

GUIDANCE NOTE

How to deal with sickness absence

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DEALING WITH SICKNESS ABSENCE

- ✓ Be proactive and deal with the issue promptly.
- ✓ Maintain regular contact with the employee, unless the medical evidence suggests otherwise. As far as possible, the same person should be the initial point of contact. Consider who this should be.
- ✓ Follow any applicable sickness or absence procedures and relevant provisions in the employee's contract of employment.
- ✓ Keep a detailed written record of conversations, meetings and considerations that have been taken into account during the process. These should be made at the time of or as soon as possible after the event.

POSSIBLE COURSES OF ACTION

When dealing with sickness absence, there are a number of stages an employer may need to go through depending on the nature of the absence, for example whether it is long-term or short-term persistent absence - see our associated FAQs on managing sickness absence for more information on this.

Informal action

Hold informal discussions with the employee at an early stage to:

- find out more about the employee's sickness and how the employer can help. For short-term absence(s), this should include finding out whether there is any underlying cause, and for long-term absence, how long the employee is likely to be absent;
- try to resolve the employer's concerns about the employee's absence(s);
- work with the employee to see if the employer can manage or accommodate their likely absence(s) and whether adjustments can be made or assistance provided to enable the employee to come back to work.

For short-term absences, consider back to work interviews after each period of absence of 3 days or more. (However, these should be used consistently for all employees to avoid discrimination issues).

For long-term absence, contact the employee regularly either by telephone or pre-agreed home visits.

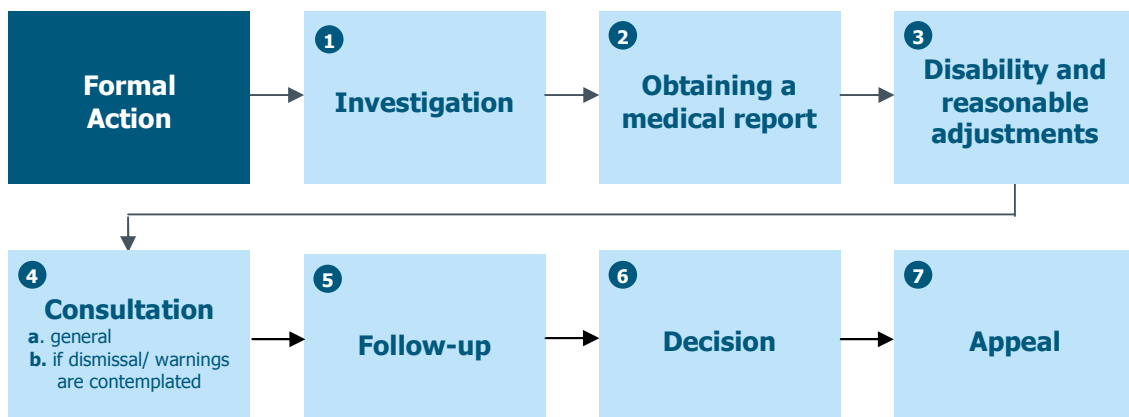
Formal action

If informal discussions are not appropriate or do not resolve the issue and the employer cannot continue to accommodate the employee's absence, a more formal process should be followed.

The employer should aim to investigate the absence fully and try to resolve the absence issue based on medical or other evidence. In some cases dismissal may be appropriate, but only after a proper process has been followed. Before contemplating dismissal, consider:

- **the employee's importance** and/or their position in the business, the impact that their continued absence is having on the business and the difficulty and cost of continuing to deal with their absence;
- **Group Income Protection (GIP)** (also known as permanent health insurance (PHI)) - there may be a duty to secure benefits for the employee from the insurer (see Group Income Protection section);
- **Company Pension Scheme** with an ill-health retirement policy - this should also be taken into account before any decisions are made;
- **record-keeping policy.** Records should be stored confidentially and in accordance with the employer's record-keeping policy. They should only be used for the purposes for which they are collected, and in accordance with the employer's data protection policy and the relevant privacy notice. In particular, medical information is 'special category personal data' under the GDPR, and should only be processed in limited circumstances, such as where it is necessary for the employer to carry out its legal obligations or exercise rights in connection with employment. The employee must know why any medical report is being requested and that the information will not be used for other purposes. Explain that the information will be kept confidential and that access to it will be limited;
- **employee issues.** If the employee is suffering from a stress-related illness, additional issues may be relevant (see Stress-related issues section).

Formal action process



1 Investigation

- The nature and extent of the investigation will depend on the employee's illness and absence(s).
- Consider who should conduct the investigation, bearing in mind that the employer may need to hold disciplinary and appeal hearings, which should be heard by more senior managers not previously involved in the process.
- The investigation should include obtaining a medical report, considering reasonable adjustments if the illness is likely to be a disability, and consulting with the employee.

- If the employer does not consider that the employee's illness is genuine, this should be investigated alongside any medical investigation.
- Review any existing information on the nature, extent and likely duration of the illness.
- Follow any capability procedure, or the disciplinary policy if it covers capability. Adjustments to the procedure may be necessary to accommodate the employee's illness (see below).

2

Obtaining a medical report

Dismissal or other disciplinary sanctions should not be contemplated prior to seeking a medical report.

Decide what type of doctor is best placed to help the employer. This may be an occupational health expert but other experts such as psychiatrists may be appropriate.

Decide whether to instruct the employer's doctor or occupational health advisers to provide the report, or whether to obtain the report from the employee's doctor.

Ask the medical expert to advise on:

- the symptoms and nature of the illness(es);
- any treatment needed, the prognosis and likelihood of reoccurrence;
- the day-to-day activities that the employee can and cannot carry out;
- whether there is an underlying medical cause for the illness(es);
- when the employee may be able to return to their role (if at all) and what type of work the employee may be able to carry out;
- whether adjustments can be made to make return more likely (or speed it up).

Access to Medical Reports Act 1988 (AMRA)

Consider if AMRA applies. It will generally apply to reports prepared by the employee's GP or consultant but not to reports prepared by an employer's doctor, occupational health physician or independent specialist, unless they can be said to be (or have been) responsible for the employee's clinical care.

AMRA: Employer actions

- must give the employee a statement of their rights under AMRA.
- must obtain the employee's written consent to the medical examination and preparation of the report.

AMRA: Employee actions

- must have the opportunity to see the report before it is sent to the employer.
- may request changes to the report but cannot insist upon them.
- may refuse to allow the report to be disclosed to the employer.

Even if AMRA does not apply, the employer will need the employee's consent to the examination. Even if there is a clause in the employee's contract allowing the employer to send the employee for a medical assessment, the employer cannot force an employee to attend. However, an employee's refusal may be a breach of contract.

3

Disability and reasonable adjustments

Consider whether the employee is likely to be disabled for the purposes of the Equality Act 2010, taking into account the medical evidence.

If the employee is disabled, the employer is required to make reasonable adjustments to any practices or policies that put the employee at a substantial disadvantage compared to a non-disabled person.

Reasonable adjustments

Reasonable adjustments may be considered in all cases but there is a legal obligation to do so if the employee is disabled. Adjustments should be to help the employee to return to work (or take less time off if the absence is intermittent).

Adjustments may include:

- staggered or phased return to work;
- varied start and finish times;
- relocating an employee's workstation;
- reallocating an employee's duties to colleagues, either temporarily or permanently (any significant change in duties should be agreed in advance with all members of staff involved);
- purchasing equipment or software;
- redeployment;
- counselling services.

It will not normally be a reasonable adjustment to give a disabled person higher or more sick pay than a non-disabled person, but it may be appropriate in exceptional circumstances.

Consider whether the adjustments are reasonable in the circumstances, including the effectiveness and practicality of the adjustment, the cost and disruption to the employer, the financial and other resources of the employer and the availability of external financial assistance to fund adjustments.

No adjustments or final decisions about adjustments should be made before consulting with the employee.

Document any decision about whether any adjustment is considered reasonable or not.

4a

Consultation - general

Before taking any decisions about action or adjustments, the employer should meet with the employee. This meeting should generally be held after medical advice has been obtained.

Meeting invitation

Write to the employee inviting them to the meeting. The letter should:

- summarise the medical information;
- set out what the employer considers to be the implications of that information;
- set out any steps or adjustments that the employer is considering taking in relation to the employee's illness;
- explain that the employer will be asking for the employee's comments on each of the above;
- explain the possible outcome(s) of the meeting;
- explain that if any formal warning or other action is proposed, the employee has the right to be accompanied by a colleague or trade union official.

Meeting adjustments

Consider whether any adjustments to the meeting are necessary in light of the employee's illness. These could include:

- holding the meeting at the employee's home or at a neutral place such as a hotel near the employee's home;
- having just one person from the employer present;
- having a member of the employee's family present.

Meeting discussion points

General	<ul style="list-style-type: none"> → The nature of the underlying illness. → The medical prognosis, and the employee's views on it. → Any representations that the employee makes. → Anything else that the employer is unaware of that may be relevant. → What adjustments could be made or assistance given that would help the employee return to work and/or improve their attendance record. → The impact that the employee's absence is having on the business and any difficulties in accommodating this. → Whether there are any government agencies, charities or other organisations that could help the absent employee or the employer in relation to any adjustments that the employer is considering.
Short-term absence	<ul style="list-style-type: none"> → The employee's attendance record. → The dates of the employee's absence and the reasons for them. → What the employer considers to be an acceptable level of absence, and how the employee's absence falls short of this. → What improvements the employer expects from the employee and the time frame for this improvement. → The possible consequences if there is no or insufficient improvement to the employee's attendance record.
Long-term absence	<ul style="list-style-type: none"> → Whether it is possible for the employee to return to work on a gradual basis. → The possibility of terminating the employee's employment if the employee is unable to return to work within a reasonable period of time. → Arrangements for future contact, further medical review and meetings.

4b

Consultation - if dismissal/warnings are contemplated

If dismissal or disciplinary warnings are contemplated, ensure that the employer has up to date medical information and, for dismissals, has considered any GIP issues (see below).

Meeting invitation

Write to the employee inviting them to the meeting. The letter should cover the same issues as for the general consultation meeting (above). In addition, it should:

- make clear the purpose of the meeting and that the employer is considering formal warnings or dismissal;
- include sufficient information about the issues and possible outcomes to enable the employee to prepare properly for the meeting;
- provide details of the employee's absence(s) and the steps taken to deal with it to date;
- set out that the employee's attendance is unacceptable and the reason(s) why;
- detail the effect the employee's absence is having on the business;
- summarise any further medical advice, the results of any previous consultations with the employee regarding their absence and any adjustments discussed;
- include copies of any relevant documentation, including any sickness or attendance procedure, medical evidence and correspondence with the employee.

As formal action or dismissal is being considered, the employee has the right to be accompanied by a colleague or trade union official. Advise the employee of this in the invitation letter. If the employee chooses not to be accompanied, document this in the meeting notes.

Meeting adjustments

As outlined in the general consultation meeting section (above), consider any adjustments to the meeting and the right to be accompanied.

Meeting discussion points

General

- The issues covered at the earlier consultation meeting (above).
- The latest medical prognosis.
- If considering dismissal, why the employer cannot continue the employee's employment any longer, or why the employer is considering issuing a formal warning under the capability (or disciplinary) policy.
- Any attempts made to find alternative employment, and why it has not been possible to do so.
- The consideration given to reasonable adjustments and why any particular adjustments are not reasonable.
- Any new representations made by the employee.

If the employee raises new issues consider whether further investigation/medical reports are required before concluding.

Following the meeting, decide on appropriate disciplinary action (if any) or dismissal. Do not take any decision at the meeting.

5

Follow-up

- Send a letter to the employee following the meeting setting out what has been discussed and any agreement reached.
- If no agreement has been reached, continue to gather information about the employee's medical prognosis, reasonable adjustments and any suitable alternative employment.
- If the employee remains absent or there is no improvement in their attendance, hold further meetings in line with discussions at previous meetings. This may include warnings or dismissals (see above). Further medical advice may be required.

- If the employee returns to work, continue to have informal discussions to ensure that any agreed arrangements are working.

6

Decision

Before taking any decision to dismiss, consider:

- the surrounding circumstances and the employee's length of service;
- whether the employee could take up alternative employment or whether there are any other possible options in the particular circumstances, which fall short of dismissal;
- any previous action taken in similar circumstances. For short-term absences, any dismissal without first issuing written warnings in accordance with the capability (or disciplinary) procedure is likely to be unfair;
- whether the decision and reasons should be given face-to-face. Even where this is the case, the decision and reasons should be confirmed in writing.

Formal warning

If the decision is to give a formal warning, confirm the decision in writing, including:

- the time frame for improvement;
- the consequences of further incapacity or a failure to improve to the required standard;
- how long the warning/improvement notice should remain current (this may be specified in the disciplinary/capability procedure);

You should also diarise key dates for any reviews.

Dismiss

If the decision is to dismiss, confirm:

- the employee's dismissal with notice;
- the correct ground for dismissal. This is likely to be:
 - for long-term absences, capability;
 - for short-term absences, capability or some other substantial reason;
 - if no valid reason is given for the absence or the employer reasonably believes that the absence is not genuine, conduct;
- the reason(s) for the decision;
- the date of dismissal.

Inform the employee of their right of appeal in accordance with the capability (or disciplinary) procedure. Normally this will be in writing and within a reasonable period of the employee receiving the decision in writing. This will usually be 5 working days but appeals should still be heard outside of this period unless it is unreasonable to do so.

Ensure the employee receives all contractual and statutory entitlements, including correct pay and pay in lieu of accrued but untaken holiday.

7

Appeal

- If the employee appeals any decision, hold an appeal meeting.
- The meeting should be with a more senior manager who has not been involved in the process to date.
- The employee has the right to be accompanied by a colleague or trade union official at the appeal meeting.

- Consider any adjustments to the appeal hearing and the right to be accompanied (as above).
- Confirm any decision in writing after the appeal hearing.

Stress-related issues

Stress-related illness should be dealt with in the same way as any other illness. However, the following issues should be considered:

- **Bullying and harassment**

If the stress-related problems are caused by bullying or harassment at work, the employer may be liable if the instances are carried out by employees in the course of their employment. The employee may have potential claims, for example under discrimination legislation, the Protection from Harassment Act 1997, for breach of contract and for constructive unfair dismissal.

- **Disability discrimination**

Stress may exacerbate an existing condition or cause stress-related illnesses that result in the employee becoming disabled.

- **Negligence**

Stress in the workplace may cause an employee to suffer a personal injury for which the employer may be liable.

- **Contract and unfair dismissal**

Breach of the implied terms that the employer will take reasonable steps to ensure the safety of its employees at work and of mutual trust and confidence may result in breach of contract and unfair dismissal claims.

- **Grievances**

An employee may raise a grievance regarding the cause of his or her stress.

The disciplinary process may also give rise to stress, which can lead to delays in the capability/disciplinary process. To keep this on track, consider a medical report if the employee says that they are too sick to attend the disciplinary hearing. Consider also where and when the meeting should be held to make it easier for the employee to attend.

Group income protection

Some companies have GIP (also known as PHI) insurance which provides payments when an employee is unable to work for an extended period of time.

If the employee is covered by the policy, the employer may have a duty to take reasonable steps under the scheme to secure benefits for the employee from the insurer as part of its implied duty of trust and confidence.

Dismissal before establishing an employee's entitlement under a GIP policy or while they are receiving benefits could entitle the employee to claim damages for breach of contract for being wrongfully denied benefits under the policy. The employee may also have a claim for damages if insurance is declined because the employer does not follow the policy.

Consider whether the employee is covered by the policy and may be entitled to any benefits. If so, consider whether there are any relevant terms in the employee's contract of employment and any procedure in the policy that the employer should follow during the sickness absence and dismissal procedure.

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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