

Understanding the Dying to Work campaign

Employment analysis: Nicholas Lakeland, partner and head of the employment and pensions team at Silverman Sherliker LLP, considers the TUC's Dying to Work campaign and how it outlines the issues raised for employers when an employee is diagnosed with a terminal illness.

Background

The TUC's [Dying to Work](#) campaign aims to see terminal illness recognised as a 'protected characteristic' so that an employee with a terminal illness would enjoy a 'protected period' where they could not be dismissed as a result of their condition.

What issues commonly arise in the work context when an employee is diagnosed with terminal illness?

The issues which commonly arise when an employee is diagnosed with a terminal illness are:

- how long the employee will be allowed or is able to work for
- the effects of long term absence due to the illness
- the continuing need that the employer has for the work to be undertaken either by the particular employee or someone filling in to cover the work
- the impact on the workload and morale of other employees who work with the employee
- how the sickness/absence policy is implemented in respect of the particular employee
- whether the employee is considered disabled and whether reasonable adjustments need to be made
- what benefits the employee might be entitled to by still being employed such as benefiting from permanent health insurance or death in service insurance

What legal obligations does an employer have in respect of a terminally ill employee?

Equality Act 2010 (EqA 2010)

Under EqA 2010, s 20 the employer is required to make reasonable adjustment to the employee's working practices to allow them to continue to work for as long as they are able to do so.

Data Protection Act 1998 (DPA 1998)

DPA 1998 classifies medical information as 'sensitive information' and sets out criteria in DPA 1998, Schs 1, 3 as to how such data is to be processed. Information about an employee's illness, injury or medical condition can only be disclosed to a third party if there is a legal obligation to do so or the employee has given their specific consent (see paragraph 2.3.3, Part 2 of the Employment Practices Code of Practice issued by the Information Commissioner's Office).

Common law

In addition, in accordance with the case of *Dalgleish v Lothian and Borders Police Board* [1991] IRLR 422, there are common law protections which prevent an employee's personal information from being published.

What legal protection, if any, does a terminally ill person have against being dismissed?

Under EqA 2010, a terminal illness is going to be a disability and the employee is protected from being dismissed by reason of their disability while they are in employment and for a period after they are off on sick leave. The difficulties arise when the employee has been off sick for a lengthy period of time and the employer is then able to fairly dismiss the employee on grounds of their capability since they are usually unable to return to the workplace to perform their duties.

What support, over and above any legal obligations, might an employer want to consider offering to a terminally ill employee?

Additional support could include:

- counselling
- other support sessions the employee may request
- helping keep the employee's morale up by continuing to involve them in the day-to-day activities of their place of work so long that is what the employee is happy with, and
- other employee assistance programmes

What is the Dying to Work voluntary charter?

The Dying to Work [voluntary charter](#) sets out an agreed way in which employees will be supported, protected and guided throughout their employment, following a terminal diagnosis.

By signing up to it, employers agree to:

- recognising that terminal illness requires support and understanding, and not additional and avoidable stress and worry
- supporting terminally ill workers and reassuring them with the knowledge that the employer will follow the employee's diagnosis and recognise that safe and reasonable work can help maintain dignity, offer a valuable distraction, and can be therapeutic
- providing employees with the security of work, peace of mind and the right to choose the best course of action for themselves and their families which helps them through this challenging period with dignity and without undue financial loss
- supporting the Dying to Work campaign so that all employees battling terminal illness have adequate employment protection and have their death in service benefits protected for the loved ones they leave behind

What are the pros and cons for an employer in signing up to it?

Pros

Employers:

- may be portrayed as sympathetic and supportive towards employees with a terminal illness and their need for protection, which may be recognised as a positive policy by other employees and the outside world
- avoid potential employment tribunal claims
- avoid having to go through disciplinary and grievance procedures

Cons

Employers:

- may be viewed as discriminatory and unfair and this may have public relations implications for the business
- could be committing themselves financially to supporting an employee and be unable to meet their obligations
- may not be able to accommodate a flexible working pattern required by the employee
- may find that flexible working arrangements for the terminally ill employee may affect other employees' ability to carry out their role

Interviewed by Diana Bentley.

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