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Legal update ——— July 2018

Employment
Wellbeing: no longer a nice to have

Wellbeing is a higher priority for businesses than ever before. It is crucial to foster better employee morale and engagement, to promote a healthier culture and to lower sickness absence rates. Fit, happy employees improve productivity!

The findings of the CIPD's latest annual report
In May this year, the CIPD published its eighteenth annual survey report, 'Health and Well-being at Work', in conjunction with Simplyhealth. The report examines trends in absence and health and well-being in UK workplaces.

According to the report, the vast majority of respondents (86%) report that they have observed "presenteeism" in their organisation over the past 12 months. Presenteeism is when people come into work when they are unwell. Only a quarter of employers have taken steps to discourage this, compared with 48% in 2016.

The survey also shows a trend for "leaveism" where people work while on annual leave, or outside their contracted hours. Over two-thirds of employers said that they had seen leaveism in their organisation, but only 27% have taken action to discourage it over the past year.

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The report explains that both presenteeism and leaveism can be associated with mental health conditions and stress-related absence, which could in turn lead to an increase in employees taking long-term sick leave. 55% of respondents reported an increase in common mental health conditions, such as anxiety and depression among employees in the last 12 months, up 14% from last year.

The key role of HR professionals in the development of a successful well-being strategy is highlighted, as they "will have the strategic vision to embrace health and well-being as a holistic practice that should be aligned to corporate goals, because it is they who will appreciate the significant benefits that can be realised from such an approach".

At the same time the growth in protection for employees, particularly under equality legislation, means that employers face greater risks when taking disciplinary action against disabled employees or when proactively dealing with absenteeism. Two recent interesting cases illustrate this.

Knowledge of consequences of disability not required for discrimination arising from disability
The Court of Appeal held in *City of York Council v Grosset* that, despite the fact that it had dismissed a disabled employee not knowing that the misconduct for which it was dismissing arose from the employee's disability, the employer had committed discrimination arising from the claimant's disability. This decision is concerning for employers who may be found to be guilty of discrimination even where they conclude that an employee's behaviour (which then leads to the taking of disciplinary action) has nothing to do with their disability.

The claimant, a teacher and Head of English, suffers from cystic fibrosis, a fact of which the Council was aware. Following a change of head teacher the claimant's work load increased and the claimant suffered stress which, in turn, exacerbated his cystic fibrosis. He showed a class of 15 and 16-year-olds the 18-rated film 'Halloween' and was then suspended and dismissed for gross misconduct. The tribunal considered medical evidence during the course of the

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hearing. The evidence which was available to the Council at the time of the dismissal did not suggest a link between the claimant's misconduct and his disability. However, medical evidence available by the time of the tribunal hearing demonstrated otherwise. Although the tribunal dismissed the claimant's unfair dismissal complaint, it upheld claims of discrimination arising from disability including in relation to the dismissal, taking account of the later medical evidence.

The Council appealed, and when the Employment Appeal Tribunal (EAT) dismissed the appeal, it appealed again to the Court of Appeal. The Court held that it was clear that the reason for dismissal was misconduct (in other words the showing of the film), and that, based on the evidence before the tribunal, the misconduct arose in consequence of the claimant's disability. It concluded, along with the EAT, that Section 15 of the Equality Act 2010 (which deals with discrimination arising from disability) did not require the tribunal to decide whether the Council knew that there was a link between the misconduct and disability. Knowledge is only relevant to whether the employer knows that the employee is disabled at all.

The decision in Grosset places a high onus on employers to investigate the reasons behind the behaviour of an employee who they know is disabled. Here the employer was found to be guilty of discrimination arising from disability even when it had concluded, on the basis of the available evidence, that the reason for which it dismissed the disabled employee was not caused by their disability.

When it comes to claims for discrimination arising from disability, an employer will only escape liability if it did not know, and could not reasonably have been expected to know, that the employee had a disability, save for arguing that the employee is not disabled at all. The fact that the employer does not know that the disability produced a certain consequence will be irrelevant.

Absence management policies must be objectively justified

The ECJ (European Court of Justice) held in *Ruiz Conejero v Ferroser Servicios Auxiliares SA* that an absence management policy which treats disabled employees whose absence is caused by their disability the same as other employees does not contravene the Directive.

Mr Ruiz Conejero, who suffers from a disability, was subjected to a provision of Spanish national law which provides that an employer is entitled to dismiss an employee for absences from work which amount to 20% of the employee's working hours in two consecutive months. This is subject to the proviso that the total absences in the previous 12 months amount to 5% of working hours, or 25% of working hours in four non-consecutive months within a 12-month period. Mr Ruiz Conjero claimed that, as his absence from work was caused by his disability, the provision discriminated against him because he was disabled.

The Spanish Court argued that the aim of the provision in question was to combat absenteeism. The measure aimed to balance the interests of employers and the workforce by ensuring that employers can maintain their productivity while also ensuring that workers are not unreasonably dismissed. The ECJ agreed that combating absenteeism in the workplace where there is evidence that it is causing material harm both at national level and to employers who have to suffer its consequences represented a legitimate aim. But the ECJ also highlighted that in achieving this legitimate aim, the regulation allowing the dismissal of disabled employees for intermittent work absences which are related to the disability, must not go further than necessary to achieve this aim.

The ECJ's decision will offer comfort to employers and follows the reasoning which has been adopted in UK case law. It's important to remember that employers are not required to completely disregard disability-related absence when operating their sickness absence policies. The employer should consider the periods of absence in detail to assess the level of absence that is attributable to the disability in question as well as what the employer can reasonably sustain. It is also important for the employer to comply with the duty to make reasonable adjustments and explore ways in which it can reasonably support the employee to return to work.

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Practical tips

Make sure you have a well-being agenda in place and that your policies and practices are tailored to suit both the needs of the employees and the organisation. The causes of absenteeism, leaveism and presenteeism should be investigated to ensure that the underlying reasons for them are understood and alleviated.

Good mental health should be promoted, and support offered (such as adjustments to workload or a small change in working hours) if needed. Senior management should be involved and resources accessed for investment into well-being. Finally, managers should all be trained to manage absence effectively, and to recognise the value of well-being at work.

Care should always be taken when dealing with disabled employees:

- Investigate the reasons behind the behaviour of an employee who you know is disabled, even if you do not think their behaviour is disability-related.
- Ensure that if you are managing an employee who is taking frequent periods of sick leave you take reasonable steps to establish whether a disability is the root cause.
- It isn't necessary to completely disregard disability-related absence when operating sickness absence policies, but the duty to make reasonable adjustments and supporting the employee to return to work should always be considered.
- If implementing a phased return ensure that this is discussed and agreed with the employee.

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