Comprehensive Guide to Unfair Dismissal: Illness/Injury

Written By:
Akiri Heath-Adams
Attorney-at-law
Heath-Adams & Co.

Comprehensive Guide to Unfair Dismissal: Illness/Injury

A worker being diagnosed with a serious illness or injury is ***not*** grounds for automatic dismissal.

If the worker's illness or injury has ***not*** impacted their ability to perform their job, then there should be no change in the employment relationship.

But if the illness/injury has caused the worker to be absent from work for a long period of time, then it may be fair for the employer to terminate the worker, but only after the proper process has been followed. And if the employer fails to follow the process, the dismissal may be unfair.

Long-Term Absence

General Principles

TD No. 2 of 2001 Banking, Insurance and General Workers Union and Hindu Credit Union Co-operative Society Limited
"...ILO Convention No. 158 of 1982…Temporary absence from work because of illness or injury shall not constitute a valid reason for termination."

An employee who is absent from work for a long time because of sickness or ill health is entitled to sympathetic consideration by the employer, but the employer can only be expected to act within sensible limits. The questions to be asked are (a) how long has the employment lasted, (b) how long had it been expected the employment would continue, (c) what is the nature of the job, (d) what was the nature, effect, and length of the illness, (e) what is the need of the employer for the work to be done, and to engage a replacement to do it, (f) are wages continuing to be paid, (g) why had the employer dismissed (or failed to do so), and (h) in all the circumstances, could a reasonable employer have been expected to wait any longer? (***Selwyn's Law of Employment, 20th Edition, Para 17.90***)

East Lindsey District Council v Daubney [1977] IRLR 181 - The adjudicatory body must examine whether it was reasonable for the employer to wait any longer before dismissing the employee, in light of the nature of the illness, the actual and potential length of the absence, the circumstances of the individual employee, the urgency of the need to fill the employee's job, and the size and nature of the employer's business.

The 'Reasonableness' Test
Hart v AR Marshall & Sons (Bulwell) Ltd [1978] 2 All ER 413- An important question to consider is: 'has the time arrived when the employer can no longer reasonably be expected to keep the absent employee's post open for him?'

Employers cannot be expected to go to unreasonable lengths in seeking to accommodate a sick employee, and what is reasonable is largely a question of fact and degree in each case (***Garricks (Caterers) Ltd v Nolan [1980] IRLR 259, EAT***).

If an employee is away for a long time, the employer should not dismiss as an automatic matter, but consider whether it is necessary to dismiss (***Selwyn's Law of Employment, 20th Edition, Para 17.90***).

Enquiries by employer
The employer should make all necessary enquiries, from the employee and from his doctor, and if possible obtain an opinion from the firm's medical advisers (***Daubney)***.

A Links & Co Ltd v Rose [1991] IRLR 353- In all cases where dismissal on the grounds of ill health is being considered, there is a need for enquiry, consultation, warnings, a search for alternatives, etc, before the decision is taken.

TD No. 204 of 2004 Westend Sawmill and Lumber Yard v National Union of Government and Federated Workers
The worker in this case is extremely incapacitated and appeared almost to be a paraplegic. These symptoms were as a result of a stroke which the worker suffered in November 2003… The worker's wife went to the Company to collect his wages and also submitted a sick leave certificate on behalf of the worker…but she did not receive any wages for the worker. The Employer refused to accept the sick leave…The Company argued that the worker abandoned his job since he had not reported for duty since November 2003. The Company was informed of the worker's health in November 2003 by a medical certificate which was submitted for and on behalf of the worker, yet the Company chose to ignore this information and it also refused to accept a further medical certificate related to the worker's medical condition.
It is stated in Patterson vs Messrs. Bracketts (1977) IRLR 137 that when the health of a worker is considered by the employer the following is a useful approach: "...first, there should be consultation or discussion with the employee, and secondly, such other steps as are necessary should be taken to enable the employer to form a balanced view about the employee's health."
It is clear therefore that when it was informed of the worker's health, there was a basic obligation on the Company to inquire into the nature of the worker's illness, this certainly was not done. It is clear that in cases of long-term ill health, a company cannot reasonably be expected to keep a worker in its employ, the nature of the illness and the likely length of a worker's continued absence from work are certainly some of the circumstances that a Company must take into account to determine whether or not to continue the contract of service…
The Company had a duty to inquire about the worker's whereabouts and the state of his health when he failed to report to work in November 2003 before it could conclude that he had abandoned his job.
On the totality of the evidence, the worker did not abandon his job but the Company abruptly ended its contract of service with the worker without first ascertaining the true status of the Worker's health.
The Company by its very act dismissed the worker in circumstances which were harsh and oppressive.

Communication & cooperation by employee

It is also the duty of the employee to keep the employer informed of the nature of the illness, and, where possible, the prognosis for a recovery. In ***McGivney v Portman Mansions Management Ltd***, the employee went off sick for six months, claiming to be suffering from 'stress'. However, he failed to produce any medical evidence of his condition, despite a number of requests from his employer for access to his medical records. He also refused to attend an appointment with an occupational therapist. His subsequent dismissal was held to be fair. He had failed to cooperate with his employer, and the dismissal was within the range of reasonable responses (***Selwyn's Law of Employment, 20th Edition, Para 17.100***).

Consultation with employee's doctor

There is no absolute rule that an employer must consult with the employee's general practitioner (and indeed, since this could result in a breach of professional confidence, it may not be a profitable exercise), although it may be desirable to do so if the employee gives his consent (***Tower Hamlets London Borough v Bull [2001] All ER (D) 209 (May), EAT***).

Estimated Date of Return

A good employer will try to fix a date by which time he must know when the employee expects to be able to give information about the likely date of return to work (***Marder v ITT Distributors Ltd [1976] IRLR 105***), but once having explained and discussed the situation with the employee, the employer is entitled to make a decision in the light of the information available (***Spencer v Paragon Wallpapers Ltd [1977] ICR 301***).

Alternative Work

In ***Merseyside and North Wales Electricity Board v Taylor [1975] ICR 185***, the Divisional Court held that there is no rule of law which requires the employer to create a special job for an employee who is off sick. Nor is there a rule that an employer is obliged to find alternative employment for an employee plagued by ill health. Each case must be judged on its own facts in the light of the employer's circumstances. It may be that the employer has some light work available of the kind which is within the employee's capacity to do, and the employee should be encouraged to take such a post, even at reduced rates of pay, before dismissal is considered.

No warnings for long-term sickness absence

Earlier cases had stated that an employer should warn an employee that unless he returns to work he will be dismissed, but this view is erroneous, for an employee cannot be warned that he has got to be in good health. However, the employer should make all proper and necessary enquiries from the employee, and not act in a precipitous manner.

Perhaps the best way to express the employer's obligations is to say that he should treat the employee with sympathetic consideration, and that he should hold the job open for as long as possible (***Selwyn's Law of Employment, 20th Edition, Para 17.92***)

Work-related illness/injury

If an employee is dismissed on ill-health grounds, the employment tribunal should not be concerned with whether or not the illness was caused or contributed to by the employer, but should consider whether the employer acted reasonably in dismissing the employee for that

illness. The fact that the employer has caused the incapacity that led to the dismissal does not preclude a finding that the dismissal was fair, but in such circumstances the employer can be expected to go the extra mile in finding alternative employment for the employee, or put up with a longer period of sickness absence than would otherwise be reasonable (***McAdie v Royal Bank of Scotland [2007] IRLR 895***).

Being declared unfit to work

If a person's health is such that continued employment may well constitute a hazard, either to himself or to other employees, or is likely to cause damage to property, then provided the employer undertakes full consultation with the employee, and obtains expert medical opinion, this is capable of being a fair dismissal (***Spalding v Port of London [1977] HSIB***), and it is not necessary for the employer to wait until an accident occurs before taking steps to dismiss (***Parsons v Fisons Ltd (Unreported***)).

In ***Finch v Betabake (Anglia) Ltd [1977] IRLR 470***, the claimant was an apprentice motor mechanic. The employers received a report from an ophthalmic surgeon that the boy could not continue to work without undue danger to himself and to others. He was therefore dismissed. It was held that the circumstances in which an apprentice could be dismissed were limited, but in the circumstances, the dismissal was fair.

Whereas, in ***Converform (Darwen) Ltd v Bell [1981] IRLR 195, EAT***, the claimant was a works director who was off work because of a heart attack. He recovered, but the employers refused to permit him to return to work, as they thought there was the risk of another attack. His subsequent dismissal was held to be unfair. A risk of future illness cannot be used as a ground for fair dismissal unless the nature of the employment is such that the risk made it unsafe for the employee to continue his job.

Key Principles regarding long-term absence due to ill-health:

The test: 'has the time arrived when the employer can no longer reasonably be expected to keep the absent employee's post open for him?'

This question is answered by looking at:

1. **The nature, effect, and length of the illness.**
   The more serious the illness, the greater the effect it has on the employee's ability to work, the longer it is expected to last, and the lower the likelihood of the worker recovering, means the more reasonable it may be to dismiss (but employer should rely on expert medical opinions in respect of the worker's chances of recovery to support such decisions).

2. **The actual and potential length of the absence.**
   The longer the worker has been absent, and the longer he is expected to be absent, the more reasonable it may be for the employer to terminate.

3. **How long has the employment lasted?**

The longer the worker has been employed with the company, the longer the employer may have to hold his position before it would be reasonable to terminate.

4. **How long had it been expected the employment would continue?**
   A reasonable employer would be expected to hold the position longer for an employee who was indefinitely employed and was expected to remain in the job for the foreseeable future as opposed to a worker who was employed on a fixed-term/short-term contract.
   Also: When considering this factor, it may be relevant to look at the worker's employment record (performances, conduct, etc.) as this may provide some indication of how long it may have been expected that he would continue in his job.

5. **What is the nature of the job?**
   The more important the employee's job is to the success of the company and its customers, the less time the company may be able to hold the job open for the employee to return.

6. **What is the need of the employer for the work to be done/the urgency of the need to fill the employee's job and to engage a replacement to do it?**
   The more urgent it is for the employer to get the absent employee's job done, the greater the likelihood the employer may have to bring in a replacement, and the less time they may be able to hold the job open for the absent employee.
   And the more the worker's absence is costing the business and/or unduly burdening the other employees, the more reasonable the decision to dismiss may be.

7. **The size and nature of the employer's business.**
   The bigger the business, the less likely they are to be impacted by the absence of one worker, and the longer they may be expected to hold the worker's job.
   Also, the more serious the work that the business does, the less time they may be able to wait for the absent employee.

8. **Are wages continuing to be paid?**
   If an employer continues to pay wages then that would likely reduce the amount of time that he can reasonably wait for the worker to return. Because it would be untenable for him to pay wages in return for no service. That may have a negative impact on operations, especially in smaller businesses.

9. **The circumstances of the individual employee.**
   Some situations may call for more compassion from the employer. For eg. If the worker is nearing retirement, or if the worker needs the job to aid his recovery.

10. **Did the employee keep the employer informed of the nature of the illness, and, where possible, the prognosis for a recovery?**

If the worker fails to communicate with the employer about the nature of his illness and prognosis for recovery, especially upon request, this may make the decision to dismiss reasonable.

11. **Did the employer make all necessary enquiries from the employee and from his doctor, and if possible obtain an opinion from the firm's medical advisers?**
    If the employer fails to make enquiries about the worker's illness and proceeds to dismiss him, the decision may be unreasonable.
    On the other hand, if the employer arranges for the employee to visit a doctor and the employee unreasonably refuses, this may contribute to a finding that the decision to dismiss was reasonable.

12. **Does the worker require light duties?**
    If the worker has been medically advised to take on light duties and has requested same, the reasonable approach from the employer would be to try to accommodate this request (if possible) before proceeding to dismissal.

13. **Did the employer look for alternative work for the employee?**
    A reasonable employer would be expected to consider placing the worker in alternative work that accommodates his illness/injury (if possible) before proceeding to dismissal. If suitable alternative work exists, and the employer fails to offer it to the worker, the dismissal may be unfair.

14. **Was the illness or injury caused at work?**
    If the illness/injury was caused at work, the employer would be expected to exercise more compassion and hold the job open for longer than he otherwise might have. This does not mean that he must hold the job indefinitely. The expectation is still only that he would hold it open for as long as he reasonably can, but what is reasonable in this case may be longer than in a case when the illness/injury was not caused at work.

15. **Did the employer fix a date by which time he must know when the employee expects to be able to give information about the likely date of return to work?**
    If an employer does not set a date by which the employee must return or give information about his expected return, before dismissing him, the dismissal may be unfair. This acts as a sort of 'final opportunity', letting the employee know that the employer is approaching the point when he will not be able to hold the job open any longer. If the employer sets this final date, the worker will have the opportunity to take whatever steps to return before it's too late. And even if there's nothing that the worker can do, at least he will have fair notice and an opportunity to communicate with his employer, before he is eventually dismissed.

16. **Could a reasonable employer have been expected to wait any longer?**

Based on the particular facts of the case, having regard to all the factors listed above and any other uniquely relevant factors, if a reasonable employer in the situation would have waited longer, then the dismissal may be unfair.

17. **If the worker was declared unfit to work, did the employer get an expert medical opinion and did he have full consultations with the employee before dismissing him?***
    If the employer declared that the worker was unfit to work and dismissed him, without having an expert medical opinion testifying to that, the dismissal may be unfair.
    If the employer has such a medical opinion, he must still consult with the employee about the medical opinion before dismissing him. It does not seem that the consultation with the employee could affect the decision to dismiss since the decision is based on medical advice; but consulting before making a decision is an essential aspect of good industrial relations. Perhaps the employee may be able to provide a contrary medical opinion to save his job. But at the very least, consultation ensures that the employee is treated fairly and with compassion, and that goes a long way towards reaching the conclusion that the decision to terminate was a fair one.

Persistent short-term absenteeism

While some illnesses/injuries might cause employees to be absent from work for an extended period of time, other illnesses might cause employees to be persistently away from work for short periods at a time.

An employee who is persistently absent can be cautioned about his absences; he can be confronted with his record, told that it must improve, and be given a period of time in which an improvement can be monitored. Indeed the employer should not ignore the powerful medicinal effect of a final warning, and a failure to give one may mean that the employee is unaware that the situation is causing the employer great concern. The effect of such a warning might be to stimulate the employee into seeking proper medical advice in case there is an underlying cause of the continuous minor ailments, it may deter the employee from taking time off when not truly warranted, and it may even lead the employee to look for other work where such absences could be tolerated (***Smith v Royal Alfred Merchant Seamen's Society HSIB 9***).

General considerations for persistent absenteeism
The employer should approach the situation with 'sympathy, understanding and compassion.' Factors to be taken into account include: (a) the nature of the illness, (b) the likelihood of it recurring, (c) the length of the various absences and the spells of good health in between, (d) the need of the employer to have that work done by that employee, (e) the impact of the absences on other employees, (f) the adoption and carrying out of the policy, (g) a personal assessment of the ultimate decision, and (h) the fact that the employee is fully aware that his employment will be terminated unless there is an improvement (***Lynock v Cereal Packaging Ltd [1988] ICR 670***).

Enquiries by employer

The employer can hold out a helping hand; he can enquire from the employee the nature of all these minor ailments, offer such medical help as the firm can provide, provide counselling, etc, in those cases where the employment is itself a major contributing factor to the illness, and so on (***Selwyn's Law of Employment, 20th Edition, Para 17.105***).

It is essential to establish the reason for the absences, as this may well determine the appropriate procedural steps to be taken. In most cases, it will be necessary to interview the employee on his return to work, which will assist in establishing the reasons for the absence, assess the likelihood of recurrence, and determine whether the appropriate 'trigger' has been reached under any attendance procedure. If an underlying medical condition is suspected, advice may be given on the need to seek further treatment. Alternative employment may be considered, or flexibility introduced into attendance improvement schemes. In other words, a great deal can be done to resolve the problem, rather than merely consider dismissal as a solution (***Selwyn's Law of Employment, 20th Edition, Para 17.106)***.

Warnings for persistent absenteeism

In ***International Sports Ltd v Thomson [1980] IRLR 340, EAT***, the claimant was away from work for about 25% of the time, with a variety of complaints (all of which were covered by medical certificates) including dizzy spells, anxiety and nerves, bronchitis, virus infection, cystitis, arthralgia of the left knee, dyspepsia and flatulence. She was given a series of warnings, including a final warning, and before deciding to dismiss her, the company consulted their medical adviser. He saw no useful purpose in examining her, as none of the previous illnesses could be verified, there was no common link between them, and she was not suffering from any chronic illness. She was then dismissed, and the EAT held that the dismissal was fair. The company had undertaken a fair review of her attendance record, she had been duly warned and given the opportunity to make representations. A further medical investigation would have produced no worthwhile results. There must come a point in time when a reasonable employer is entitled to say, 'enough is enough'.

Size of the business

In Wilkes v Fortes (Sussex) Ltd, the EAT placed particular emphasis on a consideration of the size of the firm in determining whether or not it would be fair to dismiss an employee who is off work intermittently for sickness reasons. In a large firm, the disruption caused by such illnesses may be minimal; it is easy to have a float of overmanning to cover for absent employees. But in a small business, such absences may be extremely serious or even disastrous (***Selwyn's Law of Employment, 20th Edition, Para 17.109)***.

Deadline to prove fitness

In ***Coulson v Felixstowe Dock & Rly Co Ltd [1976] IRLR 105***, the claimant was away from work due to ill health for considerable periods of time. He could no longer perform his duties, and was put on light clerical work. He was told that if he could not return to his old job, he would be dismissed, and was given six months in which to prove his fitness. However, he fell ill again

and was dismissed. It was held that the employer had treated the employee with every consideration, but there must come a time when the employer cannot be expected to keep someone on who is not doing his work. The tribunal had to consider fairness to the business as well as to the employee.

Factors the court considers

TD No. 509 of 2017 Banking Industrial and General Workers Union v Smith Robertson Company Limited- the worker received a number of warning letters which spoke to her progressively excessive tardiness and high absenteeism rate. These letters highlighted the negative effect her absence had on the Company's operations and sought her improvement in respect of same. The court set out a non-exhaustive list of factors that should be considered in assessing whether the employer acted reasonably in the circumstances:

a. The length of absenteeism
b. The existence of oral or written warnings
c. Impact on Company operations
d. Offers for counselling or assistance
e. Offers of flexible arrangements such as flexi-time
f. Assessment of the nature of the illness
g. Opportunity for the worker to improve.

Key Principles regarding persistent absenteeism due to ill-health:

The test: Did the time come when a reasonable employer would say 'enough is enough', and could not be expected to keep the employee any longer?

This question is answered by looking at:

1. **What is the cause of the absences? Did the employer interview the employee and enquire about the reason for the absences?**
   If the employer dismisses the employee without interviewing him and trying to understand the cause of his absences, the dismissal may be unfair.
   If the employer discovers the cause, this will determine the procedure to be followed. If it is a case of indiscipline, then the disciplinary procedure would apply. But if the absences are sickness-related then the sickness procedure must be applied and the employer must try to act with compassion. It may be expected that the employer would provide reasonable assistance to the employee to help him improve. And failing to do so before dismissing the employee, may make the dismissal unfair.

2. **Did the employer offer any medical help/counseling/assistance that could be provided by the company? Did the employer encourage the employee to seek further treatment/medical advice?**
   A reasonable employer would at least encourage his employee to seek medical treatment or advice if he observes that the employee is repeatedly suffering from some ailment(s). If the company has access to medical help or counselling, and they dismiss the employee without providing any of that assistance, the dismissal may be unfair.

3. **What is the nature of the illness?**
   What was the need of the employer to have that work done by that employee?
   What was the impact of the absences on other employees?
   Does the worker require light duties?
   Was alternative employment considered?
   What is the size of the firm?
   What was the impact on Company operations?
   The breakdown of these principles is the same as it is for long-term absence above.

4. **What is the likelihood of the illness recurring?**
   If based on medical advice, it is likely that the employee's illness will recur and cause further absences, then it may be reasonable to dismiss. But if the illness is unlikely to recur, or if no information has been sought about the likelihood of recurrence, then a dismissal may be unfair.

5. **What were the length of the various absences and the spells of good health in between?**
   The longer the absences and more infrequent the spells of good health are, the more reasonable the decision to dismiss may be.
   Some companies may have an absence policy that states the procedure to be followed if a worker misses a certain percentage of work days/time over a stipulated period. Did the worker's absences meet the threshold? Was the policy properly implemented? If the worker's absences didn't meet the threshold or the policy was not properly implemented, the dismissal may be unfair.

6. **Was flexibility introduced into attendance improvement schemes?**
   If it is possible for the employer to give the employee more flexibility in his work schedule which could help to improve the employee's attendance, and the employer fires the worker without affording him that flexibility, then the dismissal may be unfair.

7. **Was the employee given a deadline by which to prove his fitness otherwise he would be dismissed?**
   If the employer did not set a deadline or time frame by which the employee must prove his fitness to work, the dismissal may have been unfair.

8. **Was the employee cautioned about his absences?**
   This is one of the key differences between long-term absence and persistent absenteeism. The employer must caution the employee about his absences; this may encourage the employee to take the issue more seriously and give him the opportunity to correct it. If the employer dismisses without first cautioning the employee, the dismissal may be unfair.

9. **Was he confronted with his record of attendance? Was he told that it must improve? Was he given a period of time in which an improvement can be**

monitored? Was he given a final warning? Was the worker given the opportunity to improve?
If the employer failed to confront the employee with his record, tell him that it must improve, monitor his attendance over a period of time, and give him sufficient opportunity to improve, then the dismissal may be unfair.

10. **Was the employee given a series of warnings, including a final warning, and the opportunity to make representations before being dismissed? Did the employer make the employee fully aware that his employment will be terminated unless there is an improvement?**
    The employee should be given multiple opportunities to make representations to explain his absences and what he is doing to improve; multiple warnings should be given if the situation is not improving; and the employee should be given an unequivocal final warning before being dismissed. If the employer fails to take these steps and does not make the employee fully aware that his employment will be terminated unless there is an improvement, the dismissal may be unfair.

Questions to ask your client to determine if his dismissal due to illness/injury may have been unfair:

1. Were you diagnosed with serious illness/sustained a serious injury?
2. Was the illness/injury caused at work?
3. When were you diagnosed? What was the nature of your illness? How much did it affect your ability to work? How long were you ill?
4. Did you tell your employer about your illness? Was he aware of it? Did you provide him with documentation of the illness? Did you give him information about the nature of the illness and how it would (or wouldn't) affect your work? Did your employer make any inquiries about the nature & extent of your illness?
5. How soon after you told your employer about your illness were you dismissed?
6. Did your sickness cause you to be absent from work for an extended period of time? Or did it cause you to be frequently absent over short periods of time? How much time did you miss since the diagnosis? How long were you absent? How long did you expect to be absent before you could fully return?
7. Did your sickness affect your ability to perform all your responsibilities when you were at work?
8. Did your doctor tell you that you should stop working or that you should take "light duties" instead of performing all of your usual responsibilities? Could the company have facilitated "light duties" for you?
9. What type of work does the company do? How important is it for the company to have all its employees at all times? What was your position/role in the company? What were the responsibilities you had to fulfill? How important was your role to the success of the company? Could your role (or any part of it) have been performed virtually?

10. How vital were you/your position to the company's operations? How much was the company affected by your absence/reduced performance? Was there anybody else who performed, or could have performed, your responsibilities in your absence?
11. How big is the company? How many employees does the company have? How many were in your department or performed a similar role to you? Were you in a leadership or managerial position? Were your coworkers able to comfortably cover for you in your absence?
12. Did the business typically suffer whenever someone was absent for an extended period of time? Did the business suffer any loss because of your absence? Were the other employees excessively burdened by your absence/?
13. Did the company have to hire a replacement for you?
14. Were there any alternative positions that you could have performed? Particularly any virtual positions? Did your employer offer you one of those positions?
15. Did your employer pay you when you were absent? Was your salary reduced or stopped at any point?
16. Did your employer consult with you before firing you? Did he inquire about: the nature of your illness? When you might be able to return to work? Whether you were recovering and expected to make a full recovery? What advice your doctor had given you about the extent of your illness & the likelihood of recovery?
17. Did your employer recommend that you see the company doctor? Did your employer ask for your consent to speak to your doctor? Did your employee offer you any counselling or assistance?
18. How long did you work for the company? What was your record of attendance and performance before the illness/injury? How long did you hope/expect to work with the company? Were you on an indefinite or fixed-term contract?
19. Did you stay in communication with your employer throughout the illness/injury? At the beginning, did you notify them of the illness and share the documentary evidence with them? Did you regularly share updates & documentary evidence with them? Did you give them an estimated date of return or at least an estimated date by which you would be able to provide information about your anticipated return? Were you making any efforts to contribute to work in your absence? How often did you communicate with them? How often did they reach out to you? Do you have records of the communication that took place during that time?
20. Based on what you know about the company's operations, do you think the company could have afforded to wait any longer for you to recover?
21. Have you fully recovered from the illness/injury? Are you working again/are you capable of working? How long did it take after your dismissal for you to recover and be able to work?
22. How much time passed between your illness affecting your work and you being dismissed? When did your illness first affect your attendance or performance? When were you dismissed?
23. Did your employer say that he could no longer wait for you to return? If so, did he provide any evidence as to why that was the case? Did he show how your absence was impacting operations?

24. (If it was long-term absenteeism) Did your employer give you a final indication that if you didn't return to work by a certain date or provide information of your expected return by that date, that the company would terminate your contract? Did they consult you before dismissing you or did the dismissal come out of the blue?
25. (If it was persistent absenteeism) Did your employer enquire as to the cause of your absences? Did he confront you with your attendance record and tell you that you need to improve? Did he tell you that he was monitoring your attendance over a period to see if it improves? Did he warn you about the need to improve your attendance? Did your employer give you multiple warnings before dismissing you? Did he give you sufficient time to improve? Did your employer give you a final warning that if you did not improve your attendance, or prove, by a specific date, that you were fit to work on a consistent basis that you would be dismissed? How much time did he give you to improve between the first warning, the final warning & the dismissal? Do you have records of those warnings?

Conclusion:

An employee being diagnosed with a serious illness or injury is not grounds for automatic dismissal. If the illness/injury causes the employee to be absent from work for a long time, regularly absent for short periods of time or incapable of performing his job, the employer must implement the proper process before moving to dismissal. The key factors being that the employer should exercise compassion and hold the worker's job open for him for as long as he reasonably can.

If the employer dismisses the worker without following the proper process, or dismisses the worker in circumstances where a reasonable employer would have held the worker's job for a longer time, the dismissal may be unfair.

Sources:

1. Case Law

2. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Hoper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir