

**Society of Radiographers**  
**Sickness Absence**

**A Negotiator's Guide**

# **Table of Contents**

- INTRODUCTION..... 3**
- AGENDA FOR CHANGE SICK PAY ARRANGEMENTS..... 4**
  - HOW OCCUPATIONAL SICK PAY IS CALCULATED ..... 4
  - WHEN OCCUPATIONAL SICK PAY IS NOT PAYABLE ..... 5
  - MEDICAL EXAMINATION ..... 6
- SICKNESS ABSENCE POLICIES..... 6**
  - KEY CHARACTERISTICS OF A SICKNESS ABSENCE POLICY..... 6
  - ABSENCE RECORDING..... 7
  - ABSENCE MONITORING ..... 7
  - REPRESENTING MEMBERS IN PROCEDURE ..... 8
  - MEDICAL INVESTIGATION/OCCUPATIONAL HEALTH REFERRAL..... 10
    - Consultation ..... 9
    - Medical Investigation ..... 10
    - Redeployment and Retraining..... 11
    - Adjustments to Working Arrangements..... 11
    - Consideration of Alternative Employment..... 13
    - Retirement on the Grounds of Ill Health ..... 14
    - Members Paying Additional Voluntary Contributions..... 14
- DISMISSAL..... 15**
  - TERMINATION OF EMPLOYMENT WHILST ON SICK LEAVE ..... 15
  - DISMISSAL ..... 16
  - PERIODS OF NOTICE ..... 17
  - APPEALS..... 17
  - EMPLOYMENT TRIBUNAL ..... 18
  - NHS INDUSTRIAL INJURIES SCHEME ..... 19
    - Temporary Injury Allowance..... 19
    - Permanent Injury Allowance ..... 19
  - PURSUING A CLAIM FOR COMPENSATION FOR AN INDUSTRIAL INJURY..... 20
- THE LAW ON DISABILITY - THE DISABILITY DISCRIMINATION ACT 1995..... 21**
  - WHAT IS A DISABILITY? ..... 21
  - WHAT IS MEANT BY "SUBSTANTIAL" AND "LONG-TERM" ? ..... 21
  - WHAT ARE "NORMAL DAY-TO-DAY ACTIVITIES"? ..... 22
  - WHAT KINDS OF IMPAIRMENT WOULD AFFECT "NORMAL DAY-TO-DAY ACTIVITIES"? ..... 22
  - WHAT ACTIONS BY AN EMPLOYER WOULD COUNT AS DISCRIMINATION ? ..... 20
  - WHAT ACTIONS BY AN EMPLOYER WOULD NOT COUNT AS DISCRIMINATION ? ..... 23
  - WHAT ARE "REASONABLE ADJUSTMENTS"? ..... 23
  - HOW DOES THE DDA AFFECT PEOPLE WHO ARE ON SICK LEAVE ? ..... 24

## **INTRODUCTION**

This guide is intended to take accredited SoR reps through the key issues, policies and procedures, which may be experienced when representing members.

The guide also covers sickness related issues, which may arise as a result of a sickness absence case. This includes information on the NHS Injury Benefits scheme, pursuing a claim for compensation for an Industrial Injury and brief details of the provisions in the new Disability Discrimination Act.

By bringing all this information together in one document, the SoR hopes that this guide will assist reps in carrying out their duties, and provide much needed information to any members who fall ill or suffer an injury.

# **AGENDA FOR CHANGE SICK PAY ARRANGEMENTS**

Section 14 of the Agenda for Change Terms and Conditions of Service Handbook contains the provision of contractual sick pay and the way such payments are calculated.

The Occupational Sick Pay scheme contained in the Agenda for Change Terms and Conditions of Service Handbook is as follows:

<b>Qualifying period</b>	<b>Entitlement</b>
During the first year of service	One month's <sup>1</sup> full pay and 2 months' half pay
During the second year of service	2 months' full pay and 2 months' half pay
During the third year of service	4 months' full pay and 4 months' half pay
During the fourth and fifth years of service	5 months' full pay and 5 months' half pay
After completing 5 years of service	6 months' full pay and 6 months' half pay

Employers have discretion to extend the period of sick pay on full or half pay beyond the scale set out above in exceptional circumstances.

The definition of full pay will include regularly paid supplements including any recruitment and retention premia, payments for work outside normal working hours and high cost area supplements. Sick pay is calculated on the basis of what the individual would have received had he/she been at work.

## **How Occupational Sick Pay is calculated**

The period during which sick pay should be paid and the rate of sick pay for any period of absence is calculated by deducting from the employee's entitlement on the first day of sickness the aggregate periods of paid sickness absence during the twelve months immediately preceding that day.

In aggregating periods of absence due to illness no account will be taken of:

---

<sup>1</sup> For the purpose of this calculation, any period of absence due to illness which is not covered by the provisions of this Handbook shall be treated as if it were a period of absence due to illness.

- ◆ Unpaid sick leave;
- ◆ Injuries or diseases sustained to members of staff in the actual discharge of their duties through no fault of their own;
- ◆ Injury resulting from a crime of violence connected with or arising from employment (but not sustained on duty) where the injury has been the subject of a payment by the Criminal Injuries Compensation Board;
- ◆ As above, but an injury which has not been the subject of payment by the Board on grounds that it has not given rise to more than three weeks loss of earnings or was not one for which compensation above the minimum would arise.

Section 12 of the Handbook lays out the rules governing reckonable service for the purpose of determining sick pay entitlement.

- ◆ An employee's continuous previous service with any NHS employer counts as reckonable service in respect of sick pay, and;
- ◆ Employers have the discretion to take into account any period or periods of employment with employers outside the NHS where these are judged to be relevant to NHS employment.

Full pay must not exceed normal pay. The combined addition of any statutory benefits and statutory sick pay to occupational sick pay must not exceed normal pay.

If hospital treatment is required, a certificate (which can be a self-certificate) has to be submitted on entry to hospital; when the incapacity has lasted for over seven days, a medical certificate is required on discharge.

### **When Occupational Sick Pay is not payable**

Occupational sick pay is not payable where:

- ◆ An accident is due to active participation in sport as a profession;
- ◆ It is proved that there is contributory negligence;
- ◆ Damages are receivable from a third party in respect of an accident. However, the employer may advance an amount equal to sick pay, subject to the employee agreeing to refund the total amount, or the part of the amount corresponding to any loss of earnings payment made in the damages awarded;
- ◆ The employee's employment contract is terminated by reason of permanent ill-health, infirmity or age, without prejudice to the contractual period of notice;

## **Medical examination**

The employer may at any time require an employee absent from work due to illness to attend an examination by a medical practitioner. Staff do not have to be off sick to be referred by their employer for medical examination. The employer will meet the cost of any medical examination.

### **Reps Checklist**

- ◆ **Make sure you and your members are familiar with the terms of the Trust's scheme**
- ◆ **Make sure members are aware that they have the right to be represented by the Society of Radiographers in respect of cases of alleged failure to observe the scheme's conditions or conduct prejudicial to recovery**

## **SICKNESS ABSENCE POLICIES**

Representatives should make sure that they have a copy of the Trust's policy and are familiar with its operation - members may well approach reps with queries about how their sickness absence has been handled.

### **KEY CHARACTERISTICS OF A SICKNESS ABSENCE POLICY**

- ◆ There will generally be an introduction stating the principles and objectives of the policy. It will clarify the relationship between this policy and others, e.g. the disciplinary procedure;
- ◆ There will usually be a definition of short-term and long-term absence;
- ◆ The policy should talk about the sort of sickness absence records that managers must keep. See the section on **Absence Recording;**
- ◆ The policy may state how sickness absence should be notified and that return to work interviews must be conducted with staff when they return from a period of sickness absence. See the section on **Absence Monitoring;**
- ◆ The policy will then go on to describe the procedure under which frequent periods or long periods of absence will be dealt with. This may include informal counselling, formal interviews at various levels and should make clear that a member can take a representative with them to any or all of

6

© SoR 1998  
Revised 2005

MB

these interviews. See the section on **Representing Members in Procedure;**

- ◆ The procedure should detail arrangements for a medical referral to Occupational Health. See the section on **Occupational Health Referral;**
- ◆ The procedure should detail arrangements for re-deployment and retraining. See the section on **Consideration of Alternative Employment;**
- ◆ The procedure should detail arrangements for dismissal on the grounds of ill health, and early retirement on the grounds of ill health. See the section on **Retirement on the grounds of ill health .**

## **ABSENCE RECORDING**

Many Trusts have changed the way they record absence. This may include:

- ◆ The computerisation of absence recording;
- ◆ The responsibility for collecting absence information being devolved to line managers from the HR function;
- ◆ Line managers required to produce regular reports and analysis of absence data;
- ◆ The way in which absence rates are calculated may be changed, for example from days lost to hours lost.

As a result of these changes, Trusts are now much more aware of absence rates and therefore can clearly target these for reductions.

Notification procedures and payment of sick absence pay when injuries are connected with other insured employment will be for local determination.

### **REPS CHECKLIST**

- ◆ Do you know how absence is recorded in your department?
- ◆ Are your members aware of their responsibilities regarding the reporting of sickness?

## **ABSENCE MONITORING**

With the improvements in absence recording comes a greater emphasis on absence monitoring. Historically, if monitoring was done at all it was on an ad hoc basis, usually by the HR department taking information on days lost directly from payroll.

An Audit Commission report in 1994 attacked NHS employers for the low level of absence recording and monitoring which took place. However since then, around 90% of Trusts now monitor sickness absence in a structured way. This may include:

- ◆ Regular reports comparing absence rates and targets by departments or directorates;
- ◆ Trust Boards receiving regular reports on sickness absence.

#### **REPS CHECKLIST**

- ◆ Is the staff side involved in discussions about sickness absence monitoring?
- ◆ Is the Trust Health and Safety Committee involved in monitoring sickness absence?
- ◆ Are departmental monitoring reports shared with the staff in your department?

#### **REPRESENTING MEMBERS IN PROCEDURE**

Monitoring absence is only one way of managing attendance and most Trusts will have in place a procedure which is used to implement the policy of reducing absence.

Local reps may be called on to represent members who are called to sickness interviews under the procedure, so it is important that SoR Reps are familiar with the procedures, which operate in their Trust.

Arrangements to review the absence may be set in place well before the sick pay period expires.

The procedure may include a **Return to Work Interview**, which would take place with a member of staff following a period of sickness absence. These interviews should be informal and should not result in any action being taken against the individual: however, records of return to work interviews or discussions can subsequently form part of any more formal review of attendance, so members should be made aware of this.

Most Trusts make a distinction between how long-term absence, where termination of employment or ill-health retirement might be considered after a period of support, and short-term frequent or persistent absence are handled. For this reason most Trusts operate a separate procedure within the sickness absence policy for dealing with cases where frequent spells of unrelated absence create an "unacceptable" or "irregular" attendance pattern - **Short-Term Absence**. In many cases this procedure will use a "trigger" i.e. where a

8

© SoR 1998  
Revised 2005

MB



certain number of absences triggers a specific managerial intervention, usually a formal interview. At such interviews members should have the right to be represented by their local SoR representative. More and more Trusts are able to take action against staff in this type of case because of improved absence recording and monitoring and reps should ensure that they are familiar with the short-term sickness absence procedures and that members are aware of their rights to representation.

**Long-Term Absence** tends to be handled differently by Trusts, but it is just as important for reps to be aware of the procedure for handling such cases, so that they can advise and support members at what is a very difficult time.

Procedures for handling long-term absence generally have a number of stages, including the following:

- ◆ A formal interview;
- ◆ Referral to Occupation Health;
- ◆ A further interview to review the outcome of the referral;
- ◆ Consideration of a phased return to work package;
- ◆ Consideration of redeployment and retraining opportunities;
- ◆ Consideration of termination of employment on the grounds of capability, and options for ill health retirement.

Many of these points are covered in more detail in later sections.

#### **REPS CHECKLIST**

- ◆ Have you got a copy of the Trust's Sickness Absence policy?
- ◆ Does your Trust operate return to work interviews, and if so are they being used correctly and in accordance with the procedures?
- ◆ Are members aware that the records of such interviews may be used at a later date?
- ◆ Have you got copies of the management procedure for dealing with short-term absence?
- ◆ Are your members aware of the "triggers" in the procedure?
- ◆ Are your members aware of their rights to be represented at sickness absence interviews?
- ◆ Have you got copies of the management procedure for dealing with Long-term Absence
- ◆ Are your members aware of their rights to be represented at sickness absence interviews under this procedure?

## **Medical Investigation/Occupational Health Referral**

An employer must follow a fair procedure when dealing with employees who are on long-/short-term sick leave. A fair procedure consists of three main elements:

1. Consultation;
2. Medical investigation;
3. Consideration of alternative employment.

### Consultation

The employer must consult the employee and inform him or herself of the true medical position.

Consultation should include:

- ◆ Discussions at the start of the illness and periodically throughout its duration;
- ◆ Personal contact between the employer and employee;
- ◆ Consideration of the employee's opinion on her/his condition;
- ◆ Consideration of an offer of alternative employment.

### **Reps Checklist**

- ◆ Has the Trust consulted the employee throughout the procedure?
- ◆ Has the employee had an opportunity to give their own opinion on their medical condition?
- ◆ Has the Trust informed the employee of all the relevant procedures which will be followed?

### Medical Investigation

A failure on the employer's part to seek proper medical advice and determine the true medical position is likely to result in an unfair dismissal (see section on **Dismissal**).

The first medical opinion sought should be that of the employee's own doctor. The doctor cannot be approached, however, without the employee's consent because of the doctor's duty of confidentiality to their patient.

Section 14, paragraph 14.13 details how an NHS employer,

*"May at any time require an employee absent from work due to illness to attend and examination by a medical practitioner. Furthermore, staff do not need to be off sick to be referred by their employer for a medical".*

Although there is no **legal compulsion** on the employee to submit to a medical examination, there is a **contractual requirement**.

This would normally be a referral to the Trust's occupational health doctor. Whilst an occupational health opinion may be reasonably requested by the Trust, it should not necessarily be relied upon. The employer must have **all** the relevant facts that can be reasonably discovered and it may therefore be necessary to refer the employee to a specialist.

The employer should meet expenses, which are incurred in connection with a requested medical examination - Section 14, paragraph 14.13.

### **Reps' Checklist**

- ◆ Has the employer conducted a thorough medical investigation?
- ◆ Should the employer be seeking a specialist's opinion?
- ◆ Has the employee been consulted throughout the investigative process?
- ◆ Have all occupational health reports/specialist reports been made available to and discussed with the employee concerned?

## **Redeployment and Retraining**

### **Adjustments to Working Arrangements**

Before considering alternative employment the employer should consider with the employee what adjustments might be made to the working arrangements in their current job in order to allow them to continue.

The following are some examples of adjustments that employers could introduce either temporarily while the worker regains strength, mobility or capacity to work, or more permanently as reasonable adjustments to allow disabled workers to continue working:

#### *Adjustments to Work Process*

- A phased return to work to build up strength, for example building up from part-time to full-time hours over an agreed and appropriate time scale.

- A permanent change to working hours.
- Changing the individual's working hours to allow travel at quieter times, or flexible working to ease the work/life balance.
- Helping with transport to and from work, for example organising lifts to work, or finding out what help may be available to a disabled worker through the Access to Work scheme.
- Home working (providing a safe working environment can be maintained).
- Time off during working hours for rehabilitation assessment or treatment.

#### *Adjustments to Premises*

- Moving tasks to more accessible areas and closer to washing and toilet facilities.
- Adapting premises, for example providing a ramp for people who find steps difficult, improving lighting where sight-impaired people work, providing clear visual signs and alerts for deaf workers.

#### *Adjustments to the Job*

- New or modified equipment and tools, including IT, modified keyboards etc.
- Modified workstations, furniture, and movement patterns.
- Modified work patterns or management systems to reduce pressures and give the worker more control.
- Allocating some of the disabled person's duties to someone else.
- Re-training.
- Adjusting the premises.

Further information can be found in the Health and Safety Executive publication, '**Working Together to Prevent Sickness Absence Becoming Job Loss**' ([www.hse.gov.uk/pubns/web02.pdf](http://www.hse.gov.uk/pubns/web02.pdf)).

Under the Disability Discrimination Act 1995 the employer is required to make reasonable adjustments where working arrangements and/or the physical features of premises cause a substantial disadvantage for a disabled person in comparison with people who are not disabled.

The Act gives examples of reasonable steps which employers might have to take including:

12

MB

© SoR 1998  
Revised 2005

1. Altering working hours;
2. Allowing time off for rehabilitation or treatment;
3. Allocating some of the disabled person's duties to someone else;
4. Transferring the disabled person to another vacancy or another place of work;
5. Giving or arranging retraining;
6. Acquiring or modifying equipment;
7. Adjusting the premises.

So for example it might, with reasonable alteration to premises, be possible for a radiographer working in CT or MRI to continue to work. In fact The Society of Radiographers reached agreement with one employer which enabled a radiographer who is a wheelchair user to continue to work in the CT department.

### **Consideration of Alternative Employment**

When considering alternative employment a greater or lesser degree of training will often be necessary. Again the test as to what training should be given is one of reasonableness.

In the case of radiographers the most likely alternative employment will be within the profession.

For example:

A radiographer with a back problem may transfer from an area which requires a large degree of heavy lifting to an area where a much lesser degree of lifting is required.

A radiographer with occupational asthma may move into an area where there is no contact with processing chemicals e.g. ultrasound, MRI, CT.

Moving within the profession may require a degree of retraining at a post graduate level but if the employee at the end of that training will be able to perform satisfactorily in the post then such investment should not be considered unreasonable.

It is unlikely that the employer will agree to fund the employee to retrain for a new profession e.g. physiotherapy, speech and language therapy, medicine.

Radiographers in management positions should also be considered for general manager positions. This would be particularly useful in the case of back injuries or occupational asthma.

Other radiographers who have the appropriate background and interest should also be considered for posts in information technology, finance, training, clinical audit etc. Again a reasonable degree of retraining should not be refused.

**R e p s****C h e c k****L i s t :**

- Has the employer considered fully the possibilities for alternative employment?
- Has any necessary training being assessed?
- If training has been refused has the employer acted reasonably?
- Has the possibility of making reasonable changes to the employees current job or their working environment been fully considered?

If earnings are reduced through ill health (reducing hours or moving to a different job) then employees may, *if the employer agrees*, be able to have their period of membership at the higher rate of pay preserved, providing they ask the employer within three months.

**Retirement on the Grounds of Ill Health**

NHS Pension Scheme Benefits may be paid early to scheme members and some former members who retire early because they are unable to carry out their duties due to permanent ill health. Termination of a contract by the employer because of ill health will not automatically lead to the early payment of a pension. If members retire early in these circumstances they will qualify for early payment of scheme benefits if they have at least two years membership or they have chosen to leave the scheme, and they are still working in the NHS, and they have at least two years' preserved membership.

The amount of extra membership members will get will depend on how long they have been a member of the Scheme and their age at retirement. If members have between five and ten years membership their membership will be doubled, subject to the maximum they could have had by age 65. If they have more than ten years membership either their membership will be increased to twenty years, subject to the maximum they could have had by age 65, or their membership will be increased by six and two thirds years, subject to the maximum they could have had by age 60.

If members are seriously ill they may be able to exchange their Ill Health Retirement Pension and lump sum, including any increased membership, for a bigger lump sum payment. This is called commutation. It can apply in certain cases where a member becomes terminally ill and does not expect to live longer than a year.

**Members Paying Additional Voluntary Contributions**

If members are buying additional years of membership or an un-reduced lump sum by deductions from their pay they will not have to make any further payments and they will be credited with the full amount of the additional years

of membership they would of had at the end of their contract provided that they are under the age of 60 when they have to retire on the grounds of ill health and they started to pay for the additional years more than a year before they applied for early retirement.

Early retirement on the grounds of ill health must have the permission of the NHS Pensions Agency and members are strongly advised to seek advice from the Society of Radiographers before considering this option.

More information can be found in NHS Pensions Agency publications available at, [www.nhspa.gov.uk/scheme\\_booklets.cfm](http://www.nhspa.gov.uk/scheme_booklets.cfm).

## **DISMISSAL**

### **Termination of employment whilst on sick leave**

If the employee is still employed but has exhausted the sick pay entitlement, it would normally be sensible for the employer to act promptly in order to consider whether or not the employment can continue. In reality this often happens much earlier in the sick pay period, usually as the period of full pay is ending. This can have advantages for the employee if they are retiring on ill health grounds, since s/he escapes the hardship of half pay. However, the mere fact that the employee has exhausted her/his rights will not justify dismissal - after all, an employee might be just about to recover. Agenda for Change Terms and Conditions Handbook, paragraph 14.14 states that:

*"After investigation, consultation and consideration of other alternative posts, and where there is no reasonable prospect of the employee returning to work, employers will have the option to terminate employment **before** the employee has reached the end of the contractual paid sick absence period, subject to the employers' agreed sickness absence policies and procedures".*

Employers will not normally be able lawfully to dismiss employees for **short sickness absence**, but this does not mean that dismissal can never occur.

Employers dismissing for sickness will normally be required to have:

- ◆ Given warnings;
- ◆ Consulted with a doctor about the nature of the illness; and consulted with the employee to see if there are alternatives to dismissal, for example employing the employee in a different job or making adjustments to their current job and workplace in order to facilitate the employees return to work.

Although the employer is obliged to take steps to discover the true medical position before dismissing, the overriding principle is one of "reasonableness".

#### **Reps Checklist**

- ◆ Has the employer followed the sickness absence procedure?
- ◆ Has the employer obtained a medical opinion?

- ◆ Have the possibilities of alternative employment or adjustments to the member's current job been considered?

## **Dismissal**

A worker is dismissed if one of the following occurs:

- ◆ The employment contract is terminated with or without notice;
- ◆ A fixed-term contract is not renewed;
- ◆ The employee leaves, but claims that it is a result of the employer's conduct (constructive dismissal);
- ◆ A redundancy takes place;
- ◆ A woman with the right to return to work after maternity leave is not allowed to do so;
- ◆ The employer claims there has been a "self dismissal"; or
- ◆ There is a refusal to re-employ after a take over.

Just because an employee's sick leave entitlement runs out, this is not an automatic dismissal. The employee can continue to be employed although they are not being paid. It is important to ensure that the employee is informed of the position regarding their employment once their sick leave entitlement is exhausted. Paragraph 14.9 of the Agenda for Change Terms and Conditions gives the employer discretion to extend the period of either full or half pay in particular circumstances and this may be worth pursuing if there is a possibility of the member returning to work in the near future.

Under *section 92 of the Employment Rights Act 1996* workers with at least one years' continuous service have the right to get a written statement from the employer within 14 days giving the reason(s) for the dismissal.

## **Reps Checklist**

- ◆ Has the member been notified of their employment status?
- ◆ Has the member been dismissed?
- ◆ Has the member received written reasons for their dismissal?



## **Periods of Notice**

An employee is entitled to receive:

- ◆ The period of notice applicable under their contract; or
- ◆ The statutory minimum; or
- ◆ Payment in lieu of notice.

An employee on a permanent contract has a right to notice if the contract is terminated. The notice to end an employment contract must be stated in the contract and, under *section 86 ERA 96*, must be at least:

**One week** – if the employee has worked between one month and two years;  
or

**One week for each year** – if the employee has worked between two and twelve years.

The employer may pay the employee in lieu of notice and this will certainly apply when the employee is retiring on health grounds. If employees receive payment in lieu of notice as a lump sum with an early date of dismissal, then the payment will be a termination payment and exempt from tax liability. If the date of dismissal is given as being at the end of the notice period and the payment is made monthly as though the employee were still working, then it is liable to taxation. Employers sometimes try to run the notice period concurrent with the last period of full sick pay in order to save money.

**It is important to note that even when sick pay has either decreased to half pay or stopped completely, the notice period should be paid at full pay.**

### **Reps Checklist**

- How much notice is the member entitled to?
- Has the member received the correct amount of notice?
- Has the member been paid appropriately for the notice period?

## **Appeals**

### Internal

Internal procedures, i.e. sickness absence procedure or the disciplinary procedure should ensure that the employee has a right of appeal against the decision to dismiss. It is likely that the dismissal would be found to be unfair if there was no right to appeal.

## **Employment Tribunal**

If the employer has not carried out their legal obligations or has failed to act reasonably the employee may have grounds to claim for unfair dismissal to the Employment Tribunal.

Section 98 of the Employment Rights Act 1996 gives the grounds for a fair dismissal as;

- ◆ Capability or qualifications to perform the work (*The law includes among "capability" dismissals those relating to "skill, aptitude, health or any other physical reason or mental quality" which means that a worker can be fairly dismissed due to a poor sickness record. However, the employer will usually have to show that attempts were made beforehand to establish the employee's medical condition and that alternatives to dismissal were examined*);
- ◆ Conduct;
- ◆ Redundancy;
- ◆ Complying with legislation (e.g. Health and Safety at Work Act);
- ◆ "Some other substantial reason".

In order to be able to claim for unfair dismissal the worker must:

- ◆ Have been dismissed;
- ◆ Not be aged over the 'normal retirement age' for their work or in any case aged over 65;
- ◆ Have been working for the employer for at least one year;
- ◆ Ordinarily be working inside the UK; and
- ◆ Present the application to a tribunal within three months of the date of dismissal.

If reps think there may be a case for a tribunal, then contact should be made with The Society of Radiographers immediately, as claims must be submitted within three months of the date of the dismissal (less one day).

## **NHS Industrial Injuries Scheme**

The Injury Benefits Scheme provides benefits for any NHS employee who as a result of an injury, disease or condition caused by their NHS employment;

- ◆ Is on certificated sick leave with reduced pay or no pay, or
- ◆ Has their earning ability permanently reduced by 11% or more, or
- ◆ Dies, leaving a spouse and/or dependants.

The NHS Injury Benefits Scheme is not part of the NHS Pension Scheme. It is governed by different rules, and it covers all NHS employees whether or not they are members of the NHS Pension Scheme. There is no qualifying period and everyone is covered from the day they join the NHS.

### Temporary Injury Allowance

If a member of staff is on certificated sick leave with reduced pay or no pay because of an injury they may be eligible for a temporary injury allowance. The employer pays this allowance. It tops up income (i.e. pay NHS Pension and certain Social Security Benefits) to 85% of the average pay received immediately before pay was reduced because of the injury. When the member returns to work the allowance stops.

### Permanent Injury Allowance

If the amount an employee is able to earn is permanently reduced by 11% or more because of an injury, they may be entitled to a permanent injury allowance. The amount of this allowance is based on length of NHS service and the reduction in earning ability. If employment ends because of injury, the member may also qualify for a lump sum payment, which is a percentage of yearly average pay.

Information on the NHS Injury Benefits Scheme is not always readily available and should Reps have any queries they are advised to contact: NHS Pensions Agency, Injury Benefits Section, Hesketh House, 220 Broadway, Fleetwood, Lancashire, FY7 8LG, phone: 0125 377 4547 or go to [www.nhspa.gov.uk/scheme\\_booklets.cfm](http://www.nhspa.gov.uk/scheme_booklets.cfm).

### **Reps Checklist**

- Are members aware of the NHS Industrial Injuries Scheme?
- Remind members who are injured at work and on certificated sick leave that they can claim under this scheme

### **Pursuing a Claim for Compensation for an Industrial Injury**

Employers are under a legal duty to provide a safe place of work. Every year over 155,000 of people are injured at work and many receive compensation from the employer or are retrained to undertake new tasks or skills.

If a member is injured at work and believes that the employer is at fault the SoR can pursue a claim on the member's behalf. There is a time limit of three years in which to lodge a claim.

Members who believe they have a claim must contact the SoR as soon as possible for a P1 form which is used to assess the case. It is important that the member gives as much information as possible.

This form will then be sent to the SoR's solicitors, who may seek further information or interview the member about the claim.

When the solicitors are sure they have all the information, they will write to the SoR with a recommendation. If they advise the SoR to pursue a claim this will be at no cost to the member. If they do not think a case is valid the member will be informed.

Not all claims are successful and sometimes the claim is withdrawn because information or medical evidence is not sufficient to continue. If this is found to be the case the Society will tell the member that they do not intend to take the case further. Any costs accrued will be met by the SoR, unless there are particular and exceptional reasons to the contrary.

Claims for injury at work can take some time to reach a resolution - often ranging from months to years. During this time it is important that contact is maintained with the SoR and any change in circumstances is reported immediately.

Forms to pursue a claim may be obtained from the SoR.

### **Reps Checklist**

- Are members aware that they can claim compensation for industrial injuries?
- If a member wants to pursue a claim, advise them they must do so within three years.
- If a member's circumstances change after lodging the claim, ensure that the SoR is notified.

## **THE LAW ON DISABILITY - THE DISABILITY DISCRIMINATION ACT 1995**

20

MB

© SoR 1998  
Revised 2005

The Disability Discrimination Act 1995 was the then Government's response to the increasingly effective campaign for comprehensive and enforceable anti-discrimination legislation for disabled people. The Act addresses discrimination against disabled people in employment and in the provision of goods and services.

Although the SoR has a number of criticisms of the Act, it is important to understand how its provisions may assist, particularly where members on long-term sick leave due to a disability wish to return to work.

### **What is a disability?**

The Act defines a disability as:

**"A physical or mental impairment, which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities."**

#### **Note:**

Mental illness is covered only if the illness is clinically well recognised.

### **What is meant by "substantial" and "long-term" ?**

Long-term effects are defined as those which:-

- ◆ Have lasted for 12 months or more; or
- ◆ Can reasonably be expected to last for 12 months or more; or
- ◆ Can reasonably be expected to last the rest of the person's life.
- ◆ Even if the impairment is no longer affecting the person it is treated as continuing if it is likely to recur, with some recurrence being likely at least 12 months after the first occurrence.

#### **Note:**

People with progressive conditions, i.e. cancer, are only covered if their condition has had any impact on their ability to carry out normal day-to-day activities. This means that people who are HIV positive but do not have the symptoms of AIDS will not be covered.

Substantial is defined as more than "minor" or "trivial" and should include an assessment of:

- ◆ The time taken to carry out an activity;
- ◆ The way in which the activity is carried out;
- ◆ The cumulative effects of the impairment. For example, if several of the activities listed below are affected then the cumulative effect of having to cope with a number of impairments at a level which may seem minor,

compared with someone with a severe impairment, could still mean that the overall effect is judged to be substantial.

### **What are “normal day-to-day activities”?**

“Normal day to day activities” are defined by looking at how far they are normal for most people and carried out by most people on a daily or frequent and fairly regular basis. This would NOT include:

- ◆ Work of a particular kind, because no form of work is “normal” for most people and a particular job might be highly specialised;
- ◆ Playing a particular game, musical instrument or sport;
- ◆ Performing a highly skilled task.

### **What kinds of impairment would affect “normal day-to-day activities”?**

This definition covers activities in one or more of the following areas:

- ◆ Mobility;
- ◆ Manual dexterity;
- ◆ Physical co-ordination;
- ◆ Continence.
- ◆ Ability to lift, carry or move everyday objects;
- ◆ Speech hearing or eyesight;
- ◆ Memory or ability to concentrate, learn or understand;
- ◆ Perception of risk of physical danger.

The Government has produced “Guidance on matters to be taken into account in determining questions relating to the definition of disability” This gives detailed examples of what level of impairment would or would not be covered by the Act.

### **What actions by an employer would count as discrimination?**

Any action whereby the employer treats a disabled person less favourably for a reason that relates to the disabled person's disability. You must be able to show:

- ◆ The treatment is less favourable than the employer's treatment of someone without the disability;
- ◆ The reason for discrimination relates to the disability, i.e. it would not be enough for a disabled person just to be treated generally less favourably;

### **What actions by an employer would not count as discrimination?**

The Act states that less favourable treatment is justified if the reason for it is "both material to the circumstances of the particular case and substantial".

This means that the employer must examine the impairment experienced by the individual employee or job applicant and not just make a general assumption about all people with a similar impairment. The term "substantial" has not been clearly defined. The employer must examine whether it is possible to remove the obstacle by making a "reasonable adjustment".

### **What are "reasonable adjustments"?**

To avoid a disabled employee or job applicant from being subject to a substantial disadvantage,

Employers are forced to make reasonable adjustments to:

- ◆ Physical features of their premises;
- ◆ Equipment;
- ◆ Any arrangements.

The Act does not include a comprehensive list of steps the employer may have to take or the adjustment s/he may have to make, but it does give examples, such as:

- ◆ Making adjustments to premises;
- ◆ Allocating some of a disabled person's duties to someone else;
- ◆ Transferring an employee who becomes disabled to another job;
- ◆ Altering a disabled person's working hours;
- ◆ Transferring a disabled person to a different place of work;
- ◆ Allowing a disabled person to be absent from work for rehabilitation, assessment or treatment;
- ◆ Providing training for a disabled person;
- ◆ Acquiring or modifying equipment;
- ◆ Modifying instruction or manuals;

- ◆ Modifying procedure for testing or assessment;
- ◆ Providing a reader or interpreter.;
- ◆ Providing supervision.

For the purposes of the DDA, the judgement about whether an adjustment or step is "reasonable" rests on five factors in particular:

- ◆ The step must be effective - it must significantly reduce the disadvantage the disabled person in question would otherwise face;
- ◆ The step must be practicable for the employer in these specific circumstances;
- ◆ The financial and other costs must be reasonable, given the organisation's resources;
- ◆ The extent of an employer's resources - larger organisations will be expected to be more flexible in making adjustments;
- ◆ The financial or other help available to the employer from outside organisations.

### **How does the DDA affect people who are on sick leave ?**

It may be possible to protect people on long-term or even short-term sick leave using the provisions of the Disability Discrimination Act. Clearly they would have to meet the criteria of the Act in defining their disability, but it may be possible to argue that employers need to do some or all of the following:

- ◆ Adjust the working environment so the employee can return to their job. For example, one employer had to alter the operating mechanisms for the doors on a CT room so they could be operated by a radiographer who is a wheelchair user;
- ◆ Allocate some of a disabled employee's duties to someone else. For example, if somebody found that they could no longer do mobile radiography, then those duties could be removed from that person's rota;
- ◆ Transfer an employee who becomes disabled to another job. For example, into CT;
- ◆ Provide training for a disabled person. This could include training in either radiographic or non-radiographic areas.