

## LONG TERM ABSENCE & TERMINATION

*Last Updated: July 2017*

### INTRODUCTION:

- Case law is subject to change and the advise given is for generic cases only based on case law at the time of this draft.
- Any consideration to termination of the employees employment in each and every case should be reviewed by The HR Suite.

### GENERAL PRINCIPLES:

At all times the employee must be given a full opportunity to participate at each level	At all times the employee must be given a full opportunity to present relevant medical evidence and submissions	Ensure we consult with the employee & confirm their job is at risk if it is	Paper Trail at each step is key
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### POLICY:

- Your Company policy must be implemented consistently for all employees from the beginning of each and every absence.
- *Mark Galbraith v. Donegal Meat Processors (UD428/2013)* - EAT dismissal Unfair: Unfair dismissal upheld because the employee was not aware he would be dismissed, and the fact that employer's policy was not consistently applied.

### PROCESS:

- Following a period of a lengthened absence it is important that the below process be followed.
- Prior to this process the employee would be:
  - Following the Company absence procedure in notifying of their absence
  - Submitting medical certificates on a regular basis
  - Communicating with the Company on a regular basis in regards to their absence

**If the above are not being done please contact The HR Suite immediately to begin the process**

<p style="text-align: center; color: red;"><b>ATTEND COMPANY MEETING</b></p> <p><b>Correspond with the employee via a letter asking them to attend a company meeting to discuss their absence.</b></p> <ul style="list-style-type: none"> <li>• This meeting will allow the Company to gauge the seriousness of the employee's absence from work and allow the company to ask for a potential return to work date.</li> <li>• The meeting should be followed up in writing.</li> </ul>	
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## CONSTANT COMMUNICATION

Correspond with the employee via a letter asking them for an expected return to work date.

Letter Re: Request For Return To Work Date

- This letter would be sent at a later stage dependent on the illness certified.
- It will outline that their absence does cause operational difficulties.
- Can they provide a return to work date if outlined by their Doctor?

## APPOINTMENT WITH COMPANY DOCTOR

Ask the employee to attend a medical appointment with the Company Doctor:

- a. A letter will be sent to the employee asking them to attend the Company Doctor.
    - a. Obtain consent form employee to allow medical attendants contact each other
    - b. Details of appointment
    - c. Ensure employee confirms their attendance to doctor
    - d. Ensure employee brings medication to the doctor's appointment
  - b. A letter will be sent to the Doctor explaining your concerns but in the knowledge that the employee will have a right to see the letter if requested. Key points to confirm are:
    - a. the job he/she does;
    - b. the nature of the work;
    - c. the requirements on him/her when at work;
    - d. the accommodations you have made to date;
    - e. how valued he/she is as an employee;
- We need to ascertain what we can do to ensure work is not negatively impacting on his/her health and in an effort to identify if the company can do anything to help his/her medical condition within his work environment as his/her health is our number one priority.

***Josephine Hennessy v. Waterford Child Care Ltd (UD1758/2012)*** - EAT upheld dismissal as being fair. EAT rejected claim for unfair dismissal by the claimant who was dismissed while on long term sick leave following workplace injury when company doctor reported that her condition is worsening.

*Why do I do if the evidence from the Company Doctor and the employees Doctor conflict?*

- It is advisable, should a situation of this nature occur, that the Company seek an independent source to conduct an independent medical review.
- This would be discussed with the employee in advance of scheduling.

## **FOLLOW UP MEETING TO DISCUSS REPORT**

Follow Up Meeting With Employee To Discuss The Next Steps As Per The Doctors Report

- It is advised that the Company contact the employee and invite them to a meeting to discuss the recommendations within the doctor's report.
- If, appropriate, the Company would discuss the next steps of the risk assessment.
- Ask if the employee if they have any questions or concerns.
- A follow up letter would be sent to the employee summarizing the minutes of the meeting.

## **FIT TO RETURN WITH LIMITED CAPABILITIES**

If the Employee is certified fit and able to return to work but with limited capabilities a risk assessment must be conducted.

### **Risk Assessment**

- The Company is obliged to carry out a risk assessment in accordance with Section 2 (6) of the Safety Health and Welfare Act 2005 and take 'reasonably practical' steps to assist the employee.
- This assessment will provide the Company with guidance as to what to do next in terms of his/her ability to work in specific areas of the Company.
- The risk assessment will identify the hazards and ensure that he/she has a safe system of work.
- This should be done before he/she returns to work to ensure that the role is a suitable role they are coming back into.
- Failing to carry out the risk assessment will leave the Company exposed if he/she does hurt himself/herself at work in terms of a potential personal injuries claim particularly in light of the fact that the Company are now on notice of the extent of his injury.

The employer has a duty of care to do this under the 2005 Act.

**William Hayes v. Boliden Tara Mines Ltd (UD1218/2014)** - EAT upheld dismissal as being fair. EAT rejected claim of unfair Dismissal to the claimant dismissed after he was passed as fit only to take up light duties following a long period of certified sick leave due to a serious workplace accident.

## **FOLLOW UP MEETING AFTER RISK ASSESSMENT**

**Conduct a review of the risk assessment and invite the employee to a meeting to discuss the alternative options the Company can provide him/her as per recommendations in the Risk Assessment Report.**

- Following these steps you will be in a position to determine the next steps as you will have the full medical evidence.
- It would be important that the employee signs off and agrees to the recommended steps within the risk assessment.
- A follow up letter should be issued to the employee outlining the steps the company is taking in compliance with the recommendations within the risk assessment.
- For example:

- That you understand your own responsibilities in relation to taking care of your back and assess all manual handling tasks before attempting to move or lift loads.
- That you are not to be involved in movement of heavy bales from compactor to outside storage unless a separate assessment has been completed.
- All internal trollies and combis to be in correct working condition.
- Additional footsteps for shop floor and a ladder for use within the stock room area.
- Finally, a reduced working week to reduce exposure to the repetitive nature of the work

***Doherty v. Mark & Spencer [2013] 5 JIEC 0102*** – EAT upheld dismissal as being fair

Employee employed as sales advisor for over 7 years. Employer advised that employee could not continue to work as sales advisor following non work related injury. Transferred to food section (café) as alternative. She refused to take offer and was absent on sick leave. Employer wrote notifying the employee they could not keep her position open indefinitely and warn of possible dismissal if she did not return to work on 10<sup>th</sup> May 2010. She was subsequently dismissed on ground of ill health.

**INCAPABLE OF RETURNING TO WORK**

**If The Employee Is Incapable Of Coming Back To Work the below is the procedure.**

- Section 16 (1) of the Employment Equality Act 1998 states that an employer is not obliged to retain an employee who is not fully capable of doing the job he/she is required to do.
- However, there are steps to be taken before an employer can reasonably arrive at that stage with an employee.
- The case law requires a two stage enquiry:

1. The employer must first look at the factual position concerning the employee's capacity - this will involve looking at the medical evidence.

2. If it becomes apparent that the employee is not fully capable under S. 16 (3) of the Employment Equality Act 1998, the employer is required to consider what, if any, special treatment or facilities are required to allow the employee carry out a role. This is where the risk assessment applies. The cost of the special treatment or facilities must be considered in light of the size of the company.

- If the employee cannot give a return to work date and there is medical evidence to support that either the employees condition is worsening as a result of a severe medical condition the following test as requirements that the employer must comply with in order to have a fair dismissal:
  1. It was the ill-health which was the reason for his/her dismissal;
  2. That this was substantial reason.
  3. That the employee received fair notices that the question of his dismissal for incapacity was being considered; and
  4. That the employee was afforded the opportunity of being heard.

***Mark Galbraith v. Donegal Meat Processors (UD428/2013)*** – EAT dismissal Unfair

Unfair dismissal upheld because the employee was not aware he would be dismissed, and the fact that employer's policy was not consistently applied.

***Kennedy v. Leonard & Tolan [2011] 5 JIEC 1101*** - EAT upheld dismissal as being fair. Claimant employed as Secretary from 2007 till she was dismissed in September 2009. Initial employment issues concerned punctuality and pay rise. Employer discussed issues with the claimant at various meetings. However, claimant a year before her dismissal claimed she was bullied and went on sick leave for some time. To off load her work load, employer employed a temporary secretary to assist. In January 2009, claimant again suffered ill health and went on sick leave from 30<sup>th</sup> March. In April, her employer suggested mediation and invited her to attend. She claimed she could attend because she was medically unfit.

Following further attempt made to resolve her workplace concerns by way of mediation, she was dismissed from her employment. EAT upheld dismissal in the circumstances holding that the employer was reasonable in relation to the employee.

## REFUSAL TO ENGAGE WITH THE COMPANY

### If The Employee Refuses To Engage With The Company At Any Stage:

Section 16 (1) of the Employment Equality Act 1998 states that an employer is not obliged to retain an employee who is not fully capable of doing the job he/she is required to do.

If the employee has refused to engage with the Company then a decision has to be made by the employer to:

- a) Continue to let the employee submit medical certificates regarding the absence
- b) Start the process of terminating the employee.

#### A:

- Previously employers maintained option A as the long term sick employee was not a cost to the business.
- Due to the Workplace Relations Act 2015 employees now accrue annual leave on certified sick leave from the 1<sup>st</sup> August 2015.
- Therefore there is an onus on the employer to pay accrued annual leave for a period of 15 months after the end of the leave year should the employee resign or be terminated after this date.

#### B:

- Should Option B be decided upon an employer should ensure that the Company has acted reasonably at all times.
- The employer must have informed the employee on numerous occasions, in writing, that the position cannot be kept indefinitely open.
- The employer must have tried to continuously progress the process above consistent with the Company policy.
- The employer must have ensured that if there is conflicting evidence an independent source must be sought.
- The employer must ensure that all letters confirm that should the employee continue to not co-operate and comply with the company procedure that it will ultimately lead to the employees termination.
- The employer must ensure that all grievance issues were referred to within the paper trial and offered the employee an opportunity to raise their grievance.

Should the issue proceed to termination:

- A letter of termination needs to be given to the employee.
- A summary of the situation from the beginning of the absence needs to be outlined.
- The letter should state that the company was reasonable at all times and outline what measures the Company took
- The letter should state that the Company has been left with no option but to terminate the employment.
- An appeal mechanism needs to be stated as per the disciplinary process.

**\*IMPORTANT NOTE\*** Due to the introduction of the new Workplace Relations Act 2015 employees now accrue annual leave on certified sick leave from the 1<sup>st</sup> August 2015 and this is now a cost for the employer. For this reason employers have been trying to manage absence rather than leave it continue as before. Case law, for this reason, is not as developed as other areas of HR and at all times any decision to terminate must be made on a case-by-case basis in line with current case law and independent advice from The HR Suite.

## QUESTIONS AND ANSWERS

**What is the timeline for this process?**

- There is no set timeline for the above process.
- Employees should be kept in constant contact with throughout their absence.
- It is important to note that timeline is different for each individual employee as illnesses/conditions differ for each individual.

**What happens if a medical certificate relates to work related stress?**

- The same process is followed regardless of what condition is stated on the medical certificate.
- However it is noted that the first certificate that is received that states '*work related stress*' a letter is advised to be given to the employee outlining the grievance procedure.
- It is important that 'stress' is not mistaken for 'work related stress'.
- In the case of 'stress' it may be related to the employees personal life.

**What happens if a medical certificate relates to a work related injury?**

- Follow the Company incident procedure
- Ensure an accident/incident report form is submitted by the employee
- Inform your insurance Company
- There is no onus on the Company to pay sick pay to an employee who has had an accident at work.
- A common question is 'can we pay our employee for their sick leave following their absence at work although we do not have a sick pay policy?'
- This matter is a decision for senior management. It is important to note that this may set a precedent for other employees.
- In addition, as with all absences / illnesses/ conditions the length of absence may be undetermined and may extend for years.

**What happens if an employee resigns during their certified absence?**

- If an employee resigns during their absence it would be important to ask the employee to reconsider their decision and give a set date to confirm by i.e. a week.

- If there is a mention to a grievance or if Management are aware of an unresolved issue that was not brought via the formal channels by the employee - it would be important to give the employee a copy of the grievance procedure and outline that the Company would address this in a timely manner.
- This step would lessen the extent of a claim of constructive dismissal against the Company as if the employee decides to progress with their resignation it will show they did not exhaust all internal procedures.

**What happens if the employee has an outstanding grievance/disciplinary and then goes on sick leave?**

- If an employee goes on sick leave whilst a grievance/disciplinary investigation is being completed it would be important for the Company to write to the employee and confirm that the process is now paused whilst the employee is absent due to sick leave.
- If the employee wishes to continue with the grievance/disciplinary investigation while on sick leave it is advised that the employee gives a certificate from his/her Doctor outlining he/she is fit and able to participate in the process.

**What happens if the employee refuses to co-operate?**

- In cases where an employee refuses to co-operate the above process must be completed as much as possible.
- Constant communication is to be maintained with the employee via written communication so that a paper trail is maintained.
- Everything reasonable must be done to facilitate requests by the employee for example; the employee has stated she feels uncomfortable meeting the employer – suggest a third party meets with the employee.
- The employee refuses to attend the company doctor – schedule another appointment for the employee.

**CHECKLIST**

<b>In Every Case Of Dismissal On Ground Of Illness:</b>	<b>Y/N</b>
• The nature, length and effect of the illness or disabling event	
• The need for the employer for the work to be done	
• The employer has acted reasonably	
• The employer has attempted to arrange several meetings	
• Whether the employer carried out reasonable investigation [if the employee had a grievance]	
• The employer consulted with the employee and warned of impending action	
• Whether the employer made reasonable effort to consider other alternatives e.g. flexible working, finding other work to the employee etc.	

**CONTACT THE HR SUITE:**

# THE SUITE

FOR PEOPLE AND BUSINESS

If you have any queries please do not hesitate to contact our office on 066-7102887 and we would be happy to deal with your query.

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