



NHS Greater Glasgow & Clyde Group

Briefing Note - Sickness Absence

Introduction

Legal background
GG&C policy

Guidance for representatives

Points to consider

Case studies

Introduction

Legal background: sickness absence is normally considered within the context of the Employment Rights Act 1996. Section 98 includes as potentially fair reasons for dismissal “capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,” and subsequently defines capability as “capability assessed by reference to skill, aptitude, health or any other physical or mental quality”. This means that employers have the legal right to dismiss employees because they are absent because of ill-health; either long-term or frequent short-term illnesses. This is the case even if the employee has a current medical certificate and is still receiving sick pay; although, equally there is no rule that allows an employer to dismiss someone simply because their sick pay has run out. Whether a dismissal is considered legally fair depends on the ‘reasonableness’ of the decision to dismiss i.e. is the decision one that a reasonable employer would have made, taking into account relevant factors such as:

- The size of employer;
- Short-term replacement possibilities;
- Employee’s length of service;
- Nature and predicted duration of illness.

Additionally, the Disability Discrimination Act requires employers to make reasonable adjustments (including working arrangements) if an employee has “a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities”.

NHS GG&C Attendance Management Policy: In February 2008, following considerable discussion, the Area Partnership Forum agreed an Attendance Management Policy for NHS Greater Glasgow & Clyde. This lengthy document (30+ pages) appears at first glance to cover virtually every eventuality. However, although the policy was agreed in partnership with the unions, the subsequent training and interpretation of the policy has had minimal union involvement and very much reflects the views of Management. This has led to a significant increase in members of staff being subjected to inappropriate threats of disciplinary action etc.

In brief, the policy requires a documented Return to Work Discussion following ANY period of absence. At this Discussion, managers should explain if either the duration or frequency of absence is causing concern. One of the most controversial parts of the policy is the use of the 'trigger points' (four or more absences or more than eight days short-term sickness absence within the last twelve months (short-term is defined as 1 to 27 calendar days). At all points in the procedure, employees have the right to be accompanied by a trade union representative or fellow member of staff or a friend or relative not acting in a legal capacity.

Guidance for Representatives

Any individual situation must be considered on the basis of the facts relevant to that particular staff member. However, if you are asked to represent, or accompany, a member to a Return to Work Discussion or a formal hearing it might be useful to bear in mind whichever of the following questions/points are appropriate:

- **Absence notification procedures**
 - Are the sickness absence procedures fully explained to staff and has this been documented?
 - Is there training/awareness sessions planned?
- **Trigger Points** – if a trigger point has been reached, managers are obliged to consider 'all of the facts available', and not merely the fact that a trigger point has been reached, before organising a formal hearing. Equally, at a formal hearing all of the relevant facts would need to be considered. In either case, consider:
 - Length of Service
 - Frequency of absences
 - Length of absences
 - Work-related injury
 - Any pattern/trend to absence
 - Service requirements
 - Disability
 - Reference to Occupational Health Service
- **Long-term** – in addition to the above, have any/all of the following been considered by management:
 - Phased return to work
 - Changed duties
 - Changed shift patterns

- **Disability** – this is defined as ‘a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities’. There are many conditions which might thus be defined as disabilities although the employee (or the manager) may not consider them self to be disabled (e.g. sensory impairments, depression, epilepsy, asthma, dyslexia etc.). Consider some or all of the following:
 - Changed duties
 - Hours of work/shifts
 - Physical features of department or workplace (including access, fixtures etc)

Case Studies

Case 1: A member had been on sick leave due to a work related illness.

Important points to note when handling similar situations:

- Obtain the union’s industrial injury form from the Glasgow office
- Obtain industrial injury form from the NHS employer
- Terms and conditions allow phased return to work with payment for full hours normally worked
- Ill health retiral can be considered BUT Scottish Public Pensions Agency make the final decision on early payment of pension
- Redeployment can also be considered but may be to lower grade WITHOUT pay protection
- Agenda for Change terms and conditions have changed ill health retiral provisions. There are now two tiers.

Case 2: A member of staff was off ill on 2 occasions - 3 and 6 days (Thursday-Tuesday). Management completed a return to work interview and then initiated a disciplinary hearing as the member of staff had breached the 8 days or 4 instances aspect of the policy prior to union representation resulting in a written warning. Later within the 12 month rolling year the member of staff had another 2 days illness resulting in management pursuing a 2nd disciplinary procedure with a view to a final written warning outcome. At this stage the member contacted Unite for representation.

- Prior to the hearing our Rep had analysed the pattern and nature of illness. It transpired that the original 3 days sickness was due to an allergic reaction to the course of Hep B injections which the employer utilises for NHS employees. The 2nd instance was due to a chest infection which was directly caused by spores growing in the ventilation output of the person’s workplace, again this was documented by occupational health and infection control as several members of staff had contracted similar chest infections. Neither of these aspects had been considered at the original hearing, management to the policy to extremes.
- At the 2nd hearing our Rep raised this as a main part of the defence, this resulted in the panel dropping the manager’s case and removing the original outstanding written warning.

Case 3: A member of staff had been off ill for 4 weeks, upon return to work management, in conjunction with HR, advised that the person had breached the trigger points and that a meeting with HR was required.

- It transpired that the person was off due to a work related injury having slipped in a pool of water outside the ITU doors.
- Following union advice the member pursued an industrial injury claim via the Unite legal department.
- HR and management were advised by us that it was inappropriate to hold a meeting of this nature as the person was off due to industrial injury. Management dropped the meeting and the member received compensation.

