Dismissals for long term sickness absence

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Members are often approached by constituents who have been dismissed from their jobs because they have been off sick for a long time. The legality of such dismissals would be judged on the individual merits of each case, but this note provides an indication of the factors which might be taken in to account.

As a general rule, an employer can dismiss someone who has been absent on long term sick leave, particularly where there is little prospect of a return to work and there is a business need to replace the worker. The dismissed employee might claim unfair dismissal, or, possibly, disability discrimination, Very long absences can lead to "frustration" of the contract of employment, which means that the contract ceases to exist.

Contents

1 Overview 2
2 Unfair dismissal 2
3 Disability discrimination 3
4 Frustration of contract 4
5 Acas guidance 6

1 Overview

There is no specific statutory provision giving an employee the right to time off work on account of sickness or the right to return after absence through sickness. Nor is there any specific statutory provision entitling an employer to terminate the employment of an employee who is absent from work for a long period on account of ill health.

This is governed by the express and implied terms of the contract and by statutory provisions, such as those relating to unfair dismissal and disability discrimination. In any contract of employment there is also an implied term of mutual trust and confidence. Legal advice given with knowledge of the detailed factual background, might come to the conclusion that a particular employer's policy in dealing with sickness absence in a harsh or unsympathetic manner may be a breach of such an implied term. Also relevant is whether the employer has a formal sick pay scheme, which may form a part of the contract of employment.

If the employee is sacked on health grounds and complains to an employment tribunal of unfair dismissal, each case will be decided on its merits, since there is no special statutory provision covering sickness related dismissals. However, there are guidelines which the employer and the employee should consider (see below). Regular or continued absence from work can amount to a "substantial reason" justifying dismissal and be legally fair.

Long absence on account of sickness may on its own bring an employment contract to an end by "frustration" of the contract. In that case there would be no dismissal and therefore no possibility of the employee succeeding in a claim for unfair dismissal.

2 Unfair dismissal

The legislation on unfair dismissal is contained in Part X of the *Employment Rights Act 1996* (ERA). Under the Act, people who have been continuously employed by their employer for one year have the right not to be unfairly dismissed.[1] In determining whether a dismissal is fair or unfair, it is for the employer to show:

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. [2]

A "fair" reasons for dismissal is a reason which:

> a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
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> (b) relates to the conduct of the employee,
>
> [(ba) is retirement of the employee,]
>
> (c) is that the employee was redundant, or

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1 The qualifying period of service used to be two years, but it was reduced to one year for dismissals taking effect on or after 1 June 1999 under the *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999*, SI 1999/1436

2 ERA section 98 (1)

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment. [3]

"Capability" in relation to an employee, means:

> his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.[4]

Where the reason for the dismissal has been demonstrated to be an acceptable one under the legislation, the final decision on whether it fair or unfair:

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.[5]

Repeated sickness absence which prevented an employee from carrying out his normal duties clearly could be a fair reason for dismissal but whether any particular dismissal on these grounds would be considered reasonable would depend on the circumstances of the case. Employers are expected to follow fair procedures in dismissing employees, particularly those with health problems. As a general rule, they should consult with their employees about their future, seek medical advice and consider whether there is alternative employment within the organisation which the employee would be capable of undertaking.

Claims for unfair dismissal must normally be lodged with employment tribunals within three months of the effective date of termination.[6] Tribunals have the power to extend this if they are satisfied "that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".[7]

3 Disability discrimination

Sickness absence may raise issues of disability discrimination. The main employment related provisions of the *Disability Discrimination Act 1995* (DDA) make it unlawful for an employer to treat a disabled person less favourably than others unless he can show that the treatment in question is justified.[8]

Under the DDA a person has a disability for the purposes of the Act if he or she "has a physical or mental impairment which has a substantial and long-term adverse effect on his [or her] ability to carry out normal day-to-day activities". Past disabilities are also covered.[9] Schedule 1 of the Act amplifies the definition. For example, it provides that an impairment has a "long-term" effect if the effect has lasted for, or is likely to last for, at least 12 months. It also specifies certain conditions which can fall within the definition of a disability. These include severe disfigurement and progressive conditions "such as cancer, multiple sclerosis or muscular dystrophy, or infection by the human immunodeficiency virus".

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3 Ibid, section 98 (2)
4 Ibid, section 98 (3) (a)
5 Ibid, section 98 (4)
6 Ibid, section 111
7 Ibid
8 Sections 4 & 5
9 Sections 1 and 2

There is also a duty on employers to make reasonable adjustments to working conditions and the workplace so that a disabled person is not placed at a disadvantage.[10] This includes reasonable adjustments to disciplinary procedures or any relevant conditions of employment. Employment tribunals are given jurisdiction to determine complaints. The Equality and Human Rights Commission offers advice for resolving discrimination issues. [11] ACAS can also offer advice on a confidential basis.[12]

An employer dismissing a person whose illness prevented him from carrying out his normal duties and who fell within the Act's definition of a "disabled person" would almost certainly be dismissing him for a reason relating to his disability (his inability to carry out his duties) and would be treating him less favourably than someone to whom the reason did not apply (someone who could carry out those duties).[13] The employer would, therefore, have to show that this less favourable treatment was justified and that no reasonable adjustment could overcome the disadvantages imposed by the disability.

Claims under the *Disability Discrimination Act 1995* should normally be lodged with an employment tribunal within three months of the event complained of, although tribunals do have the power to consider late claims if "in all the circumstances of the case, [they] consider it just and equitable to do so".[14]

4 Frustration of contract

The employment law textbooks[15] quote Lord Radcliffe as giving the classic definition of "frustration":[16]

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

There are circumstances in which the illness of an employee, going to the root of the relationship, can bring a contract to an end. An early example occurred in *Poussard v Spiers and Pond* where an opera singer was unable to perform at the opening of a new opera because of illness and her contract was held to be frustrated.[17] Again the textbooks agree that the "seminal judgment" in relation to the test for frustration of contract by an employee's illness was given by Sir John Donaldson in *Marshall v Harland and Wolff Ltd*:[18]

> Was the employee's incapacity for work of such a nature that further performance of his obligations in the future would be either impossible or be something radically different from that which he undertook under the contract?

He went on to counsel tribunals to take account of (author's italics):[19]

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10 Section 6

11 Equality and Human Rights Commission, *Advice from our Helpline* [on 15 September 2009]

12 Acas Helpline, telephone: **08457 47 47 47**, Monday - Friday 08:00 - 18:00

13 *Clark v Novocold,*(1999) IRLR 318, CA established that the comparison is with a non-disabled person doing the job not with a sick, absent or incompetent employee who would also have been dismissed

14 Schedule 3, para 3

15 Dix, Crump and Pugsley, *Contracts of Employment*, seventh edition, 1997, pp 241- 247; *Bowers on Employment Law,* fifth edition, 2000, pp 262-264

16 *Davies Contractors Ltd v Fareham UDC*, [1956] AC 696

17 [1876] 1 QBD 410

18 [1972] ICR 101

19 reproduced from *Bowers on Employment Law*, fifth edition, 2000, pp 262-263

(a) *The terms of contract* including the provisions as to sickness pay. The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sickness pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true. The right to sick pay may expire before the incapacity has gone on for so long as to make a return to work impossible or radically different from the obligations undertaken under the contractor employment.

(b) How long the employment was *likely to last* in the absence of sickness. The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long-term or even life long.

(c) The *nature of the employment* – where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) *The nature of the illness* or injury and how long it has already continued and the prospects of recovery. The greater the degree of incapability and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship, has been destroyed.

(e) The period of *past employment* – a relationship which is of long standing is not as easily destroyed as one which has but a short history.

Subsequent judgments have added further tests, but, as *Dix, Crump and Pugsey* point out: "There are no easy answers as to when a contract is frustrated by illness". *Dix* et al do give a "practical guide", reproduced below, which may be of some help:

Sickness – a practical guide

13.22

(1) If an employee is engaged for a short-term project – such as series of concerts or dramatic productions extending over a period of two weeks – and is incapable of honouring the engagement because of illness, then the contract is likely to be regarded as being frustrated.

(2) If an employee is frequently away for periods of short duration with a range of minor ailments, then the doctrine of frustration is unlikely to apply. Frustration only applies when the contract is incapable of performance not when temporary illness merely affects the performance. In such circumstances an employer would need to consider whether dismissal is the appropriate option.

(3) In the case of long-term illness frustration may apply. Frustration arises by operation of law not by the decision of the parties. However, the actions or inaction of the employer will be among the considerations which will determine whether frustration has taken place. Compassion may well deter a benevolent employer from taking action to formalise the position by initiating dismissal procedures. In initiating dismissal procedures an employer may run the risk of an unfair dismissal action: in failing to act an employer exposes himself to the danger that he retains residual obligations to the employee concerned. Although the

[20]

(4) As a matter of practice it might well be wiser for an employer in the case of long-term illness to dismiss rather than rely on the prospect of establishing frustration at a later date.

5 Acas guidance

ACAS have produced a guide about managing sickness absence. It suggests that dismissal whilst an employee is on sick leave should only be a "last resort" once all other options have been considered:

> **Can I dismiss an employee while on long-term sickness?**
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> Only as a last resort once all other options have been considered. Before making a decision, think about all the factors mentioned earlier – such as reasonable adjustment, flexible working, job design, a phased return to work, etc. You may have to satisfy an employment tribunal as to the fairness of your decision.
>
> After long absences, particularly those caused by work-related accidents, there is often a fear of returning to work. An understanding approach, coupled perhaps with part-time working at first, can help build up confidence and a return to normal performance. If the job can no longer be kept open, the employee should be told. You may find it helpful to seek advice from the Disability Service Teams whose addresses can be obtained from Jobcentre Plus offices.
>
> You must, as a minimum, follow the statutory dismissal and disciplinary procedures if you wish to dismiss an employee.[21]

It should be noted that the statutory dismissal and disciplinary procedures referred to above have since been repealed by the *Employment Act 2008*. The guide also offers suggestions about how employers might manage sick leave:

> **How do you deal with long-term sickness?**
>
> If you are dealing with an employee who is on long-term sick absence you will want to consider the following:
>
> - in the opinion of the worker's general practitioner/medical consultant, or of the organisation's doctor, when will a return to work be possible?
> - would a phased return – working part-time or flexible hours – help the employee to get back to work?
> - will there be a full recovery or will a return to the same work be inadvisable?
> - could the employee return if some assistance were provided? Could some re-organisation or re-design of the job speed up a return to work?
> - is alternative, lighter or less stressful work available, with re-training if necessary
> - is there a requirement under the Disability Discrimination Act 1995 to make a reasonable adjustment?
>
> To manage long-term absence:

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[20] *Notcutt v Universal Equipment Co (London) Ltd* [1986] ICR 414, CA

[21] ACAS, *Advisory booklet - Managing attendance and employee turnover,* page 20

- keep in regular contact
- use occupational health and seek medical advice
- be clear about arrangements for sick pay
- conduct return to work interviews
- develop a 'getting back to work' programme
- dismiss fairly (after a proper investigation).

When you contact a GP or consultant for a medical opinion on an employee's health, make sure you tell them what the employee's job entails before asking any questions.

Always keep the employee fully aware of his or her position. Knowing there is a job to go back to can help relieve anxiety. In some cases, it may be appropriate to simply keep in touch with the employee and give them the time they need to recover. This is particularly true where there is a possibility that the illness has job-related causes.[22]

Many employers conduct a “return to work interview” following the absence. Where the employer thinks that the levels of absence are such that action needs to be taken they may issue a verbal or written warning. If the absences persist this action may be escalated ultimately resulting in a possible decision to dismiss the employee.

Some employers operate a so-called “Bradford Points System”. This is a method that allows employers to objectively assess the frequency of staff absences. The system highlights repeated short absences by giving extra weight to the number of occasions of absence. For example, an employee who is absent for five separate days will score 125 points whereas a person away for a week will score just five points. An employer might then consider that a Bradford Points total of 125 or above in any 12 month period will represent a benchmark for attendance. Employees who exceed the threshold in the absence of legitimate reasons may then face automatic disciplinary action. Employers might also consider rewarding employees whose attendance is above average. The significance of short-term absence is explained:

Why short-term absence matters

It is often easier to make arrangements to cover staff who are going to be off for long periods, and which are more likely to be caused by genuine illness. However, employees taking odd days off here and there are more problematic, can have an immediate impact, and, if repeated, are likely to arouse suspicions over how genuine they are – it can be hard to get medical certification for a single day of absence.[23]

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22 ACAS, *Advisory booklet - Managing attendance and employee turnover,* page 19

23 IDS Studies, *The Bradford Factor – the pros and cons of this absence review technique*, IDS HR Study 842, March 2007