

OCCUPATIONAL HEALTH ASSESSMENTS RELATING TO DISCIPLINARY ACTION

The request for Management Referrals for cases where an employee is facing disciplinary action, or where there is an allegation of poor performance or misconduct, is an increasing part of our occupational health practice at Preventative Healthcare. It is common for such individuals to be certificated by their General Practitioner as experiencing a “stress-related disorder” or to be suffering from “work-related stress”. Further, there is an increasing trend for employees to claim that their employer is handling or has handled their investigation poorly and to bring a claim against the employer on the basis that there is a breach of the implied terms of an employment contract, which is usually that of “mutually trust and confidence”.

From a legal perspective, the employer has to ensure that any allegations of alleged poor performance or misconduct are made with reasonable and proper cause, and it is the employer’s responsibility to conduct such investigations in a way that does not destroy or seriously damage the trust and confidence between the employee and the employer.

From the employer’s point of view, the way these investigations are held is extremely important. Even if an employee is found to be negligent and is dismissed, a claim can still be made for stress attributed to the way the employer handles the investigation. Indecision or significant delay in the investigation can often trigger such claims. If such cases are handled sensitively, appropriately and decisively in order to arrive at a prompt resolution, this can often reduce the potential for further claims or criticism.

Employees who are involved in disciplinary proceedings are often certificated by the General Practitioner suffering with symptoms of anxiety and depression. A reasonable employer will obviously be concerned that the impending disciplinary investigation may aggravate these symptoms and be detrimental to an employee’s health. Delaying such disciplinary actions because of medical concerns has to be outweighed against the very real risks of actually prolonging the stress and uncertainty in the individual under investigation, and also in other employees who may be involved.

In selected cases the Manager or HR Advisor may need to seek advice from an occupational health service on two main issues:-

- In order to ensure that there are no medical issues that might have a bearing on an individual’s behaviour or which may have resulted in the poor performance or misconduct that has progressed to a disciplinary process;
- In order to determine whether there is any significant medical issue in the individual’s current medical history or past medical history that will be significantly exacerbated by the disciplinary process proceeding.

It is important from an occupational health perspective to consider fitness to participate in a disciplinary process separately from fitness to undertake a proposed role or type of work. It is often the case that an employee will be fit to participate in a disciplinary process but unfit to return to work, or fit to participate in a disciplinary process before they become fit for their normal duties.

Generally speaking, there are few instances where an individual would be considered unfit to take part in an investigation or in a disciplinary process. Most employees should be deemed fit to participate in such a process if:-

- The individual is able to understand the nature of the disciplinary charges;
- The individual is able to participate in the investigation;
- The individual is able to instruct a representative in his or her defence;
- The individual is unlikely to experience any serious or permanent deterioration in his or her health as a result of the investigation.

References

1. Johnson -v- Unisys 2001, IRLR 279
2. Gogay -v- Hertfordshire County Council 2000, IRLR 703
3. McCabe -v- Cornwall County Council 2002

