Employment Law Brief

with

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One thing that can complicate the handling of disability-related absence is the employee alleging that the disability – often related to stress and anxiety – is caused or at least exacerbated by the employer's own conduct.

Usually a grievance is involved, and the employee might in effect be saying 'I cannot come back to work until you resolve this grievance to my satisfaction'. If the employer feels that the Grievance is not well-founded that can lead to an impasse. In such is it fair to dismiss?

That was one of the (many) issues raised in the case of **Ishola v Transport for London**. Mr Ishola suffered from depression and migraines and it was accepted that this meant that he was disabled. The problems began in 2015 when he made a complaint about the conduct of a colleague. He was then dissatisfied with the investigation that took place. He went off sick just before making a complaint about that investigation – and never returned to work.

An OH report commissioned by the employer concluded that 'it is unlikely his symptoms will improve until he feels the workplace issues have been addressed'. He was dismissed after just over a year of absence and he brought a wide range of claims as a result. For our purposes the most useful issue arising in the case is his argument that it would have been a reasonable adjustment for the employer to allow him 'more time to recover'. The Tribunal rejected this, finding that there was at the time of the dismissal no realistic prospect of Mr Ishola returning to work within a reasonable time frame. The evidence was that he would not be able to return until his grievances had been dealt with to his satisfaction and as far as the employer was concerned – having already rejected them – that was not possible.

The employee argued that he did not need the grievances to be resolved in his favour – merely that they should be dealt with fairly. However, the EAT held that it was open to the Tribunal to find that in his mind, the only fair outcome of the grievances was one which was favourable to him. It was not, in the circumstances, realistic to suppose that he would have been satisfied with a fair procedure even if it went against him.

Many employers in local government will recognise the scenario of what appears to be a breakdown in the employment relationship wrapped up in the issue of disability and reasonable adjustments. It can seem that there is a vicious circle in which the employee will only return to work when the grievance is addressed, but the employer cannot conclude the grievance procedure because the employee is absent and unable to participate.

In such cases it is useful to remember the underlying principle of the duty to make reasonable adjustments. The central idea is that an employer should remove obstacles that are otherwise put in the way of disabled

employees that prevent them from realising their full potential. Those obstacles might be physical in terms of the way in which the workplace is designed, but more often in this context what we look for is a 'provision criterion or practice' (PCP) which puts the employee at a 'substantial disadvantage' when compared with employees who are not disabled. The employer is then obliged to take reasonable steps to avoid or remove that disadvantage.

What makes reasonable adjustments difficult to advise on is that we don't really know what reasonable means – it is a matter for a Tribunal to decide on a case-by-case basis. It is also important to realise that the employer is not being asked to 'give reasonable consideration' to adjustments. The question is not whether, overall, the employer has taken a reasonable and fair approach. If an adjustment is identified that would remove the disadvantage – and the Tribunal subsequently decides that it was a reasonable one – then the employer will be liable for any failure to make that adjustment – even if it was not suggested at the time.

When an employee is on long-term sick leave it is almost inevitable that he or she will have a disability. If the employee is to be dismissed, then you could express that as a 'PCP' requiring employees to attend work which puts the disabled employee who is unable to do so at a particular disadvantage. The Ishola case shows, however, that it is hard to argue for 'more time' as a reasonable adjustment – particularly where the absence has already lasted a year – when there is no clear timescale for the employee returning.

But there is an air of unreality about analysing long-term absence in this way. Recently we have seen much greater emphasis on claims for discrimination because of something arising in consequence of the employee's disability – as set out in s.15 of the Equality Act. This form of discrimination fits the scenario of long-term absence rather more easily. A dismissal is clearly unfavourable treatment. The reason for dismissal is the employee's absence, and it would be easy to show that this absence arose in consequence of the disability. The question then would turn on whether the dismissal was justified or, to use the language of the Equality Act 'a proportionate means of achieving a legitimate aim'.

In a sense that takes us back to reasonable adjustments – but with a different focus. Dismissal is likely to be a proportionate response only if the employer has made – or offered to make - any reasonable adjustments that might have allowed the employee to return to work. That might include adjustments to the workplace itself – including location – or to working hours, job design or the employee's duties. It is highly unlikely to involve fixing it so that an employee's grievance is upheld. Requiring employees to work a full day or perform manual labour is a PCP that might well put a disabled employee at a particular disadvantage. The same cannot be said of the normal operation of the grievance procedure. If that is the only thing preventing a return to work then dismissal in accordance with the absence management procedure is likely to be justified.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman