

ABSENCE, LONG-TERM SICKNESS & DISABILITY.

An employee's long-term sickness can present the issue as to whether their condition might involve a disability, which could give rise to a claim for discrimination if the matter is not handled correctly.

A person has a disability for the purposes of discrimination law if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

In cases of physical disability, the employer can usually assess the condition, its effects and the prognosis using medical evidence. This is not necessarily the case, however, in regard to mental impairment.

The Employment Appeal Tribunal has recently ruled that cases involving workers who claim disability discrimination on account of depression should not be assessed only on a strict medical diagnosis but also on whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – or "impaired"- on a long-term basis. An impairment is to be taken to affect the person's ability to carry out normal day-to-day activities only if it affects a statutory list of "capacities" such as, in the case of mental illness, memory or ability to concentrate, learn or understand. Some addictions or personality disorders are specifically excluded

This means that if an employee is on long-term sick leave suffering from depression, anxiety, stress etc., great care must be taken to assess whether their condition could have a substantial adverse effect on their ability to carry out work and other normal day-to-day activities on a long-term basis. If it is, then any action that could be discriminatory must be avoided.

An employee could, with a diagnosis of a condition with recurring symptom episodes, properly claim to be disabled throughout the period: even if each individual episode were too short to be regarded as "long-term" (i.e. 12 months or more) provided they could show that the effects were "likely" to recur.

An employee on long-term sick leave will have certificates from their GP under the "Fit note" scheme, showing either that the employee is "unfit for work" or "may be fit for some work" In addition, the employer may well already have obtained a full report from the GP,

In any event, however, for the purposes of assessing whether the employee's condition might constitute a disability, their GP should be asked about the effect of the employee's condition on his ability to carry out normal day-to-day activities and also to provide a long-term prognosis. The medical evidence should also indicate any adjustments that could be made to enable the employee to return to work.

This is a potential minefield and if you have any doubts as an employer you need to take appropriate professional advice before doing anything that might be detrimental to the employee and hence potentially constitute disability discrimination.

Information courtesy of PBS Blueprint
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