WORKPLACE CHALLENGES FACING EMPLOYERS

SICKNESS / PERFORMANCE ISSUES / HOLIDAY & SICKNESS
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Employment law is often a daunting and confusing experience for employers. Whether you’re planning to dismiss an employee or are unsure/unconvinced of an employee's sickness, a firm knowledge of employment law is imperative to achieve the most desirable outcome for your business.

This e-book intends to explain, in detail, the three most common challenges that employers face regularly: sickness, performance issues and holidays.

By giving advice and examples of what to do when these problems arise, this e-book aims to make the confusing and daunting aspects of employment law clearer and easier to manage.

Inspiration for the e-book stemmed from an employment law seminar given by our Head of Employment - Ilinca Mardaescu – on the 24th of September 2015. Ilinca qualified in 2002 and specialised in employment law early on in her career. She undertakes work for both employers and employees alike, acting on a broad range of employment law issues such as unfair, wrongful and constructive dismissals, TUPE matters, restrictive covenant enforcement, health & safety, all areas of discrimination and many more. She has experience of drafting contracts of employment, handbooks and policies and settlement agreements.

The fundamental reason why Ilinca decided to give the seminar talk was, as she put it, “To try and stop history repeating itself! These issues come up time and again with the majority of my business clients. But they needn’t if some proper procedures are put into place ”.
Chapter One. - Sickness.

Sickness; it’s the tricky one for employers, a sensitive subject due to its topic and nature.

What tends to happen, in my experience, is that employers will duck their heads a little bit and will say ‘Thank you very much for letting me know, I’ll see you when you get better’ and that will be it, no more communication. But that’s not really the best way of getting employees back to work.

Different advisory services like ACAS and the British Medical Association, all advise that employers should be trying to manage their employee back in to the workplace and keep in contact on a day to day basis as much as possible.

It’s also important because sickness costs a lot! £2.9 billion last year and that is with the first 3 months of that year still being able to reclaim SSP. Changes in legislation means you cannot now claim back statutory sick pay any longer. This year it’s almost guaranteed to be a much bigger figure. So, with it costing businesses a great deal of money, how should you deal with?
Procedures

Get a system in place that helps everyone

Chapter one - Sickness

Procedures are the single most important thing you can do. Why? Because an employment tribunal is the worst case scenario, and if it comes to that point the court will want to see that you are being consistent and fair.

It’s also important to have a policy in place that will help you as the employer tell the employee what is expected of them when they are off sick; what procedures & steps they should take. It will say what you want of them in terms of notification, a doctor’s report, occupational health, what benefits you’re giving them and also making it absolutely clear to them that there are times where you may have to dismiss on grounds of capability. If employees know all that from the start, then they know what to expect.

Have a company sickness policy but also remember to carry it out and follow it yourself.

You need internal procedures in place, so when that employee calls in sick, record that somewhere centrally, collect the exact date and time and reason for the sickness when it happens, and then, if it’s getting too much, you can actually call them in and say ‘well what’s going on here, it’s been three days in two months, that’s a little bit high.’

I have had a lot of clients that say to me “This employee is always taking the odd day off, I’ve had enough” and I say “Well when has he taken the time of?” They reply, “Don’t know, but he does”. If you don’t give me a date, time and reason, you’ve got to start all the way from the beginning...

So remember in your policy you should have:

1) A Notification Form for employees to use to give you the following information;
   - The details of the illness
   - The exact date and time
   - Whether a doctor or hospital was consulted

2) An outline of the steps you expect employees to take when they are off sick (who to contact etc);

3) Requirements in terms of the employee submitting to occupational health or providing doctors notes;

4) An outline of what you as the employer will do (i.e. keep in touch, have a back to work interview etc);

5) A description and outline of when illness may lead to a potential termination on the grounds of capability and/or disability.
The company sickness policy is very important. Firstly you will want to cover whether you are offering company sick pay, or just statutory sick pay.

Most employers do offer company sick pay, even if you don’t know it, because when an employee takes a day off most employers may just say ‘Okay, I’ll see you tomorrow’ and do nothing further, and that employee gets paid. If you’re paying that employee for that one single day you’re actually paying them company sick pay.

The law states you don’t need to pay them. What the law states is that you need to give them 3 days, which are called waiting days and on the fourth day you pay them statutory sick pay. So if you’re offering those first three days, and paying them as normal, you’re actually giving them company sick pay. And that’s great, but if you’re going to give them something, why not ask for something in return?

And that’s when the company sickness policy comes in. You can state something along the lines of “We’re going to give you company sick pay for 3 days or you can chose more for 3 weeks or 3 months, but in return for that we would like you to report in on a weekly basis and go and see our doctor...” or whatever else it might be that you want to incorporate in there.
Get all your bases covered

Chapter one - Sickness

Discussions/keeping in contact

The issue that you want to be discussing very regularly with your employee is how long is it going to take the employee to recover? Now if it's a one off day, it's quite easy. But when it comes to slightly longer term sickness, the employee might actually not even know, but you need to start exploring that as soon as possible, and discuss what's wrong with them.

Unfortunately, some employees, if it's a serious matter, may not fully recover. You need to know that, as a business, so that you can actually manage that time and plan ahead.

You'll need to know how easy it is for you to get cover for the job and of course, can you keep that job open? Those are issues for you as the employer. Do you want to keep that job open? Because you don't have too, employees can actually terminate on the grounds of capability, and you are perfectly entitled to do so.

So those are the issues you need to consider.
The ‘Fit Note’

When dealing with Doctors

Chapter one - Sickness

Doctors Note or Occupational Health? The ‘fit note’ – the doctors note. This is usually the default action that most employers will ask for, obviously you can actually put in writing to the doctor what you want that doctor to answer, and if it's a short term persistent illness it's a really good idea to get the doctor to investigate more.

An employer can often push a GP into making decisions and getting more tests done. Sometimes employees just think ‘oh i’ll get better soon, I won’t bother anyone’. You can push them into seeing a GP to see if there is any underlying condition.

The GPs or the Doctors are going to be in a better position to tell you when that employee is going to recover rather than the employee, so ask them the question and then very importantly you need to be asking, in their report, are they suffering from physical or mental impairment, because if they are, and it’s classed as an employment law disability then you need all sorts of new aspects looking into that, reasonable adjustments, etc. Reasonable adjustments are something the Doctors and Occupational Health practitioners are good at advising businesses on.

So it's something to consider, and it's worthwhile putting that it in there.
Medical Records

Now, there’s a very important act which all employers need to be aware of and again this has to be in the company sickness policy. This act states that ‘you must give employees their rights in writing’. This would be something that would be covered in your sickness policy, so they know what their rights are when you’re asking them to go to the doctors. This act states that the employee must give their written consent to an examination and a report.

Under this act, the employee is further entitled to look at that report first, before you’ve even seen it, then they’re entitled to ask for changes to be made. Now, we’re all hoping that the doctor is not going to change the medical advice, but they are entitled to keep things out of the report if the employee doesn’t want it in there. And ultimately the employee can refuse to show the report completely, so you do need to be aware of this act.

Doctors are covered by this act but Occupation Health aren’t. So if you’ve got a company sickness policy in place, you might ask that all these employees go and see an occupational health expert rather than a doctor because then you know that the report will come to you eventually. The act still tells the Occupational Health to try and show the employees the report first but it does not allow Occupational Health to refuse to show it to the employer.

There are of course problems, and the problems arise when you’ve got an Occupational Health report and the employee says ‘Well I don’t like what that says and I don’t agree, so I’m going to see my GP and get my own separate report’. Then you have a conflict between two reports. But, at least it is better that you have one report from day one, and you’re able to manage that within your company’s sickness policy.
Fit For Work

The free scheme you should use

Chapter one - Sickness

Fit for work is a relatively new scheme. It is government funded, so completely free for employers to use.

It has two functions: one is simply an advisory service, you pick up the phone and you talk to them about your employee who has been off work for a while now and how you don't know what to do and how to get him back to work. They will talk you through it, give you some ideas and speak to you directly.

The second one, and the most important, is that they act as proper Occupational Health service. They will come up with a work plan, they will come to your offices, they will look at your surroundings, they will speak to the employee and they will try and help you manage that employee back into the workplace.

They are very good at assisting you with reasonable adjustments if there is a disability involved in the sickness, and there are generally lots of associations, depending on the illness or disability, that can assists you.

This is free, so you might as well use it. It automatically kicks in after four weeks when the GP has to refer. In practice it's still very new and the GP's aren't quite doing it yet. If you have a company sickness policy in place you can say 'well actually we want you to go after two weeks of being ill if it looks to us as if that's going to continue'.

Just bear in mind the GP won't always do it, so you can refer instead.
Termination of Employment?

*Making the tough decision*

*Chapter one - Sickness*

Ultimately, if that employee is not working for you, if they are not capable of doing the job that you hired them to do, for whatever reason, albeit it might be sickness, you can terminate their employment. If you followed the previous advice you’re going to have a mound of evidence, or paperwork and information about that employee, and you can then start to make a decision. The key to terminating employment on the grounds of capability is going to be reasonableness. If you do it too quickly without having taken the steps to see if you can help them back into the workplace, then that could spell trouble. But done correctly, sickness and capability due to sickness can be grounds for termination employment.

So you’ve gathered all your facts, you’ve considered everything in the report, you’ve got a doctor’s report, you’ve considered whether there’s disability and whether there are any reasonable adjustments and then its time to go down the route of formal action. Now, this will be similar to what you do if there’s a misconduct issue. You will still have to put everything in writing so as to allow the employee to know all of the evidence “against” them or what will be discussed at the meeting. You do have to be a bit more lenient generally in the process; this isn't misconduct, it’s simply that they are unable to do something. It’s an issue of capability.

A formal letter needs to be sent; again, be lenient in terms of time and place. There’s no point asking someone who’s on sick leave to come into the office, they’re obviously, genuinely, not able to do that. They certainly might not want to see their colleagues if they’re quite ill, so go to their house if they’re happy with that. Alternatively, ask them where they want to meet, and find somewhere, a half way ground, and allow them to bring a friend, rather than a colleague. Again, it wouldn’t be appropriate to ask them to bring a colleague in these circumstances.

Listen to the employees suggestions, because sometimes they might say ‘Look I’m going stir crazy sitting at home, I really want to do something’ and then you can come up with ideas like ‘maybe you could work from home just three days a week or on reduced hours or reduced duties’ it gives them something to do. That also
Making the tough decision

Chapter one - Sickness

It is likely that you will need to meet again; one meeting is probably not going to do it. Do a couple of meetings with your employee, keep in constant contact.

Keep your employee connected with the workplace, because that’s how they’ll want to come back. When you have met with them, always confirm everything in writing, take some time, and give them a copy.

If you do get to the point where you’re terminating, always remember they have a right of appeal.

When you terminate due sickness, it is rarely ever going to be misconduct, its always going to be capability. So you’re never going to be entitled to terminate without notice and there are very strange provisions in respect of notice which employers need to be aware of.

Normally employees have all the usual rights when they’re on notice as they would any other time; if they are on statutory sick pay for instance, they will continue to be on statutory sick pay throughout the notice period; unless your contract gives them only the statutory minimum. Which is, one week for every year they have been there, up to a maximum of twelve. These provisions, contained at s. 87 of the Employment Rights Act, are unique to sickness situations so watch out for them.

If your contract reflects the statutory provisions and says ‘your notice period is one week for every week you’ve been there’ then for some reason this act tells you have to pay them full pay instead. If, however, your contract says ‘we’re going to give you three months notice’ and they’ve only been there say eight years, you’re giving them more than the statutory so then you can give them statutory sick pay instead. If statutory sick pay has run out, which it does after 28 weeks, and they’re not receiving anything, you don’t have to pay them anything. It’s a sort of windfall in sickness situations where your contract only stipulates the minimum statutory provisions. So you need to bear that in mind when you’re drafting your contracts.

Right, that’s the situation with managing someone on sickness, it’s all about trying to get them back into the workplace but the message is; ‘You are entitled to terminate on the grounds of capability’ if you get your procedures right and carry it out reasonably.
Chapter Two. - Performance Issues.

Another issue, which obviously is very big for all employers, is performance issues.

Most performance issues concern such matters such as sales targets; if someone is not meeting their sales targets it’s going to be very clear that they are not reaching those targets on a consistent basis, it’s all performance issues.

Keep records! It’s the first and most important thing.

Again, I know I’m a lawyer and we keep telling you to ‘write things down’ but that is the most important things because otherwise when you come to speak to me and say ‘I want to terminate their employment’ unless you’ve got exact dates for every time of misconduct or every failure, we’re going to have to start all the way from the beginning again.

So if you do keep records for whenever you’ve had to speak to employees, whenever they have done something wrong and you’ve drawn it to their attention then you’re going to be ahead of the game. And it won’t take you half as long.

With performance issues you are required to start informally, so whoever their line manager is, it’s their responsibility to say ‘look, this isn’t working’ and explain to them why it’s not working. Set up weekly meetings and say ‘this is what we expect; this is what we would like you to do’. Try and do it all informally and it may not be as scary for the employee.

They may start to tell you that the reason they’re not doing x, y or z is because they might need a bit of training. Easy to solve: you send them on a course and then that’s it. If it’s still not working time and time again, despite being warned, then you know that you need to pursue the more formal route.
The Formal Route

What to do when it comes to meetings

Chapter two - Performance Issues

You need to tell employees what is expected of them, although by now they should be well aware as you would have spoken to them informally a couple of times at least. Then, when you are calling them to a formal meeting, allow them to bring a friend rather than a colleague, they might not want to tell a colleague ‘I’m not very good at my job and I’m getting told off for it’ so get them to bring a friend along. Make clear that the friend must not be a legal representative.

Simply listen to what you can do to help them get to the level that they want to be; where you expect them to be. Do get their input; that is important.

If after a few meetings, where it’s still not working and the issues are still not being resolved, then you proceed down to the formal route.

So, you’ve got your evidence by now, you’ve already met, had meetings, got the evidence of what the performance issues at hand are. Then when you meet up you need to send a copy of all of that to the employee prior to the meeting so that they know ahead of time what you’re going to be discussing.

The Capability Procedure

The capability procedure is similar to the disciplinary. Although again, it’s not misconduct. But the capability procedure should be incorporated into all of the other disciplinary procedures. Tell them in writing who they must appeal to and what deadline they’ve got. If you don’t have a capability procedure with your policies, do have a look at that as that will need amending.

It’s not likely to ever be gross misconduct, it’s not one of those things that you’re ever going to be able to terminate without any notice.

You don’t have any special procedures that you need to follow in terms of notice; it will be the usual ones.

Whenever it is performance issues, you need to be looking at your first written warning and then final warning you never just dismiss automatically.

Always at the dismissal stage, you must give the employees the right to appeal. You must detail who they are to appeal to and what constitutes an appeal.
Settlement Agreement

*What to do when it comes to meetings*

*Chapter two - Performance Issues*

Now, there are alternatives to going down this route, a settlement agreement.

There are new regulations which means that any discussions that you have with employees are protected, but be careful because they are only protected if you're trying to resolve a dispute – if there's something to “settle”.

I have known employers, who have taken employees to one side and said ‘why don’t you take ten grand and just go?’ That's not going to cut it, that's not protected and they then have the right to start issuing proceedings or making a claim.

Start the performance procedure first before you even look at a settlement agreement. Make sure you get the wording right, and you don't do it too quickly.

At the appropriate time, a settlement agreement can be broached. Of course one of the things you can offer them is a reference. An agreed reference, bearing in mind the subject, will be very important for employees. They want to know the reference you’re giving them is not going to hinder their chances later on, so it offers them peace of mind.

So, if you do really need to cut down on the time performance issues require to properly resolve or you feel that even with the appropriate procedures being followed the employee will be unable to improve to the required standard, consider going down the settlement agreement route as well.

Performance issues do require a lot of time unfortunately, but they can be quite simple in their conduct if you have the correct procedures in place.
Chapter Three. - Holiday and Sickness.

Holiday and Sickness. There have been a lot of cases recently about sickness and holidays and so it’s something that everyone’s been talking about.

Cases have said holidays continue to accrue while employees are on sick leave, so although you might think ‘well they’re at home resting why would they need holiday again?’ That’s not the accepted position.

The position is that if someone’s sick, they’re not relaxing. It will continue to accrue for up to 18 months. During this time, if an employee wishes to go on holiday they can. But, you cannot force them to take holiday whilst on sick leave. So, if you think someone is going to be away for a long period of time it may be better to terminate their employment on the grounds of capability (subject to the exceptions regarding disability and following the correct procedures) from a business point of view, otherwise that holiday continues to accrue.

Now, if an employee wishes to go on holiday whilst they’re on sick leave, that is reasonable. Doctors can sometimes advise it, if you’re feeling unwell: ‘a week by the sea will do you a lot of good’. Similarly with sporting activities, or if you see a photo of someone enjoying themselves at a party or playing golf it’s not going to necessarily be sufficient grounds to dismiss them. The doctor may have said ‘you’ve got to get out of the house; you’ve got to do physical activity’. So do be aware that it won’t be enough to terminate employment just on the grounds that they might be off on sick leave and yet be having some entertainment outside of that.

However, you are not allowed to suggest to the employee that they take holiday, so don’t think asking or forcing them will work either. Unfortunately, with this topic its very much taken out of the employers hands and it’s all down to the employees and what they want to do, as long as it is genuine and backed by the doctor.
Q&A

Audience member:
What about if you get an employee that’s playing with the system and takes just the one day off? But it is regular.

Ilinca:
Well that is persistence, so still go through the normal procedure, if you keep records, pull them into a meeting. And if they take a Monday off with a stomach bug, every other week then sit down and say ‘well hang on a minute, it’s not quite normal, why is it you’re taking every Monday off? We’ve got a policy in place, I’m going to send you to our GP or occupational health to see if there’s any underlying condition. We’re going to keep an eye on this, and if it continues to happen, you’re going to be entitled to terminate their employment.
**Q&A**

**Audience member:** what happens if an employee's pregnant and they call in sick?

**Ilinca:**

If pregnancy, scrap everything I’ve said. If someone’s pregnant, you cannot dismiss on the grounds of that! Because it would be sex discrimination. You are going to have to treat that in a completely different manner.

There are specific regulations that apply to pregnancy because actually if a woman is seriously ill whilst pregnant, maternity leave can automatically kick in, depending on where in the pregnancy it happens. What might happen is that she can be placed on maternity leave earlier than she would have liked because she’s just not capable of physically doing the job at that present moment.

Make sure that she is not doing something that could harm her or her unborn baby while she’s at work. So again, getting doctors reports as to what’s wrong and what she should or shouldn’t be doing depends on what the job is, if it involves a lot of heavy lifting, she’s not going to be able to do that role. You cannot dismiss her for that, because she’s pregnant. So it’s very different rules, it’s not sickness – its pregnancy.
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