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A significant problem

Absence can be a serious drain on a business, with the cost of occupational sick pay, lost production or the need to bring in replacement staff potentially running into millions of pounds a year in the UK's largest organisations.
Long-term absences through sickness or the inability to attend work regularly and consistently because of ill-health are often the most difficult problems for employers to deal with.

There are numerous hurdles to overcome and a minefield of employment legislation to face. Therefore, this month we shall take a look at managing long-term sickness absence and how to avoid those costly unfair dismissal and disability discrimination claims.

The Legal Position
Proper handling should enable employers to reduce the impact of long-term absences, and facilitate a sick employee's return to work. Unfortunately, this is not always possible, and it may ultimately become necessary to dismiss a sick employee.
When handling sickness absence, you need to be aware of the legal position.

Employment Legislation
If an employer considers taking action to dismiss employees for ill-health, they must be ware of their responsibilities under the:

- Employment Rights Act 1996

Ill-health is a potentially fair reason for dismissal as it relates to the employee's capability for performing the work which he/she is employed to do. However, in order for the dismissal to be fair, an employer must then show that they have followed a fair and proper procedure and acted reasonably in the circumstances. An Employment Tribunal will consider a number of factors including:

- the nature of the employee's illness
- the likely duration of the illness
- the nature of the job
- the needs of the employer
- the employee's length of service
- the type (and amount) of sick pay paid to the employee
- alternative employment

A Tribunal will judge the reasonableness of an employer's actions against the background of their size and administrative resources. The key to a fair dismissal for long-term ill-health is obtaining the information to enable you to make a fair and reasonable decision, discussing it with the employee, and following a fair procedure. The key information required is up to date, comprehensive and helpful medical evidence.

- Employment Act 2002 (Dispute Regulations) 2004

As well as satisfying the general reasonableness criteria, from a procedural point of view it is necessary as a minimum standard for an employer to follow the statutory minimum dismissal and disciplinary procedure. Failure to do so will render any dismissal automatically unfair and

subject to a minimum basic award of 4 weeks pay. Furthermore, any compensation awarded by an Employment Tribunal may increase by 10-50%.

- Disability Discrimination Act 1995 ("DDA")

Employees with health problems may be protected by the DDA depending on the seriousness and effect of their medical condition. Uniquely, The DDA requires employers to make reasonable adjustments to disabled employees' working arrangements and/or conditions to accommodate them. If you fail to comply with the DDA compensation can be unlimited

- Health and Safety at Work etc. Act 1974 ("HSWA")

An employer has responsibilities under the HSWA to protect employees, after they return to work, if they become more vulnerable to risk because of illness, injury or disability.

- Data Protection Act 1998

The sickness absence data an employer keeps and processes has to comply with the Data Protection Act 1998. If an absence record contains specific medical information relating to an employee this is deemed sensitive personal data and an employer will have to satisfy the statutory conditions for processing such data.

Put the correct procedures in place

Ensuring a fair procedure is followed is essential. In cases of long-term sickness a fair procedure includes:

- Investigating the cause and likely length of absence;
- Keeping in regular contact with the employee;
- Obtaining medical evidence;
- Consultation with the employee regarding that medical evidence and the way forward;
- Consideration of reasonable adjustments including alternative employment, especially in DDA cases.

Recent Cases of interest

There is a myriad of case law affecting long term sickness absence cases. A quick summary of some recent cases is as follows:

Fowler v London Borough of Waltham Forest

In this case, the Employment Appeal Tribunal ("EAT") confirmed that, it will not be incumbent on employers to keep disabled employees on long-term sick leave on full pay contrary to their sickness policies, as a reasonable adjustment under the DDA. The EAT re-affirmed it's decision in O'Hanlon v HMRC stating that payment of sick pay in itself was not an adjustment as it would not help the employee to return to work. This decision has come as a relief to employers. However, the O'Hanlon case is going to the Court of Appeal, so the situation could yet change. The appeal hearing is scheduled to take place this month.

Inland Revenue v Ainsworth & Others

This case deals with whether workers on long-term sick leave can designate part of their sick leave as accrued annual leave. The Court of Appeal held that once an employee has been off sick for 12 months, annual leave does not accrue when a worker is on sick leave. However, this case has now been referred to the ECJ by the House of Lords (where it will be called HM Revenue & Customs v Stringer & Others) so the law remains uncertain for the time being.

Royal Bank of Scotland plc v McAdie

In this case the EAT held that an employer can still potentially fairly dismiss an employee even if the employer is either wholly or partially responsible for the employee's incapacity. In McAdie medical evidence had been obtained which was unequivocal in that there was no prospect of

the employee returning to work. Despite the clear medical evidence the Employment Tribunal held that the dismissal was unfair because the illness had been caused by the employer's unreasonable behaviour. However, the EAT reversed this decision. The EAT said that there was clear evidence that the employee was incapable of performing her work and there was no prospect of recovery (the employee had also agreed with the medical report and had said that she wished to leave). The EAT held that the employer had no option but to dismiss the employee. The EAT however gave a clear warning that where the employer may be responsible wholly or in part for the employee's condition the employer may have to "go the extra mile" in helping the employee out of sickness. Offers of alternative employment or to put up with a longer period of sickness absence than would otherwise be reasonable must be considered before contemplating dismissal.

On 27 March 2007, Mace and Jones are holding a training session at Haydock which includes a workshop providing further guidance on how to manage sickness absence.
If you would like further information about this event, please e-mail samantha.kinnear@maceandjones.co.uk.
Ross Meadows, Solicitor, Employment & Human Resources Department,
Mace & Jones

In the meantime, if you require any further advice on the subject of managing sickness absence in the workplace or if you would like to discuss bespoke training about this subject, please do not hesitate to contact

Ross Meadows by telephone: 0791 991 5161 or email: ross.meadows@maceandjones.co.uk or any member of the Mace & Jones employment and human resources teams listed at www.maceandjones.co.uk

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Help at hand for small firms struggling with employment law

Employment law is a mounting problem for small businesses forced to make redundancies because of the recession or dismiss staff following disciplinary breaches, **the Forum of Private Business (FPB) is warning.**

According to the FPB's recent Referendum survey on the 'Cost of Compliance', complying with employment legislation is the costliest administrative burden faced by small businesses in the UK, totalling almost £2.4bn per year.

Now, new figures from the FPB's members' helpline service show that more than one in three of all calls in August 2009 related to employment matters – more than any other issue. Redundancy queries amounted to 14% of the total, with calls about dismissals accounting for 7%. Significantly, calls about short-time working amounted to just 2% of the total number. Queries about disciplinary matters made up 12% of all calls to the employment and legal helplines.

On 1 October 2009, business owners will be expected to cope with a raft of legal changes, including those related to employment such as increases in the National Minimum Wage (NMW) and an increase in the cost of redundancy.

"Many firms are worried that they are not following the correct redundancy procedures when they have to lay off staff," said the FPB's Policy Representative, Matt Goodman. "Looking ahead to October's one-off increase in the weekly wage limit used to calculate redundancy payments, they are also concerned that it is becoming a more expensive process."

He added: "There is a knock-on effect. The increase will also affect other statutory compensation payments, including unfair dismissal awards, compensation for non-compliance with flexible working procedures and compensation should a statement of employment particulars not be provided to an employee."

Mr Goodman urged entrepreneurs to put in place watertight procedures using the FPB's newly-updated Employment Guide, which contains guidance on every aspect of employment, and practical help on complying with the law.

The latest available data from the Tribunals Service shows that the number of employment tribunal claims accepted in the UK soared from more than 115,000 in 2005 to almost 190,000 in 2008.

According to the FPB's research, money spent by smaller businesses on complying with employment law surpasses the £2.1bn per year spent on health and safety administration and the £1.8bn on tax.

The survey found that smaller-business employers spend £259m per year on work associated with dismissals and redundancy. They spend a further £391m on absence control and management, £237m on maternity, £333m on disciplinary issues, and £1,175m on holidays and any other remaining aspects of employment legislation. The average time per month spent on all of these different aspects of employment law was found to be around 10 hours for each small business.

Companies in the South East were found to spend the most on employment law out of 12 regions surveyed, at £361 million per year. London firms faced the second-highest bill at

£332m, followed by £272m for those in the North West. Smaller businesses in the North East were found to face the smallest annual bill for complying with employment law, at £71m.

FPB member Mark Ashton, of Ashton Marketing Services Ltd in Leicestershire, believes the FPB's Employment Guide can help other business owners to negotiate the minefield of employment red tape.

"I find that, by having it on hand in the office, as a practical guide, it keeps me up to speed with the current employment legislation, as well as good custom and practice [which is] paramount to a manager working in a medium-sized business," said Mr Ashton.

Julie Tabb of the Cornwall-based environmental engineering company H20K Systems Ltd, which is also a member of the FPB, agreed.

"We have the Employment Guide and the thing we like most about it is that it is easy to use. The FPB doesn't complicate matters – the Guide is straightforward and anyone can understand it," she said.

Earlier this year, the FPB launched www.smallbusinesschannel.co.uk to provide entrepreneurs with free, concise, video-based information on business-related issues including employment law.

The site's content includes advice on employment legislation from the FPB's employment adviser, Jane Caven, a human resources specialist and non-executive director of the FPB.
For more information about the FPB's Employment Guide, call ***0845 612 6266*** *or visit* ***www.fpb.org/employmentguide.***