

Kemp Little HR Forum

Absence Management

CASE STUDY

Wolfsons is a large, notoriously ruthless, London-based estate agency business. Barry Smooth is highly ambitious (he likes to tell his staff that the 'B' stands for 'boss') and has recently taken over managing the prestigious Knightsbridge branch. His primary aim is to ensure that his branch comes top of the yearly sales chart throughout the UK. If he is successful, he'll be promoted to a regional manager and also receive a handsome bonus. However, Barry is worried that some of his staff are lazy and not pulling their weight, which will hinder his plans.

Group 1

Kevin Street has been with the business for 11 months. He is a sales consultant, and is highly effective at pushing through transactions. He gets on well with Barry, and they share the same vision. However, Kevin often calls in sick – one week it might be a cold, a couple of weeks later a stomach ache, and then subsequently a leg strain. Barry is worried that Kevin, whilst being an asset, may affect the overall sales figures. Barry spoke to Kevin last week and asked him to come to see him to discuss the issue. However, Kevin has today sent in a letter saying that his doctor has signed him off sick with stress for two weeks. Barry thinks that this is just an avoidance tactic and wants to call Kevin at home.

- (a) Can Barry ring Kevin at home? Would your answer differ if at the end of the two weeks Kevin was signed off for another two weeks, or even another four weeks, with stress?
- (b) If you think that Barry should not ring Kevin at home, what should he do instead? Does he need to comply with any particular formalities?
- (c) If Kevin had not been signed off sick, how would you have advised Barry to deal with the problem? What would you do subsequently if the problem persisted?
- (d) How would you advise Barry to respond if Kevin told him that his absences are related to an underlying drink problem?
- (e) How would you advise Barry to respond if Kevin told him that he would like to continue working for Wolfsons but in a less stressful role?

Answers

- (a) Given that Kevin has only been signed off sick for two weeks, Barry should be cautious about ringing him at home during this time in order to progress disciplinary action.

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The risk in doing so is that either any eventual dismissal might be unfair, or that doing so might entitle Kevin to resign and claim constructive (unfair) dismissal.

If Kevin is signed off for longer periods, the question becomes more of a balancing exercise. Proceeding with disciplinary action whilst Kevin is off-sick may well be risky if he can argue that his stress will impair his ability to participate properly in the process. It is also worth noting that in this case the company's evidence is likely to be written (ie absence records) rather than verbal, so there should not be an issue with people's recollection's fading over time. Against this, however, if Barry leaves it too long before dealing with the issue, Kevin himself may be able to argue that passage of time has made it difficult for him to respond to the issue.

Ultimately, Barry will need to decide, in consultation with Kevin, whether he is at some stage able to cope with an investigatory meeting or a subsequent disciplinary meeting (if applicable). One option for Barry, as part of this decision, will be to try to get an independent medical opinion in order to establish the seriousness of Kevin's condition, and the likely extent/speed of his recovery.

The reason that is important for Barry to do things appropriately is that if he does not do so any subsequent disciplinary action might entitle Kevin to claim constructive (unfair) dismissal and (if he is disabled within the meaning of the Disability Discrimination Act 1995 ("DDA")) disability discrimination.

Kevin would of course only be able to claim (ordinary) unfair dismissal if he has a year's service. Furthermore, with regard to disability discrimination, it is worth noting that in order for a condition to constitute a disability it must have a substantial adverse effect on his ability to carry out day-to-day activities and must last or be expected to last for at least 12 months, or the rest of the person's life. Therefore, if Barry wanted to take an aggressive (and slightly more risky) approach to dealing with the problem, he might dismiss Kevin before the point at which he has, or is deemed to have, a year's service¹.

(b) Instead of ringing Kevin, Barry could consider writing to him, as this may be less intrusive/stressful. In doing so, Barry could offer to meet Kevin at home, or at a neutral location, rather than in the office, or even to deal with the entire matter by correspondence. He could also offer to allow him to be accompanied by a friend (rather than a colleague or a union representative) at any meetings.

It is worth noting that Barry's initial request that Kevin attend a meeting was apparently made verbally. This does not comply with the statutory disciplinary and grievance procedures. Therefore, before holding a disciplinary meeting with Kevin Barry will need to write to him setting out the conduct which has led him to contemplate taking disciplinary action against Kevin (i.e. his repeated absences) and invite him in writing to a meeting to discuss the issue.

(c) The usual process for dealing with repeated short absences would be to advise Kevin what level of attendance he is expected to attain, the period within which he must achieve this, and that dismissal or further disciplinary action may result if there is not sufficient improvement. The situation should then be monitored to see if there is sufficient

¹ If an employee is dismissed without notice, their statutory notice is added to their actual length of service to determine their effective date of termination. This means that if an employee is dismissed without notice, then this should be done before they reach 51 weeks' service if the intention is to prevent them acquiring a year's service.

improvement. If there is no improvement at all, dismissal may be appropriate; where there is some but sufficient improvement a further warning may be appropriate. Before any action is taken, the statutory dismissal and disciplinary procedure should be complied with.

Medical evidence is unlikely to be useful/relevant here given that Kevin's absences appear to be caused by minor, unconnected conditions.

As noted above, Kevin would of course only be able to claim (ordinary) unfair dismissal if he has a year's service.

(d) If Kevin has a drink problem, this will have only a relatively minor impact on how Barry should deal with the problem.

Addiction to alcohol (and other substances) is excluded from protection under the DDA. Note, however, that if Kevin's stress arises out of his alcohol addiction, the stress could still potentially constitute a disability under the Act (*Power v Panasonic*).

With regard to unfair dismissal, it should be noted that if the company has a policy on (or relevant to) alcoholism, this policy should be adhered to. Otherwise, any subsequent dismissal is likely to be unfair (*Sinclair v Wandsworth Council*).

(e) If Kevin is disabled for the purposes of the DDA (on which, see above), the company is likely to be under a duty to make reasonable adjustments.

In this context, reasonable adjustments may include things like allowing Kevin to make a phased return to work, reallocating some of his duties, providing extra supervision, training or support to him, or even (following *Archibald v Fife Council*) transferring him to a different job without requiring him to go through a competitive interview process.

Even if Kevin is not disabled within the meaning of the DDA, the company would still be expected to be reasonably flexible in helping him to return to work (although the duty is likely to be less extensive in this case).

Therefore, Barry may need to consider a temporary or permanent change or adjustment to Kevin's role.

Group 2

Josie Brown is the office secretary. She has recently raised a grievance complaining that she wants to change her working hours so that she can leave early to collect her child from nursery. For his part, Barry wants to discipline Josie – he found out recently that she often leaves work early, saying she has a headache or a migraine. In addition, a couple of weeks ago she took two days off to look after her child whilst the child's nursery was temporarily closed, despite Barry telling her that she couldn't have the time off.

- (a) Do you think that Barry should allow Josie to change her working hours? What factors would you take into account in reaching your decision? Does it matter that Josie has raised a grievance rather than making a flexible working request?
- (b) What are the risks to the company if Barry continues to prevent Josie from changing her working hours?
- (c) Is Barry entitled to discipline Josie for taking the two days off? Would your answer differ if Josie had been asking to take off a longer period, such as a week? What about if the situation had arisen only on the day itself?
- (d) Barry thinks that Josie's headaches and migraines are just a convenient excuse for leaving early so that she can collect her child from nursery. He wants to know if he can require her to undergo a medical with the company doctor and then disclose the results to him. What is your advice? What documents do you need to see in order to answer this?

Answers

(a) Barry should certainly consider allowing Josie to change her working hours on the basis that the failure to do so might be indirect sex discrimination. This is on the basis that the requirement that she work certain hours is arguably a "provision, criterion or practice" which puts women generally at a particular disadvantage when compared with men (on the basis that women are more likely to have childcare responsibilities than men) and which has this effect on Josie in particular. In order to justify this, Barry would need to show that the requirement that Josie worked particular hours is a proportionate means of achieving a legitimate aim – in other words he would need to show that if Josie were working different hours this would have a disproportionate effect on the company's ability to operate properly. Barry would therefore need to look at whether the company could work round Josie's preferred hours.

The fact that Josie has raised the request by way of a grievance rather than a flexible working request is, at most, likely to be a minor consideration (particularly if she has set out in some detail the change which she wishes to make and the reason for this). This is because the right not to suffer from indirect discrimination is a self-standing right and is not related to the right to make a flexible working request.

(b) If Barry continues to refuse to allow Josie to change her working hours then the company will be at risk for claims for indirect sex discrimination and/or constructive (unfair) dismissal.

(c) Barry may be entitled to discipline Josie for taking two days' off. Although employees who have sufficient continuous service and who have responsibility for a child are entitled to take parental leave for the purposes of caring for a child, this must be taken in whole week blocks unless something else has been agreed with the company. (In addition, there are

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certain notification requirements which an individual must comply with before taking parental leave). Therefore, a two day period of absence cannot constitute parental leave and Barry may therefore be entitled to discipline Josie for unauthorised absence.

The situation might well differ if Josie had asked to take off a week, as that period of absence could in principle constitute parental leave.

Equally, the answer might differ if the situation had only arisen on the day itself. This is because employees have the right to take time off for dependants including, in particular, to deal with the unexpected disruption of arrangements for care of a dependent. (It might, however, be harder for Josie to justify taking off the second of the two days in this situation).

(d) Barry cannot force Josie to undergo the medical examination and disclose the results to him. Under the Access to Medical Reports Act 1988 (the "Act"), an employee is entitled to withhold their consent to a medical report being disclosed to a third party. However, the Act will only be applicable where an employee has seen the company doctor previously, or the company doctor requires a copy of the employee's medical notes in order to examine the employee and prepare a medical report. Otherwise, if Josie consents to be examined, she has no legal right to refuse the report being disclosed to the company. It is good practice though to also send the employee a copy of the final medical report.

However, if there is a provision in an employee's contract specifying that the employer can require them to undergo a medical examination and disclose the results to the employer, then, in theory at least, it might be possible to take disciplinary action against the employee for refusing to comply with this obligation.

Group 3

Trevor Block is a sales consultant. Barry has never worked with him as Trevor has been off sick for some time. Trevor was in a car accident that occurred whilst he was working. Although he has recovered from the physical injuries, he is still suffering from psychological problems. He claims that won't be able to carry out any duties until he is fully recovered which he says may not be for another year, and may never happen. As far as Barry is aware, it seems as if Trevor has been forgotten about by the previous management. Barry would like to make a clean start and terminate Trevor's employment.

- (a) If Trevor is genuinely unable ever to return to work, can Barry dismiss him? What is the relevance of the fact that Trevor's ill health arose from an incident that occurred whilst he was working?
- (b) If so, what steps should he take before doing so?
- (c) Would your answer to (a) differ if the company has a PHI scheme - what risks might there be with dismissing Trevor if the company has a PHI scheme? What documents would you need to see in order to answer this question?
- (d) Would your answer to (c) be different if it transpired that Trevor had been bad-mouthing the company in the press?

Answers

(a) Barry can dismiss Trevor if he is genuinely unable ever to return to work. The fact that the company was indirectly involved in Trevor's illness doesn't prevent it from dismissing him; however, the company would be expected to take extra steps before reaching this stage (*McAdie v Royal Bank of Scotland*). The extent to which the company would be required to take extra steps in this case would depend on how much it could be argued that it was at fault for the accident (eg was Trevor working very long hours, therefore making an accident more likely?)

(b) Before dismissing Barry, Trevor would need to follow a series of procedural steps. If he did not do so, there is a risk that any dismissal would be unfair and/or would amount to disability discrimination (if Trevor is disabled within the meaning of the DDA). The steps are likely to include the following. Firstly, it would be advisable to obtain medical evidence with a view to establishing (i) whether Trevor will ever be able to come back to work and (ii) whether he is disabled for the purposes of the relevant legislation.

If Trevor is disabled for the purposes of the legislation, the company would need to consider whether he could return to work if reasonable adjustments were made. This might mean things such as returning initially on a part-time basis before eventually increasing to full-time, reallocating some of Trevor's more stressful duties to other employees, seeing if there is a way in which Trevor can still do his job with less time spent driving (eg could his appointments be arranged so that he can travel by public transport instead?), or even transferring Trevor to a different job without requiring him to go through a competitive interview process

Even if Trevor is not disabled within the meaning of the legislation, it would still be advisable for the company to be reasonably flexible in helping Trevor to return to work (although the duty is likely to be less extensive in this case). Otherwise, there would be a risk that any dismissal would be unfair.

In conjunction with these steps, the company should consult with Trevor before taking any decision to dismiss him. In broad terms, the consultation would need to encompass his medical prognosis and ways of achieving his return to work.

Finally, if the company does decide that Trevor's employment should be terminated, before dismissing him it should (if applicable) consider whether an ill-health retirement is an option. (Ill-health retirement may give Trevor the option of early retirement on a full pension). A failure to consider this may render the dismissal unfair (*First West Yorkshire t/a First Leeds v Haigh*).

(c) The answer to (a) might well differ if the company has a PHI scheme. This is because there is an implied term in employees' contracts that (in broad terms) an employer will not dismiss the employee if that would deprive him of PHI benefits (*Aspden v Webbs Poultry & Meat Group (Holdings) Limited*). If an employer breaches this implied term it may face a claim from the employee for the amount they would otherwise have received from the PHI scheme – this can be expensive! However, it is generally considered that this implied term can be overridden by an express term in the contract providing that the employer may dismiss the employee in these circumstances. Therefore, it will be necessary to check Trevor's contract to see if this includes such a term.

(d) The answer to (c) might differ if Trevor had been bad-mouthing the company in the press. This is because the implied term referred to in the previous answer is not an absolute rule. Therefore, it might still be possible for the company to dismiss Trevor in certain circumstances (such as gross misconduct) even if this would deprive him of the right to PHI and even if there is no express term in the contract allowing it to do this (*Briscoe v Lubrizol Ltd*). It would be worth the company considering therefore whether Trevor's conduct does amount to gross misconduct.

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