

Employment angles: (legal tips from Ken Allison, a consultant and speaker who specialises in exploding the myths and removing the anxieties about employment law)

"I have a member of staff reporting to me that has a 'bad attitude'. They won't take on extra tasks and complain about perceived unfair treatment frequently. Most recently they are complaining about not receiving discretionary sick-pay despite taking several days off without even contacting us or responding to requests for the date of a likely return to work. I think that they are preparing the ground for an Unfair Dismissal Claim".

This question may be a typical issue faced by readers. The fear of an unfair dismissal claim is justified, although there are lots of issues in this case, and a much more significant danger of a claim of discrimination. Unlike 'unfair dismissal', there is no limit to the compensation that somebody could receive if they can show discrimination on the basis of sex, race, age etc.

Life can be tough, and sometimes people get treated unfairly. It's always something to try and eliminate in the workplace, but it is probably only a legal problem if the unfairness is a result of a personal characteristic covered by discrimination legislation, or the person is being victimized for asserting a statutory right such as having time off for dependents, being pregnant or being a member of a trade union.

Another danger is if the unfairness is so serious it could lead to what is called a 'fundamental breach of trust and confidence' – and this could lead to unfair constructive dismissal.

Whilst the fears are justified, the dangers can be avoided. Here are some tips:-

- Firstly, ask yourself whether a reasonable person could possibly regard this person's treatment as unfair. Withholding 'discretionary' sick pay may be unfair if in practice you usually pay it, or if you have paid it to somebody else in similar circumstances. If the answer is 'yes' – do something about it.
- Secondly, ask yourself whether the person could show a discriminatory reason for the treatment that they think is unfair, is it because of them asserting some other right, or is it so serious it could lead to a 'fundamental breach'.

Examples of the latter include asking a Finance Director to take over the duties of the office cleaner, or reducing somebody's pay, hours (unless there is an express right to do so) or holidays. If the answer again is 'yes', and you don't do anything about it, then a claim could be on its way.

In answering these two questions, a yes/yes is highly dangerous, a no/no is probably safe. A combination of yes and no is a matter of judgment!

- If the complaints are being expressed in writing, then they must be treated as a grievance, and the person is entitled to a meeting to discuss their concerns, and an appeal against any decisions that are made.
- Take particular care if this person leaves and complains in a resignation letter. It will constitute a formal grievance, and needs handling as above.
- 'Bad attitude' is usually regarded as poor conduct, and if it is expressed in terms of refusing reasonable instructions, then they should be warned, and if they do not change their approach it would justify terminating their employment.

Extra duties are to be expected from time to time, so do not worry about

something not being in their job description. Extra duties are only a problem if they are unreasonable, and this usually means that they could not possibly have been envisaged from the person's job title, and they are not just temporary.

- If the person is habitually breaking clear rules about absence reporting, this is also poor conduct and could justify warnings (at least one before dismissal, or more if your disciplinary procedure requires more). If you do not have any rules, introduce some.
- If you want to withhold sick pay if someone does not report their absence properly, you really should say so in your policy, and practice this consistently. You probably need to be a bit flexible here, because some times there are valid reasons why people do not report in as required.
- If you eventually dismiss this person for these examples of poor conduct, then remember that as the law stands at the moment, they are entitled to written details of the allegation(s), an invitation to a meeting where they are entitled to a companion, and an appeal against any decision.
- Keep a written record of all conversations, and document how you make any discretionary sick pay decisions. Make sure these decisions are coordinated so that there is consistency across the organisation – discretionary should not mean arbitrary.

Finally, a departure under a compromise agreement may be something that is considered, but don't jump to this conclusion too quickly. Habitually offering compromised departure terms is a dangerous route for any organisation to take, and this case does not sound like a good cause for this approach.

Do not offer it at all, if the answers to the first two questions was a 'no/no'. In the long run, it will be much better to be firm on your standards and expectations, and if employees do not match up to them, start the disciplinary process. Having started this, you will then be in a much stronger position to agree a compromise.

Also, remember that conversations are not 'off the record' (without prejudice) unless there is a genuine conflict between the parties; the starting of a disciplinary procedure (or at least a stated intention to start one) will help you show that there was a conflict.

All reasonable efforts have been taken to ensure that the advice contained in this article represents both best practice, and the law as it stands at the time of publication. It should not be relied on as a substitute for taking advice about specific situations.

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