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# Disabled Members: Sickness Absence and Performance Management Procedures A Briefing for Branches

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## a) Introduction

Disabled workers have been under increasing pressure in the workplace due to sickness absence and performance management procedures which take no account of the impact a disability may have if employers do not take appropriate steps to mitigate any disadvantage.

Capability proceedings affect many members and the proceedings range from informal meetings to dismissal. These can be divided into two types of cases:

- i. ill health: this will normally be on the grounds of capacity
- ii. competence or performance issues: this is where an employee is deemed not to be performing the job to the standard expected by the employer

**This briefing outlines the issues facing disabled members but should be used in conjunction with any local and national guidance on sickness absence, performance management and redundancy. All members should contact their UCU rep if they are facing any action under these procedures.**

This document

- Outlines the test for disability and areas of disability discrimination
- Sickness absence issues
- Performance management issues

## **b) Disability at work**

### **The test for disability**

The Equality Act 2010 makes it unlawful to discriminate against disabled people who have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities, requiring reasonable adjustments to be made.

- The term impairment is not defined by the Act but has a functional meaning and focuses on what someone cannot do, not on what they can.
- Substantial means more than minor or trivial
- The meaning of long term is it has lasted for 12 months, is likely to last for 12 months or is likely to last of the rest of the life of the person affected.

Claims under the Act are likely to fail if a worker does not inform their employer about their disability.

### **Types of discrimination included in the Equality Act 2010**

- **Direct Discrimination:** where a disabled person is treated less favourably than others. This could include automatically not being considered for promotion because they are disabled.
- **Discrimination arising from a disability:** This is where a disabled person is treated unfavourably because of something arising in consequence of their disability. Discrimination arising out of a disability can cover any treatment that may arise out of a workers disability. For example, where an employer decides to end the employment of a disabled person because they have been on long term sick leave for too long. In these circumstances the decision to dismiss amounts to unfavourable treatment that is for a reason connected with their disability.

Likewise if a disabled worker is told they will not receive an annual contractual bonus as it took them longer to meet some of their deadlines because of their dyslexia. This is likely to be discrimination arising from disability. Disabled people being penalised for taking time off because of their impairment might represent a case of discrimination arising from disability.

An employer can potentially justify discrimination arising from disability if they can show that their actions are a proportionate means of achieving a legitimate aim.

- **Indirect discrimination:** This could refer to any of the employer's policies, procedures, contract, terms' of practices which impacts disproportionately on an equality group such as disabled people. For example, the use of trigger points in sickness absence could be indirect discrimination.

Another example is of an employer who refused a disabled worker with stress the use of flexitime in order for her to attend a gym at lunch time. A tribunal found that the use of flexitime was a 'provision, criteria or practice' which could be used by a disabled person to help alleviate the effects of their disability, and then make up any deficit needed to meet their full working hours. (Ncheke v Her Majesty's Court and Tribunal Service 13 March 2013 Leicester Case No 1201468/11).

As with discrimination arising from disability, an employer can potentially justify indirect discrimination if they can show that their actions are a proportionate means of achieving a legitimate aim.

- **Discrimination by association or perception:** In certain circumstances it is also unlawful for an employer to discriminate against a non-disabled person because of their association with a disabled person or where they are wrongly perceived to be disabled.

Discrimination by association and perception only applies to direct discrimination and harassment. It does not apply to indirect discrimination, discrimination arising from disability or the duty to make reasonable adjustments for the non-disabled person.

Examples of discrimination by association could be the person being disciplined for time off for caring where someone with a similar level of absence is not or refusing to employ/promote someone because they are a Carer.

Under the Equality Act employers have a legal duty to make **reasonable adjustments** for disabled people. The duty to make reasonable adjustments aims to remove any disadvantage that a disabled employee has at work. This could involve making changes to policies and procedures, making physical adaptations and / or providing additional equipment and support in place. When the duty arises, the employer is under a positive and proactive duty to take steps to remove or reduce or prevent the obstacles faced as a disabled worker or job applicant.

Many of the adjustments needed to help remove disadvantage will not be particularly expensive especially when compared to the costs of not making an adjustment.

Employers are allowed to take into account the following factors when assessing the reasonableness of an adjustment.

- How effective the change will be in avoiding the disadvantage
- Its practicality
- The cost
- Their organisation's resources and size
- The availability of financial support

If a disabled worker faces barriers at work which the employer has or should have identified and which could be removed by the provision of reasonable adjustments then they should inform the employer of these adjustments. If the employer refuses to or fails to make these adjustments then the disabled worker can bring a claim against the employer in an Employment Tribunal, and the employer may be ordered to pay compensation as well as make the reasonable adjustments.

**UCU's guide:**

[http://www.ucu.org.uk/media/pdf/s/a/Reasonable\\_adjustments.pdf](http://www.ucu.org.uk/media/pdf/s/a/Reasonable_adjustments.pdf)

[Reps should also refer to guidance and advice issued as part of UCU's workload campaign. UCU is challenging 'what is reasonable' for all workers in terms of workload, performance and hours worked.](#)

[Go to www.ucu.org.uk/workload](http://www.ucu.org.uk/workload)

### **c) Sickness absence and disability**

Many workers feel that there is no support from employers to resolve sickness absence caused by disability which would enable the person to stay in their job. The focus can become of removing them from the workforce as they are judged no longer capable of fulfilling their duties. Developments in absence management policies monitoring include:

- New targets for sickness absence
- New policies on short-term intermittent absence
- New trigger points for the referral of workers to occupational health services (OHS)

- New disciplinary warning arrangements
- Increased use of the 'Bradford factor' system for assessing frequency and duration of an individual's sickness absence. The Bradford Factor is a simple calculation that can be used to highlight frequent, short-term employee sick leave.

Absence can trigger a capability or disciplinary procedure but Employers have specific legal duties under the Equality Act 2010 and dismissal for disability – related sickness absence is likely to be discriminatory unless the employer has made any reasonable adjustments that would enable the disabled person to return to work. Case law contains hundreds of examples of reasonable adjustments that could have avoided dismissal, resulting in a finding of disability discrimination.

For example, if the reason an employee's continued sickness absence was due to the failure of the employer to make a reasonable adjustment which would enable the employee to return to work, this could be discriminatory.

Good practice would be that disability related sickness should not be counted relating to:

- Disciplinary procedures
- Performance appraisal
- References
- Selection criteria for promotion
- Selection criteria for redundancy

However the protections provided to disabled employees do not mean that a disabled employee can never be dismissed for capability.

### **Short term and long term absence**

Ill health can be divided into two forms of absence: several intermittent absences which may not be for the same reason and prolonged continuous absence due to a single condition.

### **Short term/intermittent absence**

The employer should have set out the required levels of attendance and procedures for dealing with sickness absence in a sickness absence or attendance policy.

Employers can be more severe on intermittent absence with employers using 'trigger points' to identify when sickness absence has reached a level for cause for concern. Some use the Bradford Factor Index which is described below:

### **Bradford Factor definition**

**Also known as the Bradford Formula, the Bradford Factor is a way to standardise and measure absenteeism. The underlying theory behind the Bradford Factor is to judge the relative cost of absenteeism through the belief that short, unplanned absences are more disruptive than longer-term, planned absences.**

**The formula used to produce a score is:  $B = S^2 \times D$ .**

- **B = the Bradford Factor score**
- **S = the number of separate absences over a defined period of time**
- **D = the total number of days of absence over the same defined period of time**

**Use of the Bradford Factor can penalise staff who when sick, come back to work as quickly as possible. It could also potentially amount to disability discrimination as the nature of a disability may mean regular short absences, which the Bradford Factor would highlight.**

'Trigger points' can be used to review and discuss an employees absences and any review should cover:

- allowing the employee to explain their absences.
- likelihood of future absences.
- whether any absences are a direct result of work.
- whether the absences are related to a disability

For disabled employees absence could be linked to lack of reasonable adjustments in place.

### **Long term absence**

Long-term absence should be handled sensitively: the illness may be serious, and also involve debilitating treatment or an operation and recovery time. It could be a mental health condition or issue. These do require a sympathetic approach.

Defending a disabled member facing procedures for long term sickness the following issues can be raised:

1. Is the member now better? If not, what is their prognosis? Encourage the member to send a strong positive message that they want to return to work once fit, and to be proactive in suggesting possible return dates and any adjustments to make this possible.
2. Is the absence being prolonged due to fear of bullying or harassment? Is redeployment a possibility?
3. Is the employer at all to blame for the member's condition?
4. Are there reasonable adjustments that have not yet been made? Have they been properly costed? Has the employer considered Access to Work?
5. Has the employer carried out an appropriate medical investigation, including asking for a report from the member's GP or asking the member to visit Occupational Health? If yes, has the employer followed all the medical advice? What about the recommendations of the Fit for Work service.
6. What does the member's past attendance record tell you about the likelihood of a successful return? Can you use this to the member's advantage?
7. Are there other examples of staff who have been treated more favourably in a similar position?
8. If the member is fit for some work, has the employer thought properly about the possibilities such as a staggered return, alternative duties, temporarily reduced hours, or working from home?
9. Phased return? This can be specified eg 4-6 weeks, but reasonable adjustment may make it longer.
10. What evidence is there of a real impact caused by the absence on the employer's ability to function (as opposed to irritation on the part of colleagues)?
11. If sickness absence triggers are included – why have the trigger dates been set at the level they have and on what basis? Consider different trigger points where a person has a disability.
12. What about voluntary severance or an early retirement package (this needs to be what the member wants)?
13. Is it too early for the employer to be even considering dismissal?

**An important decision by the Court of Appeal in Nottingham County Council v Meikle (2004, IRLR 703), demonstrated that extending a sick pay scheme may be a reasonable adjustment particularly when a person has been placed at a significant disadvantage and are awaiting adjustments to be put in place to enable them to be able to perform their job.**

**A recent case Griffith v DWP (2015) supports the duty that employers have to make reasonable adjustments to assist disabled employees who are off work with disability related absence. This could potentially include making changes to trigger points for sickness absence.**

**In both short term and long term cases, branches should:**

- Check policies: familiarise yourself with the sickness or attendance policy, capability procedure and disciplinary procedure. Each policy will have a process to follow with certain stages. It is important that the policy is followed appropriately by the employer.
- Check the members absence record: First, make sure it is correct. Disabled members may also be able to, under the sickness or attendance policy, be able to separate sickness absence and disability related sickness absence.
- Challenge rigid attendance targets and trigger points: these could place a disabled person at a disadvantage and the employer should make reasonable adjustments to these targets.
- Identify with the member, any adjustments that could be made to help reduce their absence and allow them to return to work.
- In terms of absence, a reasonable adjustment is about removing the disadvantage and allowing the worker to return to work. In practice the purpose of a reasonable adjustment is to enable an employee to remain in employment.
- Check consistency (taking the duty of reasonable adjustments into account): is the employer being consistent in their approach and not targeting disabled members? Has the employer been consistent in categorising sickness absence, use of medical advice and targets for improving attendance. Unequal treatments may be a potential equality discrimination case.

**This briefing relates to disability so does not cover other issues such as excessive workloads and personal circumstances which are also significant factors in absence.**

### **Occupational Health**

Employers often rely on the recommendations of occupational health and often these reports can fit too easily with an employers' view and may not recognise the need for reasonable adjustments. If there is a move to involve occupational health, reps should ensure that the report is from a properly qualified expert and that the disabled worker is involved in discussions particularly around reasonable adjustments that will enable them to remain at work. If you want to challenge the OH advice, you can refer to any specialist advice or advice from the



members' doctor. Specialist advice will usually carry more weight than an OH report.

## **d) Competence or performance issues**

If a disabled person is under formal proceedings for not performing to the required standard this will raise many issues. An employer may believe the member to be inflexible at work or as difficult if they are perceived as refusing to adapt. Members may be considered not to have the required drive or personality to get the work done in a particular way and to get on with colleagues and students. All these factors can be disability related. A member may have become rigid in their approach as they have struggled to get reasonable adjustments and are now concerned that changes will once again put them at a disadvantage. The disability may mean they interact differently or means they approach tasks differently which can put them at a disadvantage.

If performance issues are raised then you should look to see if they are related to a disability and, if so, whether adjustments could be made to overcome the problem. Simply to take capability action against a disabled person because of poor performance, without having made reasonable adjustments to remedy the disadvantage has been found unlawful in Employment Tribunals.

Most capability proceedings are due to negative observations, poor results, student attendance or failure to meet certain targets such as REF or funding targets but there are particular issues which disproportionately affect disabled members when looking at performance:

**Absence record and working hours:** A 'reasonable adjustment' could be to disregard some or all of an employee's disability – related absence or use another period of time. Failure to do so might be discriminatory. This is similar on working hours which includes workers who work part time or flexibly because of their disability.

**Skills:** For example, an employee with autism may seem to relate differently because of their disability. For example on their face to face people skills when with people they do not know such as prospective students and their parents.

**Communications:** a disabled person may be disadvantaged in getting or understanding information, for example, because of dyslexia or a sight or hearing impairment.

**Student surveys and evaluation:** Disabled teachers can receive poor feedback which is related to their impairment rather than their teaching skills.

In forming an opinion, the employer should carry out a proper investigation that involves the member. The member should be given the opportunity to give their side of the situation. If any areas of improvement are identified, a member should be given reasonable time to improve and given the right support (including reasonable adjustments).

Each case will be different but to support members:

- Check policies: being familiar with the capability procedure is essential and in particular the process that the employer must follow. It will be helpful to familiarise yourself with aspects of disability law such as reasonable adjustments.
- Check the evidence: this should include job descriptions, observation policies, status of student evaluations, performance reviews and notes of one to one or team meetings with the manager.
- Evidence of support provided: Has the employer put in place any necessary reasonable adjustments, is the employer still waiting for adjustments to be put in place?
- Check for consistency: is the way that this case has been approached in a similar way to other cases? Has there been mitigation for the disability in terms of time frame and targets? Evidence that the employer has acted differently, could lead to a potential discrimination case.
- Identify any health issues? This is important for disabled members, especially if they have not previously disclosed. They may not have raised any changes in the impact of their disability because they were anxious about their security at work.

**Redeployment can be a reasonable adjustment for a disabled member.**

You need to make sure this does not include tasks or situations that the disabled worker cannot do. For example, be part of a new team situated in an inaccessible building for someone using a wheelchair.

**The House of Lords has made an important decision in the case of Archibald v Fife Council (2004, IRLR 651) about the definition and scope of an employer's duty to make reasonable adjustments. In particular, it said that the duty arises even if an employee becomes totally incapable of doing the job for which she is employed if she could do another job for that employer.**

**A recent case Griffith v DWP (2015) supports the duty that employers have to make reasonable adjustments to assist disabled employees who are off work with disability related absence. This could potentially include making changes to trigger points for sickness absence.**

## **e) Collective approach**

**UCU encourages branches to secure agreements on disability leave and flexible working as these support disabled workers in managing their disability. Check if you have these policies – and if not the branch should raise the policies as a collective issue.**

### **i) Disability leave**

Employers should as a reasonable adjustment count disability related absence separately from sickness absence and to adopt a disability leave policy. Many sickness absence policies contain trigger points for losing entitlements to pay, for holding capability meetings, and for dismissal or pressure to take ill-health or early retirement.

As a result, every year many disabled people whose impairment(s) require them to take time off work but who are still capable of returning to work find themselves dismissed through sickness absence procedures which make no allowance for disability related absence.

**UCU has produced a briefing on disability leave:**

**[https://www.ucu.org.uk/media/7835/Disability-leave-2016/pdf/Disability\\_Leave\\_2016.pdf](https://www.ucu.org.uk/media/7835/Disability-leave-2016/pdf/Disability_Leave_2016.pdf)**

### **ii) Flexible working**

A good workplace policy should include provision for flexible working and support for workers returning after a period of absence.

A cost benefit of a least 2.5 times an employer's investment in keeping a disabled person in employment was highlighted in a 2011 report from the National Institute of Blind people. The RNIB report outlined the business case, showing how it can deliver financial benefits to the economy, to employers and to employees, principally by allowing the employer to retain the employee's accumulated skills and experience and the employee to maintain income and independence. Other savings include:

- Avoidance of redundancy pay or the costs associated with terminating employment

- Reduced costs of someone on long-term sick leave
- The costs of recruitment and induction training for replacement staff
- Avoidance of costs from a claim arising from disability discrimination
- Intangible benefits of increased staff loyalty and morale, as well as a workforce more representative of its customers and community.

UCU has produced a briefing on flexible working

[https://www.ucu.org.uk/media/6674/UCU-briefing-on-new-arrangements-for-shared-parental-leave-and-flexible-working-Jan-14/pdf/ucu\\_flexibleworkingbriefing\\_jan14.pdf](https://www.ucu.org.uk/media/6674/UCU-briefing-on-new-arrangements-for-shared-parental-leave-and-flexible-working-Jan-14/pdf/ucu_flexibleworkingbriefing_jan14.pdf)

and a negotiating guide on Carers Leave to be launched at UCU Congress 2016.

There is also a general guide on disability 'Enabling not Disabling'

[https://www.ucu.org.uk/media/1625/Enabling-not-disabling-UCU-Nov-15/pdf/ucu\\_enablingnotdisabling\\_nov15.pdf](https://www.ucu.org.uk/media/1625/Enabling-not-disabling-UCU-Nov-15/pdf/ucu_enablingnotdisabling_nov15.pdf)

## **Contacting UCU**

If you facing any of these issues, you should contact your branch as soon as possible. All the contacts are on the UCU website

<https://www.ucu.org.uk/yourcontacts>

**If the issue does need to be taken through formal procedures please be aware that time limits can apply for the situation to be remedied internally or legally, so please don't delay if you want UCU to act.**

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