

# Dealing with Chronic Mondayitis

How to Reduce Duvet Days and Increase Attendance...

Russell HR Consulting



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# Dealing with Chronic Mondayitis

How to Reduce Duvet Days and Increase Attendance in the Workplace

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Dealing with Chronic Mondayitis: How to Reduce Duvet Days and Increase Attendance in the Workplace

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Carlo Klerk, Sogetist sinds 2007.

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# Preface

It is a fact of life that people become ill from time to time. You very occasionally come across those rare employees who have never taken a day's sickness absence in 20 years, but I can count the number of such hardy souls on the fingers of one hand and still have a few fingers left over. It's true that the more senior the role, the less sickness absence people tend to take, but even senior managers and self-employed people get sick occasionally (and their motivation to attend for work tends to be among the highest there is).

As employers we have to accept that there will always be some sickness absence and manage accordingly. There is a distinction between knowing that there will be some sickness absence and managing unacceptable levels. It's important to remember that life isn't always black and white and that while our policies and procedures provide useful guidance, there's no 'one size fits all approach'. Every case turns on its own facts.

That said, as employers we also have a responsibility to deal with absence. Absence can be a serious drain on a business for both large and small organisations, with the direct costs running to billions of pounds a year. Absence places a burden on colleagues and a failure to manage poor attendance can result in poor morale if the issue is not tackled, with a consequent effect on productivity and profitability.

Tackling absence isn't always straightforward. Absences come in different forms, may be of varying durations and be for a variety of reasons. Employers have to develop a range of proportionate responses. There is no one 'right' way of going about it, but any actions you take must always be fair and reasonable. Remember that inappropriate or discriminatory action can lead to expensive legal settlements.

Many employers are reluctant to manage absence, but it's really important to take control of any attendance issues. The costs of absence are high and failure to address problems impacts on everyone in the business. Simple 'crack-downs' can be counter-productive, but attendance control works better where it is part of a wider set of measures. Dealing effectively with absence calls for a continuous and coordinated effort. Sound, fair and consistent policies and procedures can provide a framework within which absence problems can be better handled.

The real key to success to managing absence at work is taking action at an early stage, keeping good records and following correct procedures.



# About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of her down-to-earth, tactical approach to HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or on open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

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# Miscellaneous notes

## Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email [pm@russellhrconsulting.co.uk](mailto:pm@russellhrconsulting.co.uk) for an up-to-date copy of statutory limits.

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## Disclaimer

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This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

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## Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

# 1 Overview of the Ebook

## 1.1 Introduction

Managing absence certainly takes some effort and is often unpopular with line managers. In most companies the main problem is persistent short term absence and managers sometimes feel overwhelmed by the volume of work it creates. It's worth remembering that most staff do make the effort to come to work most of the time and want to do a good job. They also want their manager to manage those employees who have chronic 'Mondayitis'. Their view is "why should we carry this person?" If the manager doesn't tackle matters effectively, good staff often vote with their feet and leave.

This book focuses on managing absence where there is no underlying medical condition. The good news is that consistent effort will bring about and maintain improvements. Consistency is the key to success, so you really have to stick at it.

## 1.2 Assessing the Cost of Absence

The estimated cost of sickness absence for UK businesses in 2010 was at least £17 billion and 190 million days of absence were ascribed to sickness, with public sector sickness remaining much higher than the private sector.

Employees are demonstrating a marked tendency to take 'duvet days' (i.e. days when one isn't really ill, but can't be bothered to get up and go to work). Respondents to the surveys collecting the data estimated that some 15% of these days are not genuine.

## 1.3 Reducing the risk of sickness absence

There are three main ways to tackle sickness absence. In the first place, try not to recruit a problem. Secondly, try to identify and tackle the underlying causes of absence in the first place. The last is to move into your attendance management process as soon as you become aware of a problem. In this chapter, we consider how to prevent absence becoming a problem in the first place.

## 1.4 Where are we now?

If you are to successfully manage absence, you need to know what the current position is. So the starting point is to collect and analyse data. Good data is wholly dependent upon the taking and keeping of good records. There is no one right way of measuring absence data. This chapter looks at different approaches.

## 1.5 Ensure reporting procedures are followed

Workplace standards must be clearly set out. This includes having clear procedures for employees to follow when they are advising you of their absence. Decide on the procedures you wish to adopt and communicate them to your staff.

## 1.6 Trigger points

The persistent short-term offenders tend to be the people who cause the most pain to the business. Many organisations now have a point at which concern is formally triggered and which suggests that an employee's attendance requires review. The trigger point is determined by the individual business. You can be fairly demanding, but remember that these are always open to the overriding requirement of reasonableness.

## 1.7 Return to work meetings (RTW)

Used as part of a wider attendance management process, RTW meetings are one of the most effective ways of reducing persistent short-term sickness and can help identify short-term absence problems at an early stage. They also provide an opportunity to start discussing and resolving issues which might be causing the absence.

## 1.8 Dealing with absence where there is no underlying medical cause

In order to manage sickness absence issues, it is important to fully understand the extent of the problem. There is a distinction to be made between absences where there is no underlying medical reason for the absence and absences where there is an underlying cause.

## 1.9 Medical advice

If the absences are for a series of apparently unrelated reasons, you are not legally required to take up medical evidence, although it would be a sensible idea to do so (and the courts expect you to do so) before moving on to disciplinary action.

A medical report can disclose that there is an underlying genuine medical condition, which did not originally appear to be the case. That said, there have been some cases where the doctor's report has confirmed that the absentee has not been to the doctor's surgery for some considerable time, indicating that the absences are not all genuine.

## 1.10 Workplace stress

Pundits estimate that depression causes an estimated £23.1 billion per year in lost output to the economy and that nearly 13 million working days are lost each year due to work-related stress, anxiety or depression. But one size doesn't fit all. People respond differently to the same set of circumstances. One person's exhilarating challenge is another person's worst nightmare. As ever, each case turns on the facts and chapter ten considers how to approach this sensitive matter.

## 1.11 Disability discrimination and the duty to make reasonable adjustments

According to research, around one in five people of working age are considered by the Government and by the Equality and Human Rights Commission (EHRC) to be disabled within the meaning of the legislation. If a person with a disability suffers unlawful discrimination in the workplace he can complain to the tribunal. There is no upper limit on compensation for discrimination, so an employer's unjustified discrimination, or failure to make reasonable adjustments, can be extremely costly.

You should not treat a disabled employee or disabled job applicant less favourably, for a reason relating to the disability, than others to whom that reason does not apply, unless that reason is material to the particular circumstances and substantial in nature. If the reason is both material and substantial, you may have to make a reasonable adjustment to reduce or remove it.

Chapter 11 provides a short introduction to the requirements placed on employers by the disability legislation.



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## 2 Assessing the Cost of Absence

### 2.1 Introduction

According to the Confederation of British Industry, the estimated cost of sickness absence for UK businesses in 2010 was at least £17 billion and 190 million days of absence were ascribed to sickness. Public sector sickness remains much higher than the private sector – 8.3 days on average compared with an average of 5.8 days in the private sector. Respondents to the surveys collating the figures estimate that some 15% of these days are not genuine. Readers should note that a number of surveys are carried out each year, assessing the extent and cost of sickness absence and there are considerable variations in the conclusions reached. It is therefore sensible to treat these figures with caution. What is not in doubt is that we have a significant level of sickness absence in the UK and it is very costly. It is higher in the public sector than the private sector.

### 2.2 Cost

At the company level, the costs of absence can be substantial. High absence levels tend to mean high overheads. Some indication of cost to the company is obtained simply by adding up the days of lost production and assessing the extra burden on the company's sick pay scheme.

There are other costs too. These include:

- Unnecessarily high staffing levels and overtime payments.
- Replacement labour.
- Delayed production.
- Management time.
- Lower quality or levels of service.
- Disruption of the flow of work.
- Low morale and general dissatisfaction, resulting in good attenders leaving and/or low productivity.

### 2.3 Methods of measuring absence

Absence levels across the UK are measured in two main ways. The first is via annual surveys conducted by the CBI and the Chartered Institute of Personnel and Development (CIPD), asking organisations to estimate their sickness absence rates and the associated costs. While absence for back related problems is still the biggest reason for ill health absence for manual workers, in recent years there has also been a steady growth in figures relating to stress, anxiety and depression.

Absence rates data is also collected by questioning individual employees through the General Household Survey and the Labour Force Survey. Estimates from the latter put the average absence rate somewhat lower than data collected by the CBI or CIPD, but it does confirm that rates of absence are higher in the public sector.

## 2.4 Reasons for absence

Not all absences are caused by sickness. There are several different reasons.

- Sickness absence (uncertificated, self-certificated or covered by a doctor's certificate).
- Unauthorised absence or persistent lateness.
- Other authorised absences: for example, statutory rights to leave (annual leave; maternity, paternity, adoption, or parental leave; time off for public or trade union duties; or to care for dependents) or contractual rights (compassionate leave).

# 3 Reducing the risk of sickness absence

## 3.1 Introduction

There are three main ways to tackle sickness absence. In the first place, try not to recruit a problem. Secondly, try to identify and tackle the underlying causes of absence in the first place. The last is to move into your attendance management process as soon as you become aware of a problem.

In this chapter, we consider how to prevent absence becoming a problem in the first place.

## 3.2 Don't recruit a problem

Managing attendance starts at the recruitment stage. Try not to recruit a problem. I'm a firm believer that if an employee had chronic 'Mondayitis' in his last job, he'll go on having chronic 'Mondayitis' in this job (leopards don't change their spots) and that means all the pain and time spent in having to manage him. Minimise your risk by building in some checks at recruitment, for example, using a health screening questionnaire once an offer has been made and testing and cross-checking information gathered during the recruitment process against references. You should only ask about conditions relevant to the particular job that you're advertising. For example, you might ask about arm or hand problems if the job requires frequent use of a keyboard. This means that you will have to change the form to meet the requirements of different jobs.

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### 3.3 Holistic health

One of the most cost-effective ways of managing attendance is to try to prevent employees from being absent by tackling the underlying causes of absence in the first place.

Most people want to do a good job and will attend for work regularly. If they are motivated, interested in their work, feel that they are being fairly and equitably treated and reasonably rewarded, that their company is a good place to work and they have a sense of involvement, then employees are less likely to be absent.

There will always be some employees whose absence is unsatisfactory and whose attendance needs to be closely managed, but these incidences will usually decrease if you take good preventative action. Some absence will be outside management's control, but levels of absence can be reduced when positive policies are introduced to improve working conditions and increase employees' motivation to attend work.

You could consider taking all or some of the following steps.

- Health screening as part of the recruitment process (but note that since the introduction of the Equality Act 2010, you can only insist on pre-recruitment health screening in very limited circumstances).
- Investigate how to improve physical working conditions.
- Offer healthy options in staff restaurants and at meetings.
- Investigate initiatives to promote a healthier workforce.
- Take ergonomic factors into account when designing workplaces.
- Ensure that health and safety standards are maintained.
- Give new starters, especially young people, sufficient training and ensure that they receive particular attention during the initial period of their employment.
- Wherever possible, design jobs so that they provide job satisfaction; jobs should provide variety, discretion, responsibility, contact with other people, feedback, some challenge and have clear goals.
- Review and update relevant policies, for example, training, career development and promotion policies, communication procedures and welfare provision to see if they can be improved.
- Ensure policies on equal opportunities and discrimination are fair and observed.
- Train managers so they can carry out their role properly and ensure they take an interest in their employees' health and welfare.
- Make confidential counselling services available for employees.
- Introduce flexible working hours or varied working arrangements, if this would assist employees without conflicting with production or other work demands.
- Encourage people to take their holidays within the prescribed period.

### 3.4 Insured benefits

The cost of some health related insurance benefits provided by some employers, for example, private medical insurance and permanent health insurance, tends to increase in line with the age of employees. With the removal of the default retirement age in October 2011, the cost to employers of providing such benefits would have inevitably increased which may have led some employers to withdraw benefits of this type for all employees. To avoid these issues, the Government introduced an exemption from the principle of equal treatment on the grounds of age where group risk insured benefits are provided on behalf of an employer. The exemption will mean that this type of insured benefit can be withdrawn from employees aged 65 and above (though this age will rise in line with the state pension age).

A failure to consider an employee's entitlements on termination for long-term sickness could result in an unfair dismissal. To avoid this situation, put in place a proper system for the management of long-term sickness absence to ensure that you take all the necessary steps before dismissal.

#### Example

Mr Haigh was a bus driver for FL. Following a suspected stroke in June and again in October 2005, he was signed off as unfit for work and his driving licence was withdrawn for a minimum of 12 months. The company's sick pay scheme stated that where an employee was incapable of carrying out his role, the company would consider him for any other suitable employment. In the absence of such alternatives, he would be retired under the company pension scheme as being incapable of efficiently discharging his duties and certified as permanently incapable of doing so. Alternatively, he would be dismissed on medical grounds.

Mr Haigh's manager considered that his ill health was not permanent and decided that he should be dismissed on the ground of incapability, or alternatively go on the holding register (for which there was no sick pay). Mr Haigh initially went onto the register, but disagreed that his sick pay should end. He was dismissed. He appealed and the company sought further medical information from his specialist. At his appeal, relying on only the occupational health advice that his condition could not be considered permanent, Mr Haigh was given the choice of being dismissed or remaining on the books with sick pay extended for a few months, before going onto the holding register and retiring with no application for an ill-health pension. He refused to accept the company's terms and was dismissed.

On appeal, the EAT agreed that Mr Haigh's dismissal was unfair. The company had not taken reasonable steps before his dismissal. Reasonable steps include consulting with the employee, taking medical advice and considering alternative employment. Where the employer provides an ill-health retirement pension, it should also take reasonable steps to ascertain a long-term sick employee's entitlement to that benefit, which includes seeking medical advice.

The company had failed to honour its own sick pay scheme, which stated that it would consider ill-health retirement along with termination on medical grounds, but also that it was 'good industrial practice' to consider ill-health retirement where this forms part of the employee's benefits package. The requirement for an ill-health retirement application to be signed off by a medical advisor meant that the company had an essential role in ensuring that retirement was considered before dismissal.

First West Yorkshire Ltd t/a First Leeds v Haigh [2008]

NB This case was decided in 2008. While retirement may be agreed between the two parties, you can no longer compulsorily retire employees.



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# 4 Where are we now?

## 4.1 Introduction

If you are to successfully manage absence, you need to know what the current position is. Who is taking time off? How often? How much? What are the reasons? So the starting point is to collect and analyse data. Good data is wholly dependent upon the taking and keeping of good records, a point that I'll return to later in the chapter.

There is no one right way of measuring absence data. Some organisations will separate out short and long term absence. Others will consider them together. The way it's done in your organisation is entirely a matter for you.

## 4.2 Methods of measuring absence

There are a number of different ways in which organisations can define and measure absence.

### 4.2.1 Lost time rate

The most common measure of absence is the lost time rate. This shows the percentage of the total time available which has been lost because of absence from all causes in a given period. The lost time rate is regarded as an overall measure of the severity of the problem. If calculated separately by department or group of employees, it can show up particular problem areas. Total time lost may consist of a small number of people who are absent for long periods, or a large number absent for short spells.

$$\text{Lost time rate} = \frac{\text{Total absence in the period}}{\text{Possible total (of working days or hours)}} \times 100$$

### 4.2.2 Frequency

You may want to assess the measure of frequency to show how widespread the problem is within the business. The frequency rate shows the average number of spells of absence per employee (expressed as a percentage) irrespective of the length of each spell.

$$\text{Frequency rate} = \frac{\text{No of spells of absence in period}}{\text{No of employees in the period}} \times 100$$

### 4.2.3 Individual frequency

If you want to monitor the number of employees absent during the period, the individual frequency rate can be used.

$$\text{Individual frequency rate} = \frac{\text{No employees having 1 or more absence spells}}{\text{No of employees}} \times 100$$

### 4.3 Patterns of absence

There are a number of variables associated with patterns of absence, such as management style, traditions of behaviour and working conditions. Research has identified that these patterns often display a number of common features:

- Young people tend to have more frequent sickness absences than older people, but the length of the absences tend to be shorter.
- The most likely periods for absence are Mondays, Fridays, before or after a bank holiday, along with late shifts.
- Manual employees generally have higher levels of absence than office employees.
- Unauthorised absence is more common among new starters; longer serving employees get to know the organisation's standards and stay within the framework.
- Absences can sometimes relate to annual events: such as school holidays, public holidays or major sporting occasions.
- Sick leave due to industrial accidents is also greater for new or inexperienced employees.
- Absence tends to increase where there are high levels of overtime or frequently rotating shift patterns.
- Absence is likely to be greater in larger companies.

### 4.4 Keeping records

You must have a system for recording absence, or it will not only be impossible to measure specific types, such as long-term sickness absence, but also to notice when trigger points have been reached. Without the information to indicate the scale of the problem, you won't be able to manage the situation effectively. This means that employees need to know what you expect of them. For instance, the correct reporting procedures, what documentation they're expected to complete and what information they should submit.

Note that you're also under a legal duty to keep records of statutory sick pay for HMRC.

Some companies create and publish league tables to compare absence data emerging from different departments or sites. These can prove a helpful reminder to managers and provide information which can be used in review meetings.

One of the chief advantages of objective measurement and analysis of absence is the correction or confirmation of subjective views.

The sort of questions you might usefully ask yourself are listed below.

- Is there really a problem?
- Which sections or shifts are affected?
- Are particular groups affected, such as one sex or ethnic minority?
- Does the problem extend throughout the whole organisation or is it confined to one or two departments or functions?
- How many employees are involved? Is it only a few or a large number, indicating a general problem?



- What type of absence is involved? Are they mainly certificated absences or many cases of one-day absences or lateness?

If you want to compare your company's absence rate with that of other companies in the industry or geographical area, (to see if you've got a problem and if so how serious it is), then you may be able to obtain figures for other organisations through local employers' groups. National surveys of absence are carried out periodically by bodies such as the CBI and the Work Foundation.

Another source of information is The Labour Force Survey, prepared by the Office for National Statistics ([www.statistics.gov.uk](http://www.statistics.gov.uk)), which provides information about employees' absences from work caused by sickness or injury.

#### 4.5 Data protection

The general principles of data collected under the Data Protection Act place a duty on employers to ensure that they collect and process data appropriately. This means that you should not collect more data than is reasonably necessary or relevant for the purpose, ensure that it is held securely and is only used for the purpose for which it is collected.

Data relating to the reasons for sickness absence is sensitive personal data, which means that you can only collect and process such data if you have express (i.e. written) informed permission from the employee.

Part 2 of the Code of Practice dealing with employment records suggests that absence records should be kept separately from sickness records which contain the details of the absences.

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Part 4 of the Code dealing with medical records and health information established the general principle that you should only collect information relating to the health of individual employees if:

- express, freely given consent has been provided by the employee(s) concerned; or
- the collection is necessary to enable compliance with the employer's legal obligations (for example, to prevent breaching the health and safety regulations and/or anti-discrimination rules).

Collection of medical records and health information relating to individual employees not covered by the above is likely to be unlawful and a breach of the Act.

# 5 Ensure reporting procedures are followed

## 5.1 Introduction

Workplace standards must be clearly set out. This includes having clear procedures for employees to follow when they are advising you of their absence. Decide on the procedures you wish to adopt and communicate them to your staff.

## 5.2 What must be notified?

The sort of areas you should cover are listed below:

- The person from whom you will accept a notification of sickness.
- The manager or supervisor to whom the absence should be reported.
- The time by which the notification should be made.
- What information you need to ensure you have up-to-date knowledge of the absence and for use in the RTW meeting.

When I write terms and conditions of employment for companies I tend to spell out that the communication must normally be made by phone by the sick employee. I don't accept text messages or emails (if someone is well enough to text me they're probably well enough to phone me). I also say that it is the employee's responsibility to ensure that he has the means to contact the employer; that includes having enough credit on his mobile phone.

The general rule is that employees should make the call in person. Encourage your employees to stick to the reporting requirements. In most cases there will be no reason why the employee can't comply. Research shows that the vast majority of time taken off as sickness absence is short term and for very minor illnesses (coughs, colds etc), few of which preclude the use of a phone.

Where there are exceptional circumstances and the employee can't call in person (for example, the employee's in casualty waiting to have a broken leg set), it's a good idea to find out what the situation is and whether you can do anything to help out.

In reality, companies often allow a third party to call on behalf of the sick employee. It's not a satisfactory arrangement, nor is it a good idea to allow messages to be taken by switchboards or left on an answer phone. Managing absence is about managing employees on a person-to-person basis.

For many busy managers, this is a responsibility that arises at the start of the day when they're trying to deal with lots of other pressing matters. It might be worth training a nominated person to take such calls.



### 5.3 Use telephone conversations positively

Use telephone conversations positively. When a sick employee phones in, note down as much information as you can. Prepare a template to ensure that you collect all the relevant data. Always be firm, polite and sensitive. However tempting, don't indulge in robust expressions of doubt as to the truthfulness of the reported illness!

### 5.4 Collect data

Make arrangements to make contact later in the day (or the following day) for a progress report so that you can plan for the workload.

Ask:

- What is wrong with the employee?
- What are the symptoms?
- When did he first experience the symptoms?
- What's the employee doing about seeking medical advice? Get as much detail as you can.

Make a note of the date and time of the telephone call to ensure that your reporting procedures have been followed.

Where it appears that someone is not being strictly truthful with you, it's surprising how often a later conversation varies factually from an earlier conversation. Employees engaging in such tactics can't recall accurately what they've said to you and it is these discrepancies we should gently explore and question.

You can use this data in the RTW meeting.

# 6 Trigger points

## 6.1 Introduction

The persistent short-term offenders tend to be the people who cause the most pain to the business. I've lost count of the number of managers who have confessed to me that they haven't managed an employee with a poor attendance record, because the employee in question is so good when he does appear. That's no excuse! The point is to encourage the employee to appear for work consistently and perform well nearly all the time. Many companies now have a point at which concern is formally triggered and which suggests that an employee's attendance requires review. The trigger point is determined by the individual business. You can set very high standards, but remember that these are always open to the overriding requirement of reasonableness.

It's often the same people. Most companies have a few and you'll know who they are in your business.

## 6.2 What is a reasonable trigger point?

When should you take action? Well, there is no legal standard of attendance. It comes down to your own organisation's standards. Some companies use a certain number of periods of absence in a specific timescale as a trigger, such as five or more absences in any 12-month period.



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Others use the Bradford Factor. This formula can be useful for revealing staff with high levels of short-term absence. Certain types of absence should be excluded from this calculation, for example, absences related to pregnancy, disability or underlying illness.

The Bradford Factor is useful in identifying persistent short-term offenders.

The formula is: (number of episodes of absence)<sup>2</sup> x total days off

Using this formula, persistent short-term offenders can be clearly highlighted.

#### Worked examples

One absence of five days in a given period = Bradford Factor 5  
(one episode of absence x one episode of absence x 5 days = 5)

Five absences of one day in a given period = Bradford Factor 125  
(5 episodes of absence x 5 episodes of absence x 5 days = 125)

You can see that the employee in the second example is giving the greatest cause for concern.

Different employers have formulated their own triggers. Increasingly, I find that employers are moving to a “best of two” process. That is, three episodes of absence in six months or five days, whichever arises first.

The trigger you choose will depend on the capabilities of your recording and monitoring systems.

Triggers may be tied to a specific stage in the absence procedure, for example, informal counselling or a formal warning. The aim is to encourage improvement whilst imposing effective sanctions. It is usual to agree attendance targets at this point. If the target is not met, then disciplinary action usually follows.

### 6.3 Be precise and measureable

It is important to put a specific figure on the improvement required and not just talk vaguely about improvement. You are always subject to the overriding requirement of reasonableness.

#### Example

A manager interviewed a female employee about her appalling attendance record. The manager pointed out that Doris' attendance record was unacceptably poor and that she had taken 20 sick days in the last three months. He asked Doris to make an effort to improve her attendance and advised her that if she did not do so he would have to take her through the disciplinary process for non-attendance and she might ultimately be dismissed. Doris listened carefully and agreed to all this. Three months later they met again. The manager discovered that she had indeed improved – she had taken a mere 16 days of sickness absence, instead of 20. So he got what he **asked for**, not what he **wanted**.

What he should have said was something along the lines of “If you are off work more than two days during the next three months, I will talk to you again as part of our formal disciplinary procedure.”

Note that where an employee is clearly making strenuous efforts to attend work and he is ill with a genuine illness during the review period, it wouldn't be reasonable to immediately enter into formal disciplinary action. You have to demonstrate reasonableness and some flexibility. Exercise your management discretion, continue monitoring and act accordingly.

To avoid confusion and disputes, it is sensible to have a clear-cut written procedure for absence management.

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# 7 Return-to-work meetings

## 7.1 Introduction

Used as part of a wider attendance management process, RTW meetings are one of the most effective ways of reducing persistent short-term sickness and can help identify short-term absence problems at an early stage. They also provide an opportunity to start discussing issues which might be causing the absence.

Carry out RTW meetings with all employees returning from sickness absence, however short or long the absence. It avoids accusations that you are picking on an individual and it gives you the opportunity to identify and manage potential problems before they develop into something much more serious.

RTW meetings are a golden opportunity to:

- welcome back those employees whose attendance is normally satisfactory and to thank them for their commitment to the organisation; and
- start to move those whose attendance is poor out of their comfort zone by calling them to account.

Although this is one of the best tools you can use, it has to be done properly. Here are the most common mistakes!

- Poor eye contact (many become fascinated with the papers on their desk or the toe of their shoe).
- Failing to probe properly or at all.
- Asking inappropriate questions
- Failing to agree specific improvement targets.
- Others say that they're only doing it because "HR have told them to".

Ouch!

You *do* have to carry out this meeting correctly, otherwise all you'll be doing is ticking off a checklist. It will have no impact and is waste of everyone's time. Done well, it's a fantastic tool which starts to call the employee to account.

## 7.2 Points to cover in a RTW meeting

Always carry out RTW meetings in private. This is mostly to ensure that you protect the employee's confidential information. The other advantage is that it will prevent employees (who are so inclined) from playing to the gallery.

Use the meeting to complete or sign off any self-certification forms or to collect a doctor's certificate. The completion of a self-certification form is an ideal trigger point for a return-to-work discussion. Make sure you hold the meeting in private and preferably before the employee starts work on the day of return.

The meeting will go one of two ways, depending on the employee's attendance record.

### 7.2.1 If an employee has generally good attendance ....

- Welcome the employee back.
- Ask him how he is and confirm the reason for his absence.
- Ask whether medical advice has been sought or taken, if this is appropriate.
- Ask whether you need to take any actions to help him reintegrate into work.
- Use the meeting to update the employee with job-related information – what happened while he was off sick – and let him know that he was missed.
- Use the opportunity to thank the employee for his good attendance.
- Update your documentation.

Sometimes, employees are so conscientious that they will come back to work too early and may still be ill. In these circumstances, send them home again until they have recovered.

### 7.2.2 Where there are concerns about the employee's attendance ....

Where you have concerns about an employee's levels of attendance, the format will be rather different. You start in the same way:

- Welcome the employee back.
- Ask him how he is and confirm the reason for the absence.
- Show him his attendance record and discuss the facts. Quite often the employee won't realise how much time he's had off and this reminder is all it takes.
- Ask whether medical advice has been sought or taken, if this is appropriate.
- Agree actions to reintegrate into work.
- Use the meeting to update the employee with job-related information – what happened while he was off sick. Let him know that he was missed.

But at this stage you take a different tack.

- Show him his attendance record. Draw his attention to his sickness days and express concern about his health.
- Useful questions are: "Is there any underlying medical reason causing the absence?" and "What can we do to support you and to enable you to come to work?"
- If he goes on the attack and says that he can't help being ill etc, agree and say that while you empathise fully, you are concerned about his absence and that's why you're having this discussion - to help us understand his issues and provide support if possible. He is under a duty to take all reasonable steps to look after his health to enable him to come to work.
- Ask the employee what can be done to improve his attendance, what you can reasonably do to help him achieve these improvements and agree specific improvements (we don't want a Doris scenario). Try to get his commitment.

- Update your documentation. Set a reasonable timescale (8-12 weeks) to review progress.
- Follow up at the due date.

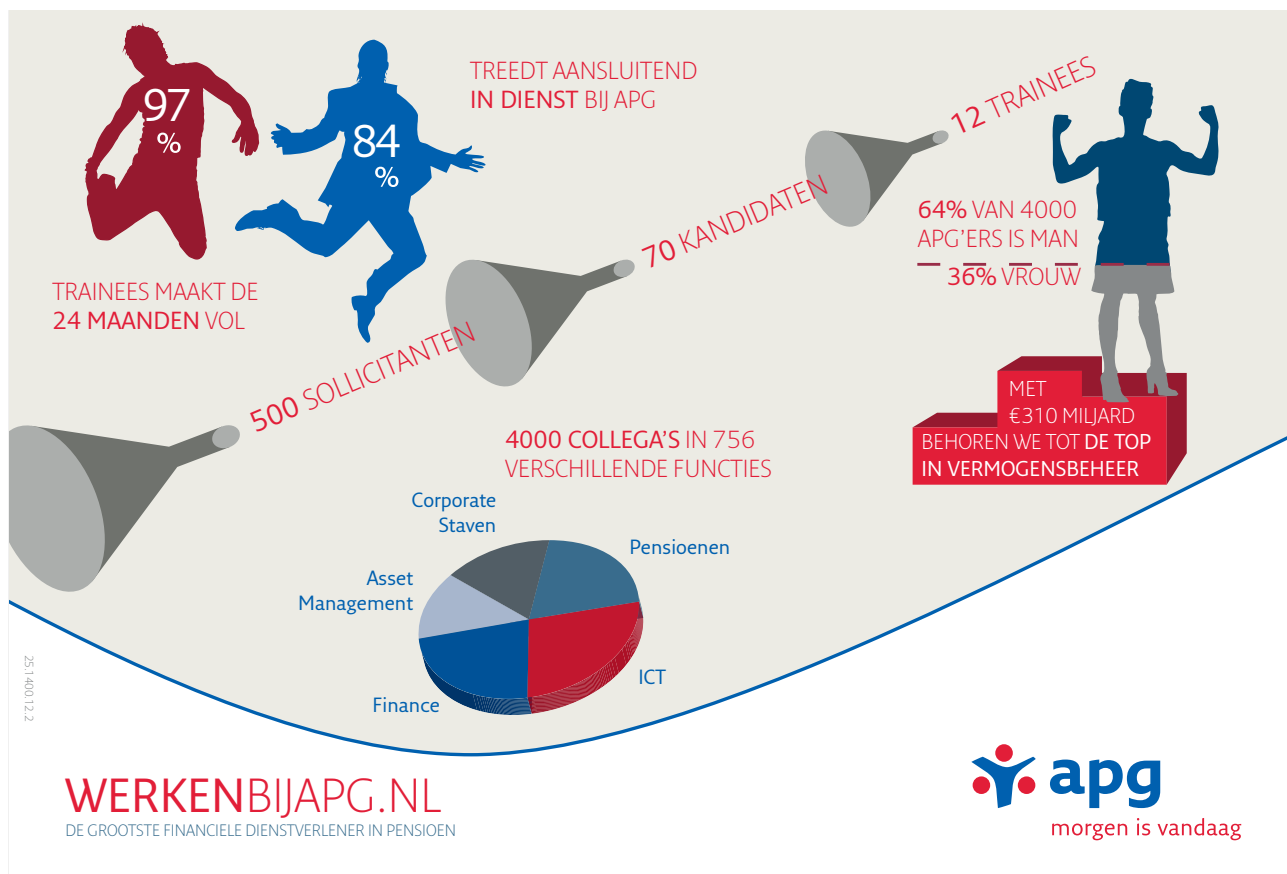
It may be the case that the employee becomes angry or defensive and accuses you of suggesting that he's not been genuinely ill. Illness is not the issue here. The issue here is his attendance, about which you have concerns.

## 7.3 RTW questions

### 7.3.1 RTW questions to ask

Depending on the circumstances, here are some useful questions that may reasonably be asked. They won't all be appropriate in all circumstances.

- How have you been?
- What were the symptoms?
- When did you first notice the symptoms?
- What impact did the symptoms have on you?
- Are you struggling to do certain things? If so, what are they?
- What do you think caused them?
- Is there any underlying cause for your ill health absences (i.e. condition connecting the absences)?
- What medical advice did you seek?
- What does your doctor say?



- Are you being referred to a consultant (or other specialist)?
- If so, when is that likely to happen?
- What medication are you taking?
- Are there any side effects which might impact on your ability to carry out your duties?
- What level of work can you now undertake?
- How can I/we help you?
- Are there any reasonable adjustments we need to consider making?
- Are there any adjustments we haven't yet made which would help you?
- What are you doing to assist your recovery/ reduce the risk of repetition?
- What issues are there to be dealt with when you return to work?
- What would make it easier for you to come to work?

### 7.3.2 RTW questions not to ask

Sometimes you'll have someone in front of you and you have very good grounds for belief that he is a lead-swinger. No matter what the provocation, don't be sarcastic or flippant; this means not saying or asking the following .....

- You've been skiving again
- Good holiday?
- Don't worry – it's not a big problem (it is!)
- A few days' sickness is OK (it is not!)
- Just sort it out!

## 7.4 The Headmistress technique!

If you are dealing with an employee who has chronic 'Mondayitis', it's useful to adopt 'the headmistress technique' (or headmaster technique depending on your gender). I've been teased so much over the years about being rather headmistressy that I thought it was time to turn it to good account (my philosophy being if life hands you a lemon, make lemonade and sell it).

This is all about moving an employee out of his comfort zone gently, fairly, firmly, ethically and lawfully. You want your recalcitrant employee to think twice about coming in front of you. Here are some tips for asserting your authority in a gentle but very firm way.

- Wear formal clothing that is consistent with your work culture.
- Make sure the meeting is held in private.
- Tone and speed are important. Be polite, talk quietly, calmly and slowly. Pause to reflect from time to time. We're not used to gaps in conversation in our culture and silence can be very powerful if you have the courage to use it.
- Listen hard. That means checking your understanding by asking clarifying questions, making a few notes, summarising back what you think the employee is saying. It also means listening between the lines, i.e. what is the employee *not* saying. Never interrupt.
- Smile amiably (but not idiotically) at the employee as you chat through the reasons for his absence.



- Probe into all his statements using open questions, so that you have the fullest possible grasp of his explanation. Most managers don't probe and only take things at face value. You'll miss a lot if you don't probe carefully.
- It also means that if you have all the information you can back him into a corner, leaving him little choice but to agree to adhere to your standards.
- Make careful notes of what the employee says and any agreed actions. Taking notes helps you remember accurately what's been said, but it also sends a message to the employee that you are taking things very seriously.
- Where there is a pattern of absence, show the record to the employee and ask, "You've had five absences this year and four of them have been Mondays. Help me understand what's happening here", then wait for an answer.
- Sometimes it's enough just to show the attendance record to the employee and he gasps and says 'I haven't taken that much time off' and you beam a bit more, looking over the top of your reading glasses (a very effective little bit of theatre) and say "I *know* – it looks bad, doesn't it. I had to double check, but it is correct. You have the *worst attendance* in the department ..."
- Reiterate that you want to help and support the employee and will do everything you reasonably can, but he must meet you half-way. Only he can attend and that is what you want him to commit to do.
- We want our employees to be happy and successful at work. I say this and it appears in my notes just in case a tribunal ever gets to see them. It might sound a bit cheesey, but it doesn't stop it being true. I'd much rather fix a problem than dismiss and start again. It makes sense to think holistically.
- Since stress and anxiety are such an issue these days, I also tend to have a bank of information about alternative therapies and remedies to hand, for example, information about local yoga classes, meditation tapes, Neuro-Linguistic Programming (NLP) and Emotional Freedom Techniques (EFT) websites. Sometimes employees have family or money difficulties, so for example I will take steps to help, such as making an appointment with a debt counsellor. We will do what it takes to get things moving in the right direction.

#### Example

On one occasion I had to help a man who was depressed, in part because of his weight. He had done nothing about it and had been complaining comfortably for some time that he practically lived on lettuce leaves (while scoffing HobNobs). At our meeting he (reluctantly) agreed to enrol as a member of a slimming group and I offered to drive him there for the first class. He was quite horrified by my helpfulness, but he went and once he got started he did lose about two stone and looked and felt far better.

- If you are putting in a review date, get out your diary there and then and still peering over your glasses, go through and put a suitable review date in. It's another little bit of theatre, another little message for the employee that this isn't going to go away. It works beautifully.
- Write to him with a summary of the conversation and agreements, including the review date.

I have adopted some or all of these tactics where I've had an employee with persistent short term absence and it works. In some cases, employees do shape up and start coming to work regularly. In others, where an employee has no intention of adhering to the standards he realises that the time has come for him to move on. Occasionally I have to manage someone through the full process, but it's less often than you might think.



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# 8 Dealing with absence where there is no underlying medical cause

## 8.1 Introduction

In order to manage sickness absences issues, it is important to fully understand the extent of the problem. There is a distinction to be made between short-term absences (where there is no underlying medical reason for the absence) and long-term absences. If there *is* an underlying reason for the absence, even though it manifests itself in short-term absences, (for example, an employee suffers from migraines), you should use the capability route. Capability is dealt with in another book in this series.

## 8.2 Effective strategies for managing absence where there is no underlying medical cause

The best way to manage short-term sickness absence is a combination of 'carrots and sticks.' Some examples of the sorts of things that employers can do to encourage good attendance are given below.

- Provide healthy food and life-style options at work (for example, fruit at meetings instead of biscuits, encouraging employees to have a break from the work place at lunchtime and perhaps go for a short walk).
- Hold RTW meetings on the employee's first day back.
- Where appropriate, hold informal welfare meetings.
- Take disciplinary procedures for unacceptable absence levels where there is no underlying medical reason for the absences.
- Use a trigger mechanism to review attendance and discuss with the employee as soon as it becomes a concern.
- Provide sickness absence information to line managers.
- Ensure line managers are trained to handle RTW and welfare meetings (and by the same token ensure they're carrying out their duties properly).
- Use your occupational health professionals effectively.
- Restrict sick pay.

Qualifying employees are entitled to receive Statutory Sick Pay (SSP), but often companies enhance that and pay some form of occupational sick pay (OSP). It is open to employers to attach conditions to the payment of OSP. Note that if you wish to restrict sick pay, then you must check that you are authorised to do so. If an employee qualifies for SSP and has fulfilled the requirements, then you must pay it.

Some examples of restrictions on OSP are non-payment in a case of:

- elective surgery; or

- sick notes submitted when an employee is taking time off under the emergency leave for dependents provisions; or sick notes submitted when the employee is undergoing or has just undergone formal disciplinary or grievance investigation or action; or
- sick notes submitted during a period of notice of termination of employment.

Note that even if you have a clause in your contract that allows you to withhold OSP if you are not satisfied as to the bona fide nature of the illness, you will still have to take medical advice in support of your argument.

#### Example

Ms Taylor worked for ME as a penalty fares inspector. Her shift ended at 11pm and she caught the last train home from Moorfields station. If this train wasn't running, she had to walk to James Street station in a different part of town. She didn't like doing this because she was scared of walking this distance late at night. She raised her concerns with her manager who suggested that perhaps she should ask a colleague to accompany her to James Street. Alternatively she could wait for the Inspector later on, but this meant she would miss her train home.

On 20 May Ms Taylor asked her manager for assistance during the following week when she was rostered to work late. She knew Moorfields would be closed and she would have to walk to James Street. Her manager said it was her responsibility to get herself to and from work. Ms Taylor left her shift on sick leave, which lasted seven weeks. She had GP sick notes covering her sick leave period but she was told that she would not be paid OSP because her employer didn't accept that she was genuinely ill.

She complained successfully to the tribunal that her employer had unlawfully deducted her pay. The doctor's certificates were clear as to the reason for absence. The company had ignored the medical certificates and had not undertaken any medical investigation of its own that might have put in doubt the opinion of the GP. The court said that even if she had originally been feeling piqued at not getting her way, then so long as that had led to the genuine stress condition that caused her absence, she was entitled to OSP in the absence of contradictory medical evidence.

Merseyrail Electrics 2002 Ltd v Taylor [2007]

## 8.3 Disciplinary action

Disciplinary procedures for unacceptable absence may be used to make it clear to employees that you won't tolerate unjustified absence and that you will enforce your absence policies. If you take disciplinary action, there must be a clear standard of attendance for the business and you have to be able to show evidence that the employee is below that standard.

Where an employee's absence has exceeded your trigger point, the first step is to talk to him about it. Tell him that his absence is causing problems. Investigate the matter thoroughly. Try to find out whether the absences are due to genuine illnesses. Don't make assumptions about the causes of the absence.

Speak privately to the employee, informally in the first instance. Set a time limit for an improvement in his performance. Tell him clearly and specifically what improvement you require and what will happen if that improvement is not achieved. Make a record of the discussion.

An employee may accuse you of picking on him because he is sick. However, your concern is with his low attendance levels rather than his ill health.

You may want to consider taking medical advice to establish whether there is an underlying medical condition. If there is no underlying medical reason for the absences, continue to treat this through the disciplinary route as a matter of poor attendance.

If, after an informal discussion, the employee's attendance has not improved to the required standard within the specified time frame, you can move matters forward to a first stage formal warning. At this point the absence problem is often treated as a form of misconduct and will be dealt with according to the company's disciplinary procedure.

You can issue formal warnings related to poor attendance. The expected standard of attendance – in other words, the target – must be very clear. Your employee must be given a reasonable period of time to demonstrate whether he can achieve the specified attendance standard.

If, at the end of the warning period, the employee's attendance has still not reached the required level, continue following your disciplinary procedure. Ultimately this will lead to dismissal.

It is fair to terminate employment for poor attendance, even where the employee has produced a medical certificate for his absences. The dismissal is for a failure to reach a reasonable level of attendance, not about whether the individual was genuinely ill or not. Dismissal in this case will be for some other substantial reason (SOSR) i.e. poor attendance.



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# 9 Medical advice

## 9.1 Introduction

You are not legally required to take up medical evidence, although it would be a sensible idea to do so before moving on to disciplinary action. The courts expect you to take medical advice before moving to dismiss an employee.

A report may indicate that there is an underlying genuine medical condition, which did not originally appear to be the case. There have been some cases where the doctor's report has confirmed that the absentee has not been to the doctor's surgery for some considerable time, indicating that the absences are not all genuine.

Employers have to try to understand the nature of an illness, the prognosis and what they can do to support the employee, but getting useful medical advice is notoriously difficult. In terms of getting the best advice it's probably best to 'grow your own' medical information resources by forming a relationship with an occupational health advisor (OHA). That way the OHA will start to know something about your organisation and about your management style. As he does so he will give better quality information. You may still have to provide some guidance, but at least you can get the relevant information.

## 9.2 Occupational health v employee's own GP

GPs are often very protective of their patient and tend to give very little useful information. The most effective way of tackling this is to use a style of short direct questions, each one asking for fairly minimal information. Rather than asking 'what's wrong with Joe Bloggs' I ask "Joe Bloggs says that he has XYZ. Please confirm that this is the case."

If you propose to contact the employee's own GP or a medical advisor who has been treating him, you will need written permission from the employee to do so. These days most companies have an express term in their contracts requiring an employee to see an OHA or other medical advisor of the company's choice. Where this is the case you can require the employee to attend the meeting otherwise he will be in breach of contract. If there is no such term in your contract you cannot require him to attend.

Occasionally, an employee who has been absent for apparent sickness refuses to give permission for you to write to his medical advisor. If this is the case explain to him that you need to get the best information you can to help decide about the next steps. Give him a little time to review his original opinion. However, if he continues to refuse, you will note his refusal and make a decision based on the facts available to you.

## 9.3 Access to Medical Reports Act 1988

Where a medical report is prepared by the employee's own GP (or other medical advisor) this legislation allows a person to see the report before it comes to the company. The employee has the right to state that he wishes to see the report. Additionally he can withhold consent to the report being supplied to the employer or request amendments to the report.

Where the employee states that he wishes to have access to the report, you must let the GP know this when making the application and at the same time let the employee know that the report has been requested.



While the employee doesn't have the right to see the report if it has been prepared by a specialist or company doctor who has not had any responsibility for the medical care of the employee, there is a growing tendency amongst OHA services to require permission from the employee before the report can be disclosed to the employer. You can tackle this by making it a requirement of the employment contract that an employee agrees to disclose an occupational health report within a specified number of days of the date of completion.

#### 9.4 Conflicting medical reports

It's fairly common in ill-health cases for there to be conflicting advice on the prognosis for an employee's return to work. You can prefer one doctor's opinion over another, as long as you have reasonable grounds to explain your choice

##### Example

Ms Jenkins was employed by HE as a customer services representative. Her main duties were to ensure that trains arrived and departed safely. A number of these tasks were categorised as 'safety-critical' and 'safety-related' work. Under the Railways (Safety Critical Work) Regulations 1996, employers must ensure that employees who undertake such work are fit and competent to do so.

Failure to comply is a criminal offence. In 2002, Ms Jenkins was involved in a distressing incident at work and sustained a personal injury, leading to a long period of sickness absence. She tried to return to work but began to suffer from panic attacks, a condition which meant that she was classified as disabled. Throughout her period of absence, the company took medical advice on Ms Jenkins's fitness to return to work and sought to discover what adjustments they could make to assist that return and whether she was fit and competent to be engaged in safety-related and safety-critical work.

Eventually, the company had advice from three different medical professionals. One consultant psychiatrist felt that Ms Jenkins would make a recovery and that she could eventually resume her normal role. Another consultant psychiatrist considered that she had excellent prospects of making a full recovery without any permanent incapacity and suggested that a return to work programme should be instigated as soon as possible.

Dr Bell, the company's occupational health physician disagreed with both reports. His advice was that although Ms Jenkins was well enough to return to work in a general sense, she should be permanently restricted from undertaking safety-critical activities. He also suggested that the company should examine closely whether or not she was suitable for safety-related activities. The company considered that Dr Bell's report was crucial. In particular, they relied on his view that no reasonable adjustments could be made allow Ms Jenkins to continue in her 'safety-critical' role. A number of attempts were made to find her alternative work, but none could be found and she was dismissed in January 2006.

Ms Jenkins complained of disability-related discrimination, a failure to make reasonable adjustments and unfair dismissal. In the EAT the court held that the company were entitled to rely on the report of the occupational health physician and to conclude that there were no reasonable adjustments that could be made.

Heathrow Express Operating Company Limited v Jenkins [2007]

# 10 Workplace stress

## 10.1 Introduction

It is estimated that depression causes an estimated £23.1 billion per year in lost output to the economy and that nearly 13 million working days are lost each year due to work-related stress, anxiety or depression. While it is not in doubt that 'stress' is a significant cause of absence, data is collected from a number of different surveys and it is almost impossible to get a precise picture.

The Health and Safety Executive (HSE) defines stress as:

'The adverse reaction people have to excessive pressure or other types of demand placed on them. It arises when they worry that they cannot cope.'

The word 'stress' has been used to describe a variety of states, ranging from mild anxiety to serious psychiatric illness. It's important to remember that stress itself is not an illness, but it can be a cause and/or be a symptom of a number of serious illnesses, so you should not ignore such complaints.

Different people respond in varying degrees to different stimuli and experience very different levels of stress. One size doesn't fit all. It might be tempting to dismiss as an over-reaction an employee's complaints of stress if you don't experience the same reaction in the same circumstances. The fact is that the employee may well experience a different and greater response from the one you might have, however unreasonable you think it is, and it is *that* response you have to deal with.



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## 10.2 Legal risks associated with stress

The main risks of failing to identify and deal with employees' stress related issues are as follows:

There are a number of risks to an employer of not dealing with workplace stress:

- Breach of the health and safety legislation.
- Constructive unfair dismissal claims.
- Disability discrimination claims.
- Personal injury claims.

### Example

Mr Hone was a Licensed House Manager at an SCR pub in Luton. He refused to opt out of the Working Time Regulations (WTR) and so had not agreed to work more than 48 hours per week on average. His records showed that over a two-month period he worked between 89 and 92 hours a week. He complained to his employer that he was working excessively long hours and that he felt tired. They agreed that an assistant manager should be appointed, but had done nothing about this before Mr Hone collapsed and sued the company for negligence.

Mr Hone had not suffered previous mental illness and had not informed anyone that his health was being affected by the stress of work. However, because he had complained about his workload before his collapse and the provisions of the WTR had been ignored by the company, the court decided that it was reasonably foreseeable that he would suffer a psychiatric injury.

Six Continents Retail Ltd v Hone [2005]

Historically, it has been very difficult for an employee to claim damages for psychiatric injury against his employer, as it was necessary to show that such psychiatric injury was reasonably foreseeable.

There is a common law duty in every contract of employment that the employer will take care of employees' health and safety. The first case in which an employee successfully claimed against his employer was *Walker v Northumberland County Council [1995]*, in which the employer was held to be liable for psychiatric injury caused to a social services employee through stress. The case determined that employers may be in breach of their duty of care towards employees if they place them under such a degree of work pressure as to damage their health.

As a result of this case, employers should be aware that they need to be mindful of the possibilities of employees suffering damage to their mental health as a result of workplace pressures, such as an overload of work. In particular, where an employee has complained about an excessive workload, of work-related stress or of unreasonable demands being placed upon him at work, then the employer should take action to alleviate the problems. Where a valid complaint has been made and the employer has failed to take appropriate remedial action and where the employee's health suffers, this could be classed as a breach of the duty to take care, entitling the employee to claim damages.

In 2002, the Court of Appeal in *Sutherland (Chairman of the Governors of St Thomas Becket RC High School) v Hatton* considered the question of occupational stress claims in a number of cases. They made it clear that the same principles apply to stress claims as to ordinary industrial accidents. In other words, it is necessary to show that the kind of harm suffered by the particular employee was reasonably foreseeable.

### 10.3 Reducing the risk of stress

You can do a number of things to help to reduce stress in the workplace. Think through all the factors which can create stressful working conditions, such as the work environment, organisational culture and management style, job design, organisational structures and personal issues, and take preventative action where possible.

You can consider taking some of the following measures to reduce stress at work:

1. Conduct an assessment of stress hazards in the workplace to measure stress and its causes. Carry out a risk assessment to identify the risks to the health and safety of any person arising out of, or in connection with work, or the conduct of the undertaking. This includes risks to both physical and mental health. While most people respond well to a certain level of pressure, be aware of the personal and organisational signs that an individual may be under more pressure at work than he can cope with. There may be warning signs of increased stress levels from employees, such as higher-than-usual numbers of sickness absences or changes in usual patterns of behaviour.
2. Consider having a stress policy containing organisational commitments to minimise any potential work-related stress claims. Such a policy would set out guidance to both employees and managers on how to effectively identify and manage stress in the workplace.
3. Introduce training on stress awareness, coping skills and managing stress.
4. Set out the responsibilities of all the parties.
5. If possible, you should make available a confidential counselling service for employees and bring it to their attention, for example, by referring to it in staff handbooks and by advertising it on notice boards, websites and newsletters.
6. Review employment practices and job specifications to assess whether it is really necessary for employees to work long hours. Regard should be paid to the requirements of the WTR.
7. When appointing a person to a job that may be stressful, draw his attention to the stressful nature of the work and ask him to consider carefully whether he can cope with such demands.
8. If it is likely that employees will work long hours, consider asking them to sign the opt-out from the 48-hour week. Note that an employee must not suffer detriment for refusing to opt out. Keep an eye on them to ascertain whether they are coping with the hours.
9. Ensure that employees have a reasonably managed workload and that management systems are in place to give employees the kind of support they require to carry out tasks satisfactorily.
10. Explore employees' concerns fully if they are raised with you.

Where an employee actually tells you that he's not coping, it may be hard for you to evade liability for any subsequent breakdown unless reasonable steps had been taken to reduce the burden on the employee.

Note that where an employee is experiencing stress relating to excessive workloads, having a workplace counselling service will not in itself discharge your duty of care in stress claims. Even if you have systems in place to support staff who are suffering from work-related stress, this is no substitute for putting an action plan in place to reduce their workload. Failure to do so will result in a finding of negligence.

If an employee does complain that work-related stress has caused him an illness or injury, investigate the causes and symptoms with the employee and take steps to understand the medical issues. Try to establish what has caused the condition and if it is a work-related issue what you need to do in order to address the cause. Find out what the employee is doing to address the matter and what you can do to help.

Where appropriate, it can be helpful to agree with an employee a plan for him to return to work in a limited capacity, increasing over several weeks. People are sociable animals and being at home with nothing but daytime TV for company can impede recovery. Including him in the social context of the work environment reduces the sense of isolation and increases the chances of an early return to work.

All of this should happen before you take any steps against the employee concerned in relation to their absence.

If absence from work for stress is likely to lead to dismissal, you must ensure that you have proper medical evidence of the employee's state of health and explore the possibility of a return to work with the employee.



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Employers are under a duty to carry out an assessment of risks at work, both physical and mental and do what they can to reduce or remove those risks. The assessment should identify what the risks are, how they arise and how they impact on those affected. This information is needed so that the decisions on how to manage those risks are made in an informed, rational and structured manner and the action taken is proportionate.

## 10.4 HSE guidance

The HSE has produced a number of publications to help employers deal with the management of stress at work, including a set of 'Management Standards' to help employers comply with their legal obligations and to prioritise and measure performance in managing work related stress.

- Look for hazards.
- Decide who might be harmed and how.
- Evaluate the risks and decide whether the existing precautions are adequate or whether more should be done.
- Record your findings.
- Review your assessment from time to time and revise if necessary.

## 10.5 Handling stress at work

From the work that I've done with clients in recent years I'm left with the clear impression that the use of 'stress' to describe a condition is being very over-worked. Considering that stress isn't even an illness, but a necessary part of being alive, it has become something of a problem for managers. In seeking to support their patients (and with the best of intentions) doctors can sometimes cloud the issues by providing sick notes which say things like 'stress', 'fatigue' or 'general debility'. I've even seen sick notes that say 'family problems' and 'bereavement'. None of this is helpful in trying to address the employee's difficulties.

In these circumstances employers are rather left holding the baby and you have to be rigorous about investigating the matter with the employee and trying to do whatever you reasonably can to support him in his recovery.

There seem to be a number of categories. Some employees will become genuinely ill with a psychiatric illness. It may be triggered by all sorts of things, such as events affecting friends or family death or illness or something that's built up over a period of time outside work. It could be work related issues. Sometimes it's a combination of things and the employee simply feels overwhelmed.

Some employees may work very hard for a while, become tired and take a day or two off sick with stress as a means to recovery (this often happens with shift work and where people are paid overtime for doing extra work).

There are undoubtedly employees who take convenient refuge in having stress when they hear something they don't want to hear or are asked to do something they don't want to do, or else are being taken through the disciplinary process.

This is what happened in one of the cases I managed for a client.

**Example**

A senior manager, D, was found to have been accessing and downloading vast amounts of pornographic material during, before and after working hours. This was in breach of the company's internet procedures and considered to be a matter of gross misconduct. During the initial meeting to investigate the alleged breach, D admitted to breaching the rules. He was subsequently suspended to allow the investigation to be completed. He tried several times to persuade the company to allow him to resign on favourable terms, but it refused to do so. D then went to his doctor and was signed off sick with depression. The manager dealing with the matter, S, expressed concern for D (and indeed the company provided some financial help so that he could see a psychiatric consultant), but advised that the investigation would continue and it would contact D in writing with the outcome.

D appointed a legal advisor who also sought to agree favourable terms for a resignation. The company said that it was open to D to resign but that it would continue with the investigation. Once the investigation was concluded S wrote to D setting up a formal disciplinary hearing. S also advised him that once the company had entered into the formal process then it would not accept a resignation. This had the effect of producing a resignation thirty minutes before the hearing, which the company accepted.

As employers we do have a duty to deal appropriately with these situations. Our responses will vary depending on the circumstances. Where an employee is seriously ill, for example he's had a nervous breakdown, we have to work with the medical advisor to understand the nature of the problem and to plan if and how the employee may be able to return to work. This is likely to be a long-term plan and you should keep in regular touch with the employee and his medical advisor.

If we notice that an employee works hard most of the time, including doing a lot of overtime for six or seven weeks at a stretch then goes off for a few days with stress, take a different approach. It could be that the employee gets tired, or simply thinks "I've done my bit for the last few weeks. It's time to have a break". We'll investigate and try to find out the stress symptoms, what the employee thinks is prompting the condition and what he thinks we can do to help him break the cycle. Always remind the employee that we'll do what we reasonably can to help him return to work and ask for his thoughts on how to improve matters so that he's able to cope without having to take the time off every six weeks. Note all this down. Have your kit bag of ideas and suggestions ready (yoga, meditation tapes, etc) so that if he says, "Well, I'm having trouble sleeping" you can ask him what he's doing about the problem and be able to offer some ideas as an alternative to getting sleeping pills from the doctor. Monitor progress and review with him. NB We are not doctors and therefore not offering any form of advice or treatment. What we are doing is encouraging the employee to explore all avenues to facilitate a return to good health.

There are some people who use stress as a way of evading responsibility and/or as a way of attacking their manager. Let's just remind ourselves that while there are employees like this, the vast majority are good, hard-working people who want to do a good job. Always take the approach that the employee is a genuine case, even when your baser nature suggests that it is not.



## Example

A couple of years ago I was asked to get involved with helping a young man, P, who had allegedly been held up at knife point. Since the incident he had been off work with stress. If P had indeed been held up at knife point (and it was a possibility) I can imagine that it would be extremely stressful. The problem was that P had such a poor attendance record that everyone thought he was 'crying wolf'. Only P really knows. By the time I saw P he had been away from work for six weeks. The sixth to eighth week of absence is often quite a critical time in attendance management, because it's round that time that employees get used to being at home and out of the way of the work routine. It's therefore rather more difficult to get them to focus on coming back to work. I asked P to talk me through his symptoms to help me understand the difficulties he was experiencing and then asked what was happening about addressing them. P told me he was having problems sleeping and that he was seeing a counsellor. Further questioning revealed that he hadn't started seeing the counsellor and had not yet made a date to do so. I asked him for the counsellor's name and address and when he proposed to start the therapy. I also asked for permission to write to the counsellor once the therapy was part-way through to investigate how well P was responding.

Then I asked what else he was doing to help himself recover. "I have the love and support of my family," P answered.

By this time I was in full 'headmistress' flow and said that I thought that the support of his family was no doubt invaluable, but he would probably need rather more specialist help in the short or medium term. Again I asked him what he was doing to help himself. The discussion was steered towards yoga and meditation and P, slightly bemused by the turn the conversation had taken, agreed to try some yoga to help him relax and sleep. This commitment was noted down and then we talked about a phased return to work. Being herd animals, most of us don't really thrive at home alone for any length of time and in fact it can actually make us feel depressed. I suggested that we try a slow phased return, so that P could come in for a couple of hours the following week and see how he got on. We would monitor the plan carefully and adjust it to meet his requirements. P agreed and the end result was that by the end of the month he was back to work full time and didn't take any more sick time for the duration of his employment with the company.

If you get a sick note in with 'stress' or similar, contact the employee in the first or second week of absence. Have a face-to-face welfare meeting and find out what's causing him difficulties and see if you can do anything to support him. The sooner you start to address issues, the sooner they're likely to be resolved and the employee can come back to work.

Where the employee seems to be suffering a fairly low level type of stress condition try to agree a gradual return to the workplace. You may need to involve his GP or your OHA. The approach will vary depending on individual circumstances, but in many cases you will find that by bringing the employee in to work for a few hours a week to start with, then increasing by half a day or a day each week, you will have the employee back at work within a four-six week period.



The advertisement features a background image of two wind turbines on a flat, open landscape under a grey sky. A yellow banner at the bottom contains the ECN logo (a stylized red and white circle) and the text "ECN Energy research Centre of the Netherlands". A red call-to-action button with a white hand cursor icon contains the text "www.ecn.nl". Below the banner, a black bar contains the text "Work today on a sustainable solution for tomorrow".

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# 11 Disability discrimination and the duty to make reasonable adjustments

## 11.1 Introduction

When you're dealing with sickness absence you have to be mindful of the requirements placed on employers by the Equality Act 2010 (EqA).

According to research, around one in five people of working age are considered by the Government and by the Equality and Human Rights Commission (EHRC) to be disabled within the meaning of the EqA. If a person with a disability suffers unlawful discrimination in the workplace he can complain to the employment tribunal. There is no upper limit on compensation for discrimination, so an employer's unjustified discrimination, or failure to make reasonable adjustments, can be extremely costly.

You should not treat a disabled employee or disabled job applicant less favourably, for a reason relating to the disability, than others to whom that reason does not apply, unless that reason is material to the particular circumstances and substantial in nature. If the reason is both material and substantial, you may have to make a reasonable adjustment to reduce or remove it.

## 11.2 Definition

The definition of a disability under the EqA is 'a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities.'

In order to fall within the EqA's definition of disabled a person must have a physical or mental impairment. In many cases, there will be no dispute about the existence of an impairment. Any disagreement is more likely to be about whether the effects of the impairment fall within the definition. Even so, it may sometimes be necessary to decide whether a person has an impairment, so as to be able to deal with issues about its effects. If in doubt, it's probably best to work on the basis that he has got a disability.

Impairment is interpreted very broadly and includes damage, defect, disorder or disease. Whether a person is disabled for the purposes of the Act is generally determined by considering the effect that the impairment has on that person's ability to carry out normal day-to-day activities.

Many illnesses and conditions are capable of being disabilities within the meaning of the EqA. Whether they are found to be so by the court will depend on the circumstances and the degree to which the person is affected. Only a few will automatically be considered to be disabilities.



### 11.3 Exclusions

A disability can arise from a wide range of impairments. There are a number of exclusions. These are illnesses, but not disabilities.

- Addiction to, or dependency on, alcohol, nicotine, or any other substance (other than the result of the substance being medically prescribed).
- Seasonal allergic rhinitis (e.g. hay fever), except where it aggravates the effect of another condition.
- Tendency to set fires.
- Tendency to steal;
- Tendency to physical or sexual abuse of other persons.
- Exhibitionism.
- Voyeurism.

Interestingly, a person with an excluded condition may enjoy the EqA's protection if he has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to a substance such as alcohol may also have depression, or a physical impairment such as liver damage, arising from the alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he may still meet the definition as a result of the effects of the depression or the liver damage.



## 11.4 Reasonable adjustments

As an employer, you are under a specific duty to make reasonable adjustments to accommodate the needs of a disabled employee. A reasonable adjustment is any step or steps that you can reasonably take to ensure that existing workplace arrangements don't put the disabled person at a disadvantage in comparison with a non-disabled person.

The duty applies where any physical feature of premises occupied by the employer, or any arrangements made by or on behalf of the employer, cause a substantial disadvantage to a disabled person compared with non-disabled people.

## 11.5 Examples of reasonable adjustments

Some examples of possible adjustments are given below:

- Making adjustments to premises. For example, an employer might have to make structural or other physical changes for wheelchair users, such as widening a doorway, providing a ramp or moving furniture.
- Allocating duties to another person. Some duties might be reallocated to another employee if the disabled person has difficulty in doing them because of the disability. For example, if a job occasionally involves going onto the open roof of a building an employer might have to transfer this work away from an employee whose disability involves severe vertigo.
- Transferring the person to fill an existing vacancy. If an employee becomes disabled, or has a disability which worsens so he cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable him to continue doing the current job, then he might have to be considered for any suitable alternative posts which are available. Such a case might also involve reasonable retraining.
- Altering working hours. This could include allowing the disabled person to work flexible hours to enable additional breaks to overcome fatigue arising from the disability, or changing the disabled person's hours to fit with the availability of a carer.
- Assigning the person to a different place of work. Consideration could be given to transferring a wheelchair user's work station from an inaccessible third floor office to an accessible one on the ground floor. It could mean moving the person to other premises of the same employer if the first building is inaccessible.
- Allowing the person to be absent during working hours for rehabilitation, assessment or treatment. If a person were to become disabled, the employer might have to allow the person more time off during work than would be allowed to non-disabled employees, to receive physiotherapy, psychoanalysis or undertake employment rehabilitation.
- Giving the person, or arranging for him to be given, training. This could be training in the use of particular pieces of equipment unique to the disabled person, or training appropriate for all employees but which needs altering for the disabled person because of the disability. For example, all employees might need to be trained in the use of a particular machine, but an employer might have to provide slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that he can use a computer with speech output.
- Acquiring or modifying equipment. An employer might have to provide special equipment (such as an adapted keyboard for a visually impaired person or someone with arthritis), or an adapted telephone for someone with a hearing impairment or modified equipment (such as longer handles on a machine). There is no requirement to provide or modify equipment for personal purposes unconnected with work.

- Modifying instructions or reference manuals. The way instruction is normally given to employees might need to be revised when telling a disabled person how to do a task. The format of instructions or manuals may need to be modified (e.g. produced in Braille or on audio tape) and instructions for people with learning disabilities may need to be conveyed orally with individual demonstration.

#### Example

Ms Archibald was a road sweeper for Fife Council. After surgery she suffered complications and as a result was virtually unable to walk. She was accepted as disabled for the purposes of the legislation.

She retrained and applied unsuccessfully for over 100 sedentary jobs. The council operated a competitive interviewing system (i.e. they appointed the best person for the job). Although Ms Archibald was qualified to do the job she was never the best candidate. Eventually she was dismissed on the grounds that she wasn't able to do her road sweeping job. Her disability discrimination claim was initially unsuccessful and eventually she appealed to the House of Lords (now the Supreme Court).

The Lords allowed her appeal. The court held that the terms, conditions and arrangements relating to the essential functions of her employment were 'made by the employer' within the meaning of the Disability Discrimination Act (now subsumed into the EqA). As a result, Ms Archibald was disadvantaged compared with staff who were not disabled, as she was at risk of dismissal. Where an employee becomes incapable of performing the duties of his job the employer must make reasonable adjustments. In certain circumstances this could require an employer to transfer a disabled employee to an existing post at a slightly higher grade without requiring him to go through the competitive interviewing process.

A positive duty to make reasonable adjustments was therefore triggered. It may have been reasonable for the council to automatically transfer her to an existing post at a slightly higher grade, despite her not necessarily being the best person for the job

Archibald v Fife CC [2004]

The decision in this case requires employers to go beyond what was previously considered a 'reasonable adjustment'. A positive duty to make reasonable adjustments was therefore triggered. It may have been reasonable for the council to automatically transfer her to an existing post at a slightly higher grade, despite her not necessarily being the best person for the job.

## 11.7 Emphasise the positive

In tackling the issue of reasonable adjustments, the starting point is to ask yourself what a disabled employee can do. If you start by thinking about what the employee can't do you're much more likely to reach the conclusion that he can't do anything. Remember, this legislation is designed to help those with disabilities continue working.