INFORMATION FACTSHEET

Dismissal due to Ill Health
- Unfair Dismissal
There are three main types of absence from work:
- Persistent and potentially intermittent short term absences.
- Long-term absences or absences relating to chronic sickness.
- Pregnancy-related sickness absence.

Potentially fair reasons for dismissal which ill health dismissal fall under may include:-
- Conduct – i.e. poor attendance rate
- Capability – i.e. ability to do a job
- Some other substantial reason

It is up to the employer to show that one of the above reasons is the primary reason for dismissal. It is then for the tribunal to decide whether they accept the reason for dismissal as detailed by the employer and whether the employer acted reasonably considering all the circumstances of the case when dismissing for that reason.

A: PERSISTENT SHORT-TERM ABSENCE
The law recognises that poor attendance by an employee may become commercially damaging for an employer and so an employer may fairly dismiss the employee concerned provided the employer acts reasonably and follows the correct procedures.

A number of cases from the Employment Appeal Tribunal have laid down some useful guidelines requiring employers to take into account the following:
- the nature of the illness;
- the likelihood of it recurring or of some other illness(es) arising;
- the length of the various absences and any periods between them;
- the need for the employer to have the work completed;
- the impact of the absences on other employees;
- the importance of a personal assessment of the situation;
- the importance of consultation with the employee; and
- the importance of appropriate warnings of dismissal if there is no improvement.

Since 6 April 2015 an employee is required to have accrued 24 months service to claim Unfair Dismissal under the normal rules.
Without 24 months service it is not possible to claim unfair dismissal under the normal rules.
An employee can be dismissed because of their ill-health in certain circumstances. This fact sheet explains some circumstances in which this may be fair or unfair.
For a dismissal to be fair, the employer must investigate the facts, review the attendance record and the reason for the absences, let the employee know that the level of absenteeism is unacceptable and warn the employee of what the consequences of continued absence may be, i.e. dismissal.

Employers must consider the reasons provided by an employee for any absences. It will be necessary for the employer to interview the employee, show them their attendance record and listen to any explanations provided. There may various underlying reasons for the absence and the genuine reason may not be instantly clear however the employer should attempt to identify the actual problem.

Examples of underlying problems include:

- an undiagnosed medical condition;
- a personality clash at work with another employee;
- a problem actual work itself, e.g. too stressful;
- some domestic, personal or family issue;
- some other personal problem, e.g. drug dependency or financial problems;
- malingering; or
- moonlighting.

**Improvement in attendance**

An important factor influencing whether any decision to dismiss was fair is the degree of improvement in attendance made by the employee after warnings were issued. In such circumstances it may be reasonable to extend the final warning period where an improvement has been made but the required standard has still not yet been reached as yet.

**B: LONG TERM OR CHRONIC SICKNESS ABSENCE**

The dismissal for capability of an employee who is absent from work due to ill health or long term illness may be potentially fair. The definition under statute of capability details that this includes reference to an individual’s health.

**The decision to dismiss**

Any decision whether or not to dismiss an employee on the basis of their continued ill health is not a medical decision but a decision for management. Medical evidence will however be extremely important.

Procedure for handling long-term absence

In cases of chronic or long term illness there is usually an underlying medical condition causing the absence from work. The condition affects the employee’s ability to carry out the job. It may also be classed as a disability under the Equality Act (2010).

There are three essential steps which an employer must follow to show a dismissal was fair as set out below:-

1. The employer should attempt ascertain the true medical position and prognosis.
2. The employer should consult with the employee.
3. The employer should consider any suitable alternative employment.
1. **Ascertaining the medical position**
The employer will need to obtain a medical report on the employee in order to attempt to ascertain the medical position. In order to obtain a medical report, the employee must give their consent. The employer should explain to the employee why the report is being requested.

It should be explained to the person preparing the report the nature of the employee's duties and job as well as the reason for the enquiry. The health professional may be asked to provide an opinion in relation to an employee's medical position, their suitability for a job given they suffer from that condition and also a date when they are likely to be able to return to work.

If an employee refuses to consent to the provision of a medical report the employer will have to make a decision whether to dismiss based on the information they have available to them providing they have explained to the employee why the report is required.

To dismiss the employer will need to show, without a medical report, that the employee was not capable of carrying out their role and it was unreasonable for the employer to wait until the employee had recovered.

**The medical report**
Generally medical reports are relatively vague as to the timing of the employee's likely return to work. In such situations the employer may request a further opinion or may simply make a decision based on the information available at the time. Some factors influencing this decision include the length of any absence(s), the size and resources of the employer and the effect of any continued absence on the business and colleagues.

2. **Personal consultation with the employee**
Warnings may not always be appropriate in cases of long term ill health absence; however it is essential that the employer consults with the employee throughout the absence, and in particular before any decision is made to dismiss.

A discussion is required of the position between the employer and the employee, so that the situation can be weighed up. Issues to be considered include the nature of the illness, the likely length of the continuing absence, the need of the employer to have the work done and all the circumstances of the case.

3. **Suitable alternative employment**
A purpose of consultation is to establish whether the employee may be capable of undertaking suitable alternative employment. Where an employee has a temporary disability, the employer will be expected to consider making minor modifications to the original job in order to allow the employee's return to work. There may also be requirements under the Equality Act to make reasonable adjustments. However employers are not expected to create a role especially to facilitate the employee's return.

C: **DISABILITY DISCRIMINATION**

If you are dismissed because of or for a reason a relating to long-term absence or
capability this could also amount to disability discrimination. Please seek additional advice if you feel you have been treated unfavourably in relation to any disability.

D: FRUSTRATION OF CONTRACT DUE TO ILL HEALTH

During a period of long term absence an employer may attempt to argue that the contract of employment has been frustrated because the employee has been unable to carry out the work for so long. In deciding whether or not there has been frustration of contract because of sickness, a tribunal will consider:

- what sick pay provision there is in the contract;
- how long the employment was likely to last;
- the nature of the job and how important it is for the employer to replace the employee;
- the nature of the illness and how long it is likely to continue;
- the length of service of the employee.

An employer cannot assume a contract is frustrated and fail to take action, they should investigate any situation in an attempt determine if, and when, the employee may be able to return to their job.

Tribunals are likely to find that there has been a dismissal and are generally reluctant to find that a contract has been frustrated. You may therefore wish to consider whether you can show that any dismissal suffered was in fact unfair.

E: PREGNANCY-RELATED SICKNESS AND ABSENCE

Dismissal of an employee due to her pregnancy is likely to be deemed automatically unfair if this is the sole or primary reason for dismissal. There is no requirement for a minimum length of service. Such a dismissal may also amount to discrimination on grounds of sex.

It can be difficult to determine whether or not ill health is a reason connected with the pregnancy of the employee. If it can be established that the sole or primary reason for a dismissal was a pregnancy-related illness, the dismissal is likely to be rendered automatically unfair.
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Please note that this factsheet is intended to give general guidance only and does not constitute definitive advice on the law. Please seek professional assistance where you need specific advice.

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