



July 2016 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

Raising concerns with an employee on sick leave – should employers do it?

A recent case in The Employment Appeal Tribunal (EAT) has decided that an employer who attempted to discuss workplace difficulties with an employee on sick leave constructively dismissed that employee.

The employee was disabled and had a history of sickness absence. In October 2013 the employee went off on sick again due to depression and anxiety. She claimed that two senior employees of the company had bullied and harassed her.

The company's CEO wrote to the employee, while she was still off sick, stating that he had spoken to the senior employees. He outlined six areas of concern to discuss. A week later, the employee resigned and claimed that the employer had fundamentally breached her employment contract by sending the CEO's letter.

The Tribunal agreed with the employee and found that the employer knew that the employee was very ill and that while the letter was a genuine attempt to resolve the employee's concerns, the issues did not have to be addressed urgently.

This case highlights the difficulty of communicating with an employee who is off sick with work-related anxiety, stress or depression. Employers must take care to balance the needs of addressing work-related issues with the potential effect on a sick employee of communications that they may be unable to cope with at that time. Before sending letters to

absent employees, dealing with performance and/or conduct concerns, employers should carefully decide if the concern merits the degree of urgency it is being accorded.

Employers: need to weight up whether the concern is important enough to make it necessary to send a letter while an employee is off work ill, (particularly if they are off due to stress) as it may create a risk of a claim of constructive unfair dismissal and possibly a chance of a discrimination claims, particularly if the employee is disabled and the disability is linked to the issues being addressed while they are off sick.

Contact us if you need help with an employee if they are off work due to long-term illness

Holidays – managing holiday periods

The long school holiday season is fast approaching much to the panic of working parents. For some businesses it can be difficult to manage, particularly when we all seem to want to be off together!

How do we handle this? Here are a few of our top tips:

- Make sure your employment contracts set out the holiday rules such as:
 - the basis for approving holidays (typically done on a first-come, first-served);
 - limiting holidays to 2 weeks maximum at one time (unless there are exceptional circumstances);
 - specify whether holiday can be carried over from one year to the next, and if so, how many days;
 - specify particular busy times for your business where employees are not able to take holidays;
 - the company's right to reschedule holidays or propose alternative dates where business needs dictate
- Sharing the employee holiday calendar with the team is one of the easiest and most effective ways to avoid holiday scheduling difficulties. It empowers employees to take responsibility for avoiding holiday clashes with their colleagues.
- If you are having issues with employees not taking enough holidays and wanting to

carry them over to the next year, think about setting a deadline for when your employees must have submitted all their holiday requests.

- For times when most of your team want to be on holiday at the same time (e.g. between Christmas and New Year), the usual first-come, first-serve basis for approving holidays may not be the fairest way of managing it. Instead, you might want to consider pulling names out of a hat or rotating who gets to be off each year.
- Think about how you will cover employee absences. For holiday cover to work effectively, encourage the employee going on holiday to write a 'handover' report, covering tasks in progress, tasks remaining, deadlines coming up, key contacts etc. This is important if they are in the middle of an ongoing project.

Employers: check your employment contracts have clear simple guidance on holidays and your employee has briefed you or their manager on any important deadlines or problems that may come up while they are away.

Contact us if you need help with checking or drafting Employment Contracts

When the ACAS Code or Practice on Disciplinary and Grievance Procedures applies

The ACAS Code of Practice ('ACAS Code') on disciplinary and grievance procedures sets out key guidance for employers to follow. This includes minimum steps for carrying out sufficient investigations, holding a hearing and appeals.

An Employment Tribunal can award an uplift in compensation of up to 25% for non-compliance where Claimants are successful with their claim.

Disciplinary procedures are regularly used, not just to deal with misconduct issues, but also with issues of capability. However, a recent case has clarified that the ACAS Code will not be applicable to every type of capability dismissal.

In this case, the Claimant was dismissed on grounds of ill health on the basis that he was no longer able to carry out his job as a security guard. The Employment Appeal Tribunal found for the ACAS Code to apply, they decided that there must be some culpability on the part of the employee (ie if it was a dismissal due to misconduct). In this situation the ACAS Code did not apply to this type of ill health dismissal.

This concept that there must be some element of culpability for the ACAS Code to apply is helpful, but there will remain many grey areas, in terms of what amounts to culpability in particular cases. The position would be different if the reason for dismissal was not the sickness absence itself, but rather a failure to comply with sickness absence procedures. The ACAS Code would probably also apply in cases where an employer considers that the illness is not genuine.

Employers: it is important to understand that following the ACAS Code is not only relevant to the question of an uplift in compensation, it is also capable of affecting the fairness of a dismissal.

Contact us if you have any questions about sickness or capability

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



Silverstone

Business Forum

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Employment Law Support Principal: Caroline Robertson, Solicitor Non-Practising
T: 01327 317537 E: enquiries@employmentlawsupport.co.uk