



ILL HEALTH, INJURY AND STRESS

the easy complete guide to fixing problems

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CHAPTER 1 – ILLNESS, INJURY OR OTHER INCAPACITY

CAN JUSTIFY DISMISSAL

Dismissal for incapacity is well established, but there are unfortunately no hard and fast rules to guide employers. Like all other dismissals, the employee can challenge the decision with a personal grievance, in which case the Employment Relations Authority will look at substantive justification and procedural fairness.

REQUIRES SUBSTANTIVE JUSTIFICATION

To be substantively justified, the dismissal decision must be **one that a fair and reasonable employer could come to as at the time when it became effective**. The ERA will only interfere if the decision was clearly not open to the employer on the information known to it, or that should reasonably have been known to it.

The employer must **balance fairness to the employee** with the **reasonable dictates of the business** (much like in the case of redundancy).

Factors To Consider

- **The terms of the contract** – If this contains anything relevant, it should be followed. It will be easier to justify dismissal if the employment contract contains a clause providing that employment will be deemed terminated after a specific period of absence.
- **How long would employment have lasted if the incapacity did not arise?** - Generally speaking, short term contracts make it easier to justify termination.
- **The nature of the employment** – in particular, the importance to the business of the position. It is likely to be easier to justify dismissing a key employee than one of many doing the same work, where all the positions need not be filled all the time. A shop manager is a good example.
- **The nature of the incapacity, its duration and prognosis** – The more serious, the longer it has lasted and is likely to last, the more justification there is. Dismissing someone a fortnight after a heart attack and less than a fortnight after his early release from hospital, has been considered unjustified.
- **Length of employment** – The shorter the period, the easier to justify, but the nature of the position has a bearing in this. Four years has been considered not to be long term, except for a manager/salesperson of a retail shoe shop.
- **Other factors** – In certain circumstances it is necessary to consider whether it is reasonable to impose a deadline for return to work, after consultation with the employee.

AND PROCEDURAL FAIRNESS

Open and honest communication

especially telling the employee of the possibility of dismissal at an early stage, and again when the absence is reconsidered. It also means not misleading the employee with false promises or by not telling them that a replacement is being considered.

A fair enquiry

into the nature and likely duration of the incapacity, after actively seeking relevant information and discussing this with the employee with a view to establishing their view regarding their ability to return to work. All information must be shared with the employee, who should be made aware that the information is being considered in deciding whether or not to terminate employment.

The employee should also be advised that they may use a representative.

PROCESS

The process to follow depends on the circumstances of the case. The initial focus will be on checking whether the employee has sick or other leave due, and if not, deciding whether to give paid or unpaid leave, and on how to fill the position temporarily.

You will then start assessing whether the employee will return to work, and if so, whether it will be on light duties. Your main concern at this stage is for the employee. You will have offered assistance and have told them how you are covering their work in the meantime.

If the incapacity continues, the point will come when you have to consider dismissal, in which case the following basic process is suggested. You should, however, call 0800 WANZHELP (0800 926 943), for specific advice on your particular circumstances.

FIRST - write to the employee and -

- explain that you have reached the stage where you are considering dismissal.
- Explain that you will be seeking written medical opinion on the extent and likely duration of the incapacity, and that you would like their consent to do so. Say whether you intend getting independent medical opinion.
- Say that the information will be shared with them, and that you will also want their views on the likelihood of their return, before you make a decision.
- Tell them how you are covering their work.
- Also tell them that they may have a representative to assist them.

A draft letter is included in the documents - FIRST LETTER REGARDING INCAPACITY.

Then - Once you have the employee's consent, **obtain** such **other medical opinion** as you think you may need, and send a copy to the employee.

At the meeting -

Refer to the medical opinion(s) that you have

- Ask the employee for their assessment of the situation, particularly -
 - When they foresee returning to work
 - The possibility of an earlier return to do alternative work
 - The effect an early return to work will have on their recovery.
- Explain the effect on the business of the illness and say that you are considering termination of the employment contract.
- Then close the meeting and say that you will write to them.

Have a witness at the meeting and record everything said.

Then - consider the employee's views and the factors set out above under Substantive Justification. If you feel justified in terminating the contract, it will be advisable to call another meeting with the employee and their representative to -

- discuss the facts pointing to termination
- consider any suggestions that the employee may have, and to
- discuss a termination date.

A draft letter is included in the documents - SECOND LETTER REGARDING INCAPACITY.

At that meeting -

- Give the facts from your investigation
- Say why you have come to the decision to dismiss
- Suggest a termination date
- Ask the employee to comment
- Discuss and consider any suggestions made.

Have a witness at the meeting and record everything said.

Finally - after the meeting, write to the employee and advise them of the termination, with notice, of their employment for incapacity due to ill health or injury, as the case may be. A draft letter is included in the documents - FINAL LETTER REGARDING INCAPACITY.

KEY POINTS

ILLNESS, INJURY OR OTHER INCAPACITY

- Employer has right to dismiss
- Decision must be one that a fair and reasonable employer could come to at that time
- Must balance fairness to employee with reasonable dictates of business requirements
- Must be substantively justified - several factors
- Must be procedurally fair
- At least two meetings with employee suggested

CHAPTER 2 – STRESS

A SERIOUS MATTER

Employees who have not been protected from harmful workplace stress have a choice of taking their employer to the District Court for breaching the Health and Safety in Employment Act 1992, or to the Employment Relations Authority. The fines are substantial, and in the Authority there is lost wages, holiday pay and hurt and humiliation to consider, as well as a penalty of up to \$10,000 for companies and \$5,000 for individuals.

4 KEY ISSUES

There are 4 key issues –

- the stress must be harmful to the employee.
- the work must cause the stress
- the stress must be reasonably foreseeable
- reasonable and or practicable steps must be taken to address the issue.

Harmful stress

Some jobs are inherently stressful, and the type of person suited to and usually successful in gaining such jobs do not find it harmful. The problem arises when an unsuitable person ends up in such a position, because the stress will be harmful. This is why clarity about the requirements of the job, pre employment screening and selection is so important.

Cause

Deciding the cause of stress can be difficult and the Authority will investigate **whether the stress stems from the workplace**, because that is what the employer must protect the employee against. The nature of the work and workload are obvious factors to consider.

Stress is often the consequence of both work and other factors, and the Authority will investigate these fully.

Proper medical opinion is required, and certificates simply stating what the doctor was told by the employee will not be enough to prove stress. Usually, psychiatric evidence is required, because stress is a psychiatric condition. General Practitioners' medical certificates for physical conditions (such as hives or loss of appetite) that are said to be the result of stress are therefore not enough, because the question is what caused the stress, and that requires psychiatric opinion.

Reasonably foreseeable

The Authority will look at –

- the nature of the job
- whether the employee alerted the employer to the stress.

If the nature of the job is such that it causes stress **or causes that employee stress**, the employer must take steps to protect the employee. The job and the workload are obvious factors to consider.

If the nature of the job is not at issue, then the employer can defend himself if he did not know of the problem. Absences from work may be enough to alert an employer.

Reasonable and or practicable steps to address the issue

The Court of Appeal has explained this as follows –

“What is ‘reasonably practicable’ requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of this means, all have to be assessed.

Moreover, under s 19 [of the Health and Safety in Employment Act] the employee must himself take all practicable steps to ensure his own safety at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of contractual obligation.

Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight.

An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.”

Steps could include –

- responding immediately to an alert, such as a medical certificate
- liaison with the employee’s doctor regarding plans to return to work
- part time work
- additional sick leave, perhaps with pay
- employing another person to relieve the employee’s workload
- offering other less stressful roles
- changing the mix of duties.

It is important that the steps are introduced in consultation with the employee. If the employee does not participate in or take advantage of the employer’s efforts, he or she will have to take some responsibility for the stress.

If you and the employee cannot agree on the steps to take or the agreed steps prove ineffective you should consider the action below. This also applies if there are no practical steps that can be taken, due to the inherently stressful nature of the job.

Obtaining a professional opinion

Personal grievances based on stress claims grew dramatically in the United Kingdom a few years ago. They reduced equally dramatically after the English Appeal Court said that employers who took the initiative to send their employees to a clinical psychologist or psychiatrist to determine exactly what aspects of work contributed to stress, generally were considered to have taken a reasonable step and were not liable, even if the job did substantially cause the stress. Such specialist medical opinion was likely to give guidance on steps to reduce stress, including whether termination of employment was necessary.

This whole process has to be carefully tailored to the circumstances and we strongly recommend you call 0800 WANZHELP (0800 9269 4300) for advice when you deal with any stress situation.

KEY POINTS

STRESS

- the stress must be harmful to the employee
- the work must cause the stress
- the stress must be reasonably foreseeable
- reasonable and or practicable steps must be taken to address the issue
- get a psychiatrist or clinical psychologist's opinion if you and the employee can't agree on what to do about it or are unable to relieve the stress