there may be a limit on how many hours you can do. Therefore it is vital to check the small print before coming to a decision, especially if you envisage possibly wanting to seek work again in the future.

The other condition that most schemes will apply is that your medical condition is either permanent, or that it should last at least until you reach your normal retirement age.

The Employment Appeal Tribunal has decided that when an employee is on long term sick leave and their pension scheme contains a provision for ill health retirement for "permanent incapacity", the employer should consider ill health retirement before dismissing for incapacity.

For more information on Ill Health Retirement, see The Pensions Advisory Service website at the link below, or contact them on **0845 601 2923**:

[http://www.pensionsadvisoryservice.org.uk/occupational\\_pensions/ill\\_health](http://www.pensionsadvisoryservice.org.uk/occupational_pensions/ill_health)

### **Do I have to pay for an independent medical report?**

If this is at your employer's request then you should not have to pay for it: e.g. if they refer you to a contracted out Occupational Health Doctor. You might want an independent report if you dispute the findings of your employer's chosen doctor and would like to have someone impartial to do a report. If your employer does not agree to fund this then you may have to pay if you feel that a report from your own GP or specialist will not do. If you are bringing a legal claim then it is worth exploring whether your solicitor would meet the cost of this report.

### **Should I get full pay whilst off sick?**

There is no statutory entitlement to this and many employers will only be able to pay statutory sick pay to those who qualify. You should have been given a copy of your terms and conditions of employment within the first 2 months of your employment. These will outline what your company's usual entitlements are. Some larger companies may offer full pay for impairment related sickness as a reasonable adjustment, but this is by no means guaranteed. If you are off sick because of a failure to make an adjustment on their part, then it would usually be reasonable to expect your employer to continue to pay you at the full rate.

### **What benefits could I claim if I had to leave my job on grounds of medical capability?**

This depends on whether you are able to go straight back into the job market.

Job Seekers Allowance is a benefit for people who are available for and actively seeking work.

Employment and Support Allowance (ESA) is for people whose ability to work may be limited in some way. This has replaced Incapacity Benefit for new claimants and statistics show that it is a much harder benefit to get. Therefore it would be a good idea to get assistance from a welfare rights advisor when filling out the form. If you are successful in getting ESA you will either be placed in the 'work related activity' group, where you get a certain amount of compulsory assistance towards moving back to work; or the 'support group' where you are not expected to do any work related activities. Only about 6% of claimants are currently placed in the support group. If you are found fit for work and disagree you can appeal.

If you are on a low income then you may be able to get Housing Benefit, Mortgage Interest Payments and Council Tax Benefit.

If you have significant support and mobility requirements, you may be able to claim Disability Living Allowance if you are not getting it already. DLA helps with the extra costs of living associated with having an impairment.

If you need assistance to live independently then you may be eligible for an Individual or Personal Budget. This currently requires an assessment of needs through your local social services team.

Useful information on benefits is available on the Disability Alliance website at:  
<http://www.disabilityalliance.org/>

### **What can I do if my employers think I am malingering and their occupational health agrees?!**

This could depend on how far along an absence process you have come. Did your employer request a medical report from your GP/consultant, and if so, did you provide consent? Have reasonable adjustments been implemented in a way that works for you? Can you talk to your doctors informally, asking them to back up your case? You could raise your concerns informally or put in a formal grievance. If your company has an absence policy based on triggers and you have received warnings, you can appeal at each stage in the process. You may want the support of an advocate or union rep with this.

### **What can we do collectively as disabled employees if we think that our company's absence procedures are discriminatory?**

If you are in a recognised union you could campaign for this collectively to be reviewed. Or you could put in a group grievance. If you work within the public sector you could ask whether the policy has had a Equality Impact Assessment done on it, and what the outcome of this was. You may also be able to claim that it is a form of indirect discrimination under the Equality Act.

### **Should I get full pay when coming back on a phased return?**

This is discretionary and will depend upon the means of your employer.

### **How should I explain past sickness absences to a new employer?**

Employers cannot ask job applicants about their health / impairment until they have been offered a job (outright / conditional) except in relation to:

- Reasonable adjustments in the recruitment process
- Proficiency tests
- Diversity monitoring
- Schemes to increase the number of disabled workers e.g. guaranteed interview schemes
- A genuine occupational requirement
- Questions necessary for the preservation of national security
- An ability to carry out a function intrinsic to the job.

Be prepared to discuss adjustments in a positive way if relevant, and ensure your employer knows about the Access to Work scheme. You might like to get a copy of our booklet, 'Declaring to An Employer', available from us and on our website at:

<http://www.breakthrough-uk.co.uk/Resources/factsheets>

### **What are the time limits for appealing dismissal for absence?**

You should appeal straightaway as, if unresolved and you need to take it to Tribunal, the time limit for a Tribunal application is 3 months less one day from the date you were dismissed.

### **Useful resources:**

Using your rights resources – Equality and Human Rights Commission. This resources is for people deciding whether or not to take a discrimination case:

<http://www.equalityhumanrights.com/your-rights/using-your-rights/>

Acas Guidance

**Absence:** <http://www.acas.org.uk/CHttpHandler.ashx?id=241&p=0>

### **Disciplinarys and Grievance:**

<http://www.acas.org.uk/CHttpHandler.ashx?id=1043>

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