

Dismissing an employee who had 406 sick days in four years was unfair and discriminatory

In a recent case the Employment Tribunal held that a dismissal was unfair and discriminatory despite significant periods of sickness absence. While the Tribunal found that the reason for dismissal was the historic sickness absences, it held that the employer did not act reasonably in treating that as a sufficient reason for dismissal, partly because it had failed to recognise that the employee was disabled. Further, dismissal on the basis of historic absences, rather than the propensity for future absences, could not objectively justify the discriminatory dismissal.

What happened in this case?

Ms Kitching was employed as a cleaner at the University Hospitals of Morecambe Bay NHS Foundation Trust (**the Trust**), cleaning the Lancaster Suite, from 2019 until her dismissal in June 2023. Over her employment, she accrued 406 days of absence across 29 occasions in 4 years, with approximately 85% of her absences linked to her mental health conditions, which included bipolar disorder and anxiety.

Ms. Kitching asked to work shorter hours or fewer shifts while remaining on the Lancaster Suite, where she was familiar with the staff and processes. She said that this adjustment would help her manage her anxiety and improve her attendance.

However, her request was denied, with the Trust stating that reducing her hours would require her to work in different areas of the hospital, which she would have found stressful and disruptive.

The Trust's "Attendance Management at Work Policy" outlined absence triggers, where exceeding certain thresholds could lead to formal review and potential dismissal. However, the policy also referenced the "Support and Retention of Disabled Employees Policy", which allowed for flexibility in managing absences for employees with disabilities. However, the Trust applied the stricter absence thresholds to Ms Kitching.

The Trust dismissed Ms. Kitching based on her history of absences.

What was decided?

The Tribunal found that Ms Kitching's dismissal was unfair and was based on a fundamentally flawed and discriminatory process. There was no chance that Ms. Kitching would have been fairly dismissed if the Trust had followed a fair procedure. Despite multiple fit notes and occupational health reports confirming her disability, the Trust failed to recognise or accommodate her conditions adequately and there was a *"complete lack of an enquiring mind into whether the claimant was disabled or not"*.

The Trust had also failed to make reasonable adjustments, particularly by not adjusting her shift patterns (which would have improved her attendance) or tolerating a higher level of absence in accordance with its own policies. The Tribunal had

particular regard for the size and resources of the Trust when considering this.

The Tribunal found that the Trust had dismissed Ms Kitching due to absences directly linked to her mental health condition and her claim for discrimination arising from a disability was successful. The Trust failed to justify the dismissal as a proportionate means of achieving a legitimate aim, particularly given that its own policies permitted greater flexibility in managing disability-related absence, which had been ignored.

In particular, the Tribunal criticised the Trust's use of a backward-looking process in assessing Ms Kitching's absences. Instead of evaluating her current and future capability to work with reasonable adjustments in place, the Trust focused primarily on her past absences without considering their context or the potential improvements that could have been made. This retrospective approach failed to account for the positive impact any reasonable adjustments would have had.

What does this mean for employers?

- **Recognising disabilities:** Employers must consider whether an employee is disabled under the Equality Act 2010 where an employee has heightened levels of absence, and should carefully consider the medical evidence provided, including Occupational Health reports and fit notes.

- **Accommodating disabilities:** Employers should always consider what reasonable adjustments can be made to help get an employee back to work. Employers should commission Occupational Health reports for employees who have period of absence, or extended absence, which can provide advice in this regard.
- **Following internal policies:** If an employer has policies regarding the treatment of disabled employees, these must be adhered to.

[Kitching v University Hospitals of Morecambe Bay NHS Foundation Trust](#)

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