

Cascade – Leave and absence webinar

Audio transcription of a Personnel Today webinar in association with Cascade HR.

A video of the webinar and the slides are available on demand at

<http://www.personneltoday.com/webinars/>

Original webcast: 12 July 2016 , 2:00 PM BST

Rob Moss:

Good afternoon and welcome to another Personnel Today webinar brought to you in association with Cascade HR Software. Some forms of leave require employers to pay the employee as if they were still at work but some do not. What do HR professionals need to think about when employees take holiday, fall sick or face other issues that may affect their attendance? How do different types of leave affect employee rights and how can employers manage attendance fairly without running the risks of discrimination or underpayment?

To answer some of these questions and more, I am delighted to be joined by three experts in this field. Noelle Murphy joins me in the studio here in London; she's my colleague from XpertHR. Noelle is a senior HR Practice Editor with a background in qualitative and quantitative research. She's responsible for many of XpertHR employer surveys and focuses on topics including absence, running and development and employee benefits.

And live from Leeds, I'm pleased to welcome Marie Walsh and Ceri Widdett. Marie Walsh is an experienced employment lawyer at Consilia Legal who has acted on behalf of a range of clients throughout thirteen years of service. She has a straightforward, no-nonsense approach and acts predominantly on behalf of businesses and senior executives in all areas of employment law. And Ceri Widdett is a Barrister from Exchange Chambers who has worked on all types of discrimination cases representing clients on a variety of aspects of employment law including whistle-blowing. She has acted on behalf of numerous public bodies and unions, including the Met Police and the Police Federation.

Well, clearly leave and absence is a massive topic and when you registered you were asked if you had any questions for our panel and we've taken a good look at those questions and, as expected, most have been around sickness absence. So, you'll see a lot of focus on sickness absence but we will cover all types of leave, as many as we can.

You can submit a question at any point using the chat pane on the left-hand side of your screen and we'll tackle those as they come in or we'll save them up for the Q and A at the end before we close at approximately three o'clock.

Okay, we're going to start with a poll and the question on the poll is this, it's a hypothetical question – if an employee requires time off because their child is diagnosed with chicken pox, how would treat this type of leave? If you can start voting using the buttons just to the left of each option, there are five options, we've purposely left out don't know to try and force you to make a decision. Compassionate leave, time-off for dependants, parental leave, holiday or paid leave. So, I can see lots of your voting already. [pause] I'll just allow [pause] the majority of you to have voted before we close the poll. S five options, compassionate leave, time-off for dependants, parental leave, holiday or paid leave. So, let's close the poll. [long pause] And, there we go. So, we've had 203 responses and almost three quarters are suggesting that time off for dependants is the best way to treat that type of leave and with that, I'm going to introduce Marie and Ceri who are in Leeds, welcome both.

Marie Walsh:

Hi Rob.

Ceri Widdett:

Morning.

Rob Moss:

Is that roughly what you were expecting?

Marie Walsh:

Yeah, roughly, yeah and it ties in nicely to the first slide actually. Yeah, that's we're going to talk about time-off for dependants now.

Rob Moss:

Yeah, go ahead.

Marie Walsh:

Okay, so, hi everybody, it's Marie Walsh and Ceri here. Thanks for the intro Rob. Let's skip through these. So, it was what we're expecting in relation to leave for dependants. So, there's been a lot of— as billed, this a huge topic about time-off. So, we've just picked, sort of, certain ones that came up of interest to people and have linked to questions that we had before the webinar. If you do have any other questions as we go through, you can type them in the chat box, if we can respond to them as we go through we will, even though there will be questions at the end, so, it's really interesting for us to have a bit of dialogue with you as we go along, so please feel free. So, first of all, I'm going to whizz through these various types of time off and Ceri is going to then go on to sickness absence.

So, just looking at time-off for dependants then. So what is time-off for dependant's provision? Well, it's a reasonable amount of unpaid leave to take necessary action to deal with particular situations affecting dependants, okay? It's not time off to get your boiler fixed, or waiting in for a gasman. Believe me I have had that in practice, you know, they can only come between nine and one, it's an emergency, I'm taking time-off is that dependant leave? Ridiculous, of course. So, what we're looking at in relation to the right, well we're looking at employees only. There's no length of service requirement and you've got the right to take this time-off if the dependant – and a dependant is defined as a spouse, civil partner, child, parent and I say *not* grandparent, I'll come on to that in a minute, but does include people living in the same household. So, the grandparent thing I always think is a bit strange because in today's society we do end up looking after our elderly relatives and grandparents more but it seems that under the legislation if they don't live in the same house as you this would not apply.

So I don't know whether you've come across that on a work-basis or whether you've had people asking for time off but it's a bit strange I think. Anyway, you can take time off to provide assistance in the consequence of a death, so an employee can take time off if there's been a death. But an unexpected incident involving children, and the key here is unexpected, so, where we get a lot of queries here and some of the questions that came up before the webinar, you know, where people know that they have to take a period of leave, say there's operation planned and they need two weeks off in six months' time, or four months' time this right is really, I mean, each situation is fact specific, to take time off to deal with, sort of, almost emergency situations or unexpected incidents. A different way of dealing with planned or incidents that are known about is parental leave. So, just not to be confused.

So, the next right then quickly to look at is parental leave. So, again this relates to employees only and this has a length of service requirement of one year. It's there for employees with responsibility for a child and the purpose of this is to care for the child. So, if there is a planned incident, or if there is something where you have to actually take time off to care for the child, as opposed to dealing with a situation or making provision for care for the child, then you're probably looking more at parental leave. Now the rights in relation to parental leave is eighteen weeks, per child, per parent, up to the child being eighteen years old and it's unpaid, okay?

A lot of you will have, or I hope you have, a parental leave policy. If you don't, there is a statutory provision that kicks in and a question that I have regularly in relation to parental leave is, 'I've been asked for parental leave, it's going to affect the business,' or, 'it's at the busiest time of the year, can I knock it back?' and the answer is you can, look at the statutory procedure if you do have issues with this but you can postpone a request if there's undue disruption to the business as a result of the request for parental leave, and it might be handy to know that it's generally no more than four weeks in a year and it should be taken in multiples of a week, which again I've had quite a few queries around recently particularly in relation to summer holidays. People are using this, in my experience, for summer holiday childcare, particularly last year when it was a very long period of leave.

Okay, moving on from that we'll just take a quick note about shared parental leave. So this isn't parental leave. This is relating to the first year of a child's life and basically in a nutshell, because it would take an entire webinar to discuss this, we're looking at a right for the parent of the children or for the adopting parents to share the leave. And so I think it was introduced really with a view to assisting families who perhaps had one higher earner than the other and qualified for the leave. It's a complicated system, I've only had one client, so far, have a request for shared parental leave but your experiences might well be different and I'd be interested to know if you've had an enormous take up. Certainly, the stats that I've been seeing have been, maybe Noelle could tell us later, but it's not been particularly successful but who knows? I'm saying in relation to parental leave, have a policy and take advice for shared parental leave.

Okay, very briefly then, before I hand on to Ceri who's going to talk about the sickness absence, we mentioned other types of leave, jury service – in relation to jury service it's usually ten days leave, it's unpaid normally but you may have a policy that says differently. You can ask the employee to defer a jury service request if it's going to cause undue disruption to the business. So, again in relation to a lot of leave I do get queries from employers a lot of them say, you know, 'Well I don't really have any option,' and the answer is you do and you need to take advice and look into it if it's going to disrupt the business if it becomes difficult for you. In relation to voluntary public duties, there's a right to take time off and that might include things like being a tribunal member, magistrate, councillor, prison visitor, school governor, but it's unpaid and again you should really have your own policies in place there. And also don't forget the

reserve forces duty, so if any of you do have employees who are in the reserves, they can be mobilised at any time and also expected to attend training and there's a right to take time off for this but again either have your own policy, or do take advice if they would like to leave. It's not fair to put these employees to a detriment for taking these types of leave, so, particularly in relation to returning to work in the same role. You may be exposed if you change roles or don't allow somebody who's taken leave to return to the role that they'd had before. Compassionate leave, I say about it at the end, it's normally a difficult one because everybody has a different view. I've got clients who allow a day's paid compassionate leave, three days, five days, again that's just your policy and be consistent with that, so that's where we're up to with the leave.

Now, just handing over then to one of the other more common issues and again this is where all the questions have come in really, sickness absence, okay, so Ceri's going to talk to us about sickness absence. Over to you Ceri, you've devised this method, haven't you?

Ceri Widdett:

Right, it's a methodology Marie, is based largely upon the HSE recommendations but it's a seven step process which hopefully if you follow the seven steps should make managing long-term sickness absence relatively painless. I will also be talking at the end of this about sickness absence dismissals and how we should deal with disabled employees.

So, step one then is to review. The first thing you need to ask yourself is where are our sickness absence and disabilities policies? Are the staff aware of them as well? Are they up-to-date? Are they reviewed regularly and are they clear? What kind of language are you using in those policies, is it disciplinary language with sanctions, if so you should really be looking at your policies to change them. The recent Court of Appeal case of Griffiths v Secretary of State for Work and Pensions was particularly critical of using that kind of language in these policies.

Marie Walsh:

So, Ceri when you say about disciplinary language, I'm assuming you mean about warnings...?

Ceri Widdett:

The language of warnings, I think, is mainly– I think using triggers points but keep away from the language of warnings.

Marie Walsh:

Okay, that's helpful

Ceri Widdett:

If you try and look at it in terms of getting an employee back to work rather than dismissing employees is probably the best way to do it.

- Marie Walsh: Okay. So I think we've got a poll coming up here about how you communicate your policies to line managers.
- Rob Moss: Yes, I'll take over now and we'll just take a quick break while the audience vote and I can see most of them have done so already, so...
- Do you provide comprehensive absence management training for line managers? And we've got yes, no, or don't know. Just click on the small circle next to each option to vote.
- Okay and I can see that most people have voted, just a few more seconds. Do you provide comprehensive absence management training for line manager? Yes, no or don't know.
- Okay. Thank you for voting.
- Marie Walsh: Okay.
- Rob Moss: And [pause] here's the result. Back to you...
- Marie Walsh: Wow that was close.
- Ceri Widdett: That's great because that's about half, yes, and about ten don't knows.
- Marie Walsh: Yes.
- Ceri Widdett: Which is step two, which goes into step two, which is to train. We need to make sure that we're training our managers effectively to deal with sickness absence, particularly long-term sickness, unpredictable sickness patterns and mental health related sickness. Many of the cases that come to Court really, in our experience in any event, really the theme it is communication and understanding, particularly of mental health related sickness. If you do have mental health problems to present themselves in a particularly way, they may be difficult to get any agreement with, they may have no trust in the organisation and special training and care is needed to deal with people with those problems.
- Marie Walsh: That's right isn't it? So, where we, Ceri and I, have been in quite a few tribunals together, lucky for some!
- Ceri Widdett: We have.
- Marie Walsh: Particularly the discrimination issue, inconsistency of treatment of staff is a key area of opening up allegations of alleged discrimination under the Equality Act, particularly based on disability and I think we both agree that what we tend to find is when the managers are not trained and they take inconsistent

steps with different types of employees, depending on their view of certain illness and absences, that's where we tend to get heavily disputed claims that progress to tribunal. So, it is key to have training and consistency and also the other issue for most line managers is a fear about communicating with people who are ill, either because they're not presenting well because they are ill, or they feel scared to make contact for fear of being alleged to have harassed an employee. But in that situation, either way there is an issue. You can be criticised for failing to communicate, can't you Ceri?

Ceri Widdett: I think so. I think employers can more easily understand a physical injury but when there's a mental health problem sometimes you've got an untrained manager they can deal with it particularly badly and the usual thing is we see a list four, you know, pull yourself together, you know when I had this problem I was able work and that's quite undermining for employees.

Marie Walsh: That's exactly...

Ceri Widdett: Which takes us on to step four, which is communicate. We'll be coming back to the calls at the end of this.

Marie Walsh: Yes.

Ceri Widdett: Now keeping in contact with an employee who is absent through sickness and can be a really tricky issue, can't it Marie?

Marie Walsh: It can.

Ceri Widdett: On the one hand some employees may complain that contact makes them feel under pressure to return to work when they're not fit to do so. On the other hand, and certainly we've had cases where employees have felt isolated and under-valued if there's insufficient contact. Well the answer to this is a clear policy of communication levels and modes of communication during the sickness absence. This reduce any misunderstanding and conflicts and your employee will also know what to anticipate when they're off sick. So you need to set down the way you're communicating, is it going to be by telephone, by email, by letter. Also you need to identify point of contact during sickness and also set out in the policy what level and degree of communication can be expected during sickness absence so the employee isn't taken by surprise.

Marie Walsh: Yeah, I mean one thing that I found worked well is offering to meet with the employee at home or at a site that's not work related, particularly if you have any employee who's suffering from serious stress and it may be related to the work place.

There's absolutely no harm in offering a neutral venue for a meeting. At least you've offered it and you can be seen to be communicating. We've got quite a few questions Ceri, I don't know if it's probably right to deal with it now about the— You mentioned earlier about not including warnings, sort of, disciplinary type warnings in sickness policy. One of the questions was, 'Did you say not to include trigger points?' but I think you actually said, 'No, refer to trigger points rather than you will get a warning.'

Ceri Widdett:

You don't have to use the word trigger point but certainly in terms of timing, I'd avoid the use of warnings. It will not necessarily have an adverse effect at tribunal, it was a comment by the Court of Appeal and it's called *obitus*, so it's not binding on anyone but it assumes which clearly shows the Court of Appeal was not very happy with dealing with some cases of a few dismissals.

Marie Walsh:

That's right, I think if you're seeking to dismiss an employee who's been sick, the Employment Tribunals they might do anyway, want to see that you've tried every avenue to retain the employee and dealt with them in an open and transparent way and only as a, sort of, last resort to dismiss. We will come on to that in a minute, so, we're making good progress here.

Ceri Widdett:

Yeah, we're go on to step five and this is by far the most time-consuming step that you will have to undertake and this is to plan, it's also probably extremely important... Here there is three different aspects to it, it's got the use of occupational health and other medical reports, return to work interviews and reasonable adjustments for disabled employees. So occupational health and medical reports, these are central to any rehabilitation back to work. If you don't follow the recommendations in the report, you might find yourself being sued in the civil courts for stress at the workplace, or in the employment tribunal for disability discrimination case under the Equality Act 2010. The new Fit for Work Scheme offers employers free advice and access to occupational health assessments for employees if they've been off sick for four weeks or more and there's a realistic likelihood of a return to work. This started last year, the GP or the employer refer, not the employee, and in a majority of cases there will be a 45 minutes assessment between the employee and the Fit for Work case manager, which will be built into a personalised return to work plan.

Marie Walsh:

Yes, I don't know if anybody here has actually been involved with the new service. I've had a couple of clients who have used it, again, it might be nice to hear if you have had a good

experience or if you'd recommend using it. I know there are plenty of people— I think we've got nearly 300 people basically on this webinar, so it's a good communication tool for you all here. My experience has been that there's been a faster and more efficient turn around on reviews than independent occupational health, or an in-house occupational health service. But, I'm happy to be, you know, given some tips if you've got any, share them in the chat box, I'm sure other people would too.

Ceri Widdett: Certainly, it seems like a useful tool and I think it favours the smaller and medium-sized employers and it's supposed to help again with the employee getting them back to work, it's a government initiative.

Marie Walsh: Yeah, and certainly it does avoid the pitfall of— and I know many of my clients are irritated by GPs who they say, and obviously I wouldn't like to say either way, and just relay what the employee wants the employer to be told rather than an overall helpful picture of how they can assess a return and accommodate, so it's definitely something worth considering...

Ceri Widdett: Just to follow on from that, if you get a GP's report and you don't believe it's accurate then you've got to accept that medical evidence on the face of it, unless you've got some evidence to rebut it and there was one case where, it's one with a union march whilst they were off sick and that was deemed to be sufficient evidence to rebut the GP record.

Marie Walsh: That's interesting.

Ceri Widdett: That takes us to work interviews that should be the second part of the current step. You should aim at really welcoming the employee back and trying to get their agreement to a return to work plan which is the first time you get the opportunity to do this. Agreement is really important if you can possibly get it because it means the employee is more likely to come back with those adjustments. You also need to set out the aim of the plan, the steps involved, the timescale and a date for review. If you can't accommodate adjustments because you don't think they're unreasonable, then it's best to explain this to employee at an early stage and set it out in writing as well. Certainly I had a case that went to tribunal where a lecturer asked to dim the lights during lectures because of epilepsy and that was found to be not a reasonable adjustment because effectively the students would be in dark and they'd fall down the steps.

Marie Walsh: Yeah, I've had incidences where in order for an employee to remain employed the only real adjustment would be to

employee another employee in that role. So remember adjustments do have to be reasonable and that is assessed in each case. The other thing about occupational health, there was a case recently, wasn't there Ceri, about not blindly following the report of occupational health. Following it but also using your own discretion. So, if you've been communicating well with the employee, even if an occupational health report says they're not a disabled person for the purposes of the Equality Act and you think they may be, then do use your common sense and feel free to go back... And there have been a couple of questions as we were speaking and I think there might have been a sound issue which has resolved. Happily ask the question about reasonable adjustments, typed that in the chat box, but there was question earlier about, Ceri, what if an employee refuses to go to an occupational health assessment who had high levels of sickness absence?

Ceri Widdett: If they refuse to go to go to an occupational health assessment, you've got to just make your decision on the basis of the evidence you've got...

Marie Walsh: Factually.

Ceri Widdett: ...which may not help your employee particularly.

Marie Walsh: That's right, so, if you've got some well worded letters that have been, I suppose in a lot of cases, approved by senior HR or legal, then as Ceri said, if you're not aware and you can only take decision in light of the information in front of you, which again is not helpful for the employer plus in any Employment Tribunal the employee's behaviour is, of course, taken into account. So it would look obstructive and unreasonable. Right, I don't think we've had the question about reasonable adjustments, so we'll move on...

Ceri Widdett: I just want to talk about reasonable adjustments very briefly, and then I will talk about dismissals and capability to...

Marie Walsh: Yep.

Ceri Widdett: We'll talk about disability as well at the end. So, under the Equality Act there's no real employers required to make reasonable adjustments when it knows, or ought to have known, the disable person has a disability and is likely to be put at a substantial disadvantage by a policy, practice or capability due to that disability employment law— it's a mouthful isn't it Marie?

Marie Walsh: It is.

- Ceri Widdett: And she was only required to make the adjustment that would prevent the disadvantage caused by the disability. So, therefore, important to ask any experts, you know, is the steps you're asking me to take, is that actually something to prevent the disadvantage? You're only required to take steps that are practicable, the cost of any steps are important as are the sources available to an employer and there's a number of potential adjustments, safe return to work, making adjustments to premises, allocating some of the disabled person's duty, transferring to fill an existing vacancy, training, relocation, allowing time off for rehabilitation etc., the provision of a mentor, we know the ones about modifying equipment, instructions and procedures, even providing a reader, providing supervision or other support and help with transport to and from work have all been identified as adjustments.
- Marie Walsh: Yes, and I have had a cracking success on an adjustments claim for a dyslexic employee of one of my clients recently where initially it did seem that there would have to be a number of significant adjustments to keep the employee in role and performing and actually in the end, after taking some good advice from a specialist organisation, we could make significant progress with changes to colour of the screens, certain vision aids and it's been an absolutely rip-roaring success. So, when we're talking about the sickness absence, it doesn't always end in dismissal and we do always seek to accommodate— and you should always seek to accommodate employees to stay where you can.
- Ceri Widdett: Don't forget also Access to Work, that's a quite useful, it the case of practical support to the disabled employee at work. The employee might have to share the costs of specialist equipment, adaptations; the grant is currently capped at £41,400 a year from Access to Work.
- Marie Walsh: That's really interesting. We've had a few questions as well going through there about, you know, is there a rule of thumb for reasonable adjustments and I think we'd both say that each case is fact specific in relation to the employee and the employer's circumstances, so...
- Ceri Widdett: Absolutely.
- Marie Walsh: ...wouldn't like to say.
- Ceri Widdett: There's no rule of thumb.
- Marie Walsh: No.

- Ceri Widdett: And it's an objective test really, effectively a Tribunal will see what they consider to be reasonable.
- Marie Walsh: That's right and one of the other questions, Ceri, was if you're using a sickness absence procedure should you make trigger points longer or increase them if you have a disabled employee?
- Ceri Widdett: There's no actual rule that you do have to change trigger points for the disabled employee. There is some recent case law on it. For example, if there's any absence that's a couple of days outside the trigger then it will probably be reasonable I think to extend the trigger point but there's no rule of thumb and the recent case law has confirmed that, Marie.
- Marie Walsh: Oh, that's interesting. Okay, so moving on then we've got when return and what happens when you do get an employee back to work who has been ill. Hopefully, all your adjustments are in place, so over you.
- Ceri Widdett: This is the monitoring and reviewing. The occupational therapist or anyone else you've got advising, should oversee the implementation of any plan and also importantly review the plan and set necessary changes. Employer's quite often will put a plan in place but then there's no review and nothing happens and at the end of the period that's supposed to be rehabilitation, the employee's kind of sitting there thinking, 'Well is that it? What goes on?' You need to review the final stages, good communication will be improved, also important during this stage and many rehabilitation plans fail because communication of the employee is poor. Remember as well people's mental health problems that you have to make that extra effort in terms of communication their trust to the organisation due their problems might be quite low.
- Marie Walsh: Yeah and also I think the communication upon return is where a lot of employee, employers do fall down and become exposed, particularly in relation to line managers again failing to communicate and to review and amend adjustments that have been made. They're not always going to stay the same, you might need further reports but just talking to the employee and asking them if they're okay, is there anything else you can do, this is all perfectly acceptable behaviour, it's welcomed behaviour and also in relation to returners, it's very key to monitor the behaviour of other employees. That's led to a few problems that have landed us in Tribunal with clients, hasn't it?
- Ceri Widdett: Yes.

Marie Walsh: Where, you know, people have felt that they've been put on in the absence of an employee and how to communicate about the person's absence with other staff. You need to be speaking to them to understand what they would like to be fed and how they would like to be dealt with, that's absolutely fine.

Right, so, just moving on, I think we've had a request to speak more slowly there, so we'll try and take that on board. We're probably rushing. Okay.

Ceri Widdett: Yeah, we'll go back. This is effectively step three we put it at the end— This section of recording of sickness absences is essential if an employer is to know who is off due to sickness, identify trends, individual and collective sickness absence, again that's important, that's where software can be important. Provide earlier assistance with a view to reducing further absences. So what about unfair dismissal then?

Marie Walsh: Yeah, so, where myself and Ceri normally come in is if somebody alleges they've been unfairly dismissed or discriminated against. We're then provided with as many as records as the employer has about the individual which in absence of any sort of computerised system is sometimes hand-written notes, tea— coffee-stained, A4 pieces of paper and, you know, generally we do need the evidence to be able to defend a claim, so that's why we were talking about recording everything.

Ceri Widdett: Absolutely.

Marie Walsh: In relation to unfair dismissal then...

Ceri Widdett: Right, it should be a last resort. Obviously, you know that it's two years for an unfair dismissal for capability dismissal can be a fair reason, the cap is £78,962 at the moment. For a disability discrimination claim with no qualifying period and it's unlimited compensation. So, the criteria that you have to meet for an unfair dismissal is the dismissal must be fair and that's just using the usual 98 Form ERA section. The band of reasonable responses is going to be important in deciding whether an employee has been fairly dismissed for disability related absences, it's also got to be procedurally fair. So this is going to depend upon the size and the resources of the employer, firstly. The smaller employer, effectively, won't be expected to take the burden of an extended sickness absence but a larger employer would. The second question is how long could you be expected to wait and again that's going to be determined by the organisation itself. The nature of the illness, is it likely to reoccur, is it sporadic, the nature of the job as well is important.

The needs of the employer and the effect on other employees. The likely duration of the illness and how the illness was caused. All of these are going to be relevant as to whether or not the dismissal is fair.

Marie Walsh: That's right because you've got your fair reason in an unfair dismissal claim and in this case it would be capability out of the ones on the slide but you do have to act fairly unreasonably in all the circumstances and again each case is fact specific, that's the key to it. So if you feel that you have a fair reason, obviously take advice in relation to each case, but, you know, nine times out of ten if you've taken a good balanced view and you can defend your view to the employment tribunal and you've done everything else that you could do to manage that then you should be okay...

Ceri Widdett: And also considering the availability of suitable, or alternative employment as well is important.

Marie Walsh: Right, we're nearly out of time.

Ceri Widdett: Where we have disabled employees, and I think I'm on my last slide now Marie.

Marie Walsh: Yes.

Ceri Widdett: You also need to make sure that you've made reasonable adjustments and that the dismissal can be justified. That's under Section Fifteen, Disability-Related Absence Dismissal. There is no rule that the employer cannot take into account disability related absence and operating its sickness management procedure. The question is always going to be whether or not it was justified and that means whether or not it was a proportionate means of achieving the legitimate aim of consistent attendance at work and certainly we see case law has confirmed that consistent attendance at work is a legitimate aim. So you've just got to show it's a proportionate means. So it's a balancing exercise to be undertaken.

Marie Walsh: Okay, so...

Ceri Widdett: And the same consideration is largely for unfair dismissal will be taken into account in seeing that a whether or not it is justified and quite often when you've got a disability related dismissal, you're going to have a reasonable adjustments claim potentially and also a section fifteen Disability Related in the discrimination claim.

Marie Walsh: Yeah, so what we encourage use of really is to— good sources of data. So, if you do find yourself managing a sickness

absence and you think that there may be issues further down the line or just generally, if you just want a good way of measuring sickness absence, we do promote use of a computer system because it helps at the end of any potential dispute, it helps to encourage processes so that a lack of bias on a consistent approach by line managers, It encourages and prompts processes like back to work meetings and also you can monitor patterns of absence and a lot of the questions I can see so far are relating to, you know, intermittent short term absences. Well, a good system can flag these up. I did have client once about ten years ago who had an employee who was away, when we counted up the days every Tuesday after a bank holiday and every other Wednesday, as we got the data, I said, 'Well this is shocking, there's obviously pattern here,' and it was a student night at Ritzy's nightclub which I don't know if any of you were younger enough, old enough to remember.

Ceri Widdett: So that's why it's good. Yeah, it helps...

Marie Walsh: It became a conduct issue rather than capabilities but it does help you to flag those up and also barriers to a successful claim. Okay, so, I think...

Ceri Widdett: In terms of process, there is no timescale that we can give you advice as some of the cases that recently are coming before the courts are have literally lasted for about a year, particularly long cases of a further period of absence for 49 and a half weeks, this is the case of Carranza that's set out in the handouts which we'll be providing you with later. Forty-one and a half weeks by September 2001 and Mr Carranza had two further periods off sick with his disability. They weren't taken into account. Then he went off sick for a further three months and the EAT said that was before and wasn't justified.

Marie Walsh: That's interesting. Okay, so we're going to take some questions but I think it's over to you now Rob, because maybe take the questions at the end?

Rob Moss: Yes, indeed. We've got lots of questions still coming in so we've got plenty of time for a Q&A at the end but next up is Noelle but before I introduce Noelle, we're going to have another poll and this one is about measuring your sickness absence. So, let's have a look. Start voting as soon as you understand the question. Do you know the median rate of absence in your organisation? Okay quite a specific question, think back to school if you've forgotten what median is, it's the one in the middle. The mid-point. The mid-point in the range, there you go. So, mean, median, and mode. Do you know the median rate of absence in your organisation? Yes, no, or don't

know and I can see that more than 200 of you have voted so, let's close the poll.

Okay, over to you then Noelle, and welcome, this is the result of our poll. Roughly half and half know what their median. Why do we use the median way?

Noelle Murphy:

Well, I suppose the first thing is we use the median rate because it, for us, we see it as the far more accurate figure. It is the figure that kind of excludes very low or very high numbers, so it gives us a more accurate view. So we would always report on median rates as the most accurate rate but we would also refer to average rates. I suppose what's interesting about the results of that poll there is that we've seen over time, we've been conducting research in this area, monitoring and gathering data on absence rates for ten years now and we've certainly seen more engagement with trying to measure absence rates and I suppose one of the things when you look at a lot of the questions that have come in here are looking at how to manage absence. And the starting point really has to be as was referred to earlier is measuring and recording absence because it allows you to identify triggers and targets within your own organisation. So, if you know your absence rate, your sickness absence rate within your organisation, it allows you to deal with managing absence from those who are, say, on intermittent absence etc., more effectively because you can refer them and say, 'Look everybody else in the organisation is having, you know, an average of this number of days or this median number of days absence, yours is way above that,' so it's a good, kind of, it's a fairer way and it's a reasonable way of an employer to kind of begin the discussion that can be difficult.

So I mentioned there that we have been monitoring sickness absence rates for ten years and the results this year show that the median percentage of working time lost to sickness absence in 2015 was 2.6% and the average was 2.8%. When we translate that into days sickness absence per employee, per year, it's a median of 5.8 and an average of 6.3 days. The best find there we can see that that's the results for this year but when we put it into context and we look at, kind of, what has been happening with absence rates over the ten years since we've been doing our research, we can see that the number of days sickness has been consistently falling, really, since 2006. When we were first looking at the figures, we kind of thought, 'Okay, well maybe the recession there is having an impact and maybe employers or employees are less likely to take sickness absence and maybe there a little more concerned about their roles,' but I suppose what also has emerged is that managing

sickness absence has become more of a priority for employers. We hear that in a lot of the research that we do when we ask HR practitioners about their priorities over the twelve months. I suppose the first thing I should say is that this is based on a survey sample within the UK. We had 602 data sets to use, looking at sickness absence. It's a very broad, sectorial coverage and our data covers almost 1.7 million employees. Now all of that makes it one of the most authoritative research projects in this area within the country really, and the fact that we have been monitoring the data for ten years and gathering the data for ten years, allows us to feel very confident in the results that we have.

So if we go back there, we looked at the percentage of working time, we can see that when we started in 2006 it was at a high of around 4% and now it's, kind of, hovering between 2.5% and 3% both in the average and the median. So, I think that we've found that employers are definitely measuring absence more, our response rates would also indicate that, we have had increasing numbers, year on year, of people who take part in our survey and provide data in this. I suppose the other thing is that we look at both working time and days lost to sickness absence per employee, per year because we found that some organisations will have the percentage figure and some will have that translated into actually how much it means in terms of days. So, for ease we allow people to give us either figure. We then spend an awful lot of time cleaning the data to make sure that we can translate working time into days lost and vice-versa.

Just before I finish up, I suppose the other thing is that one of the things we get asked an awful lot about is the cost of absence. And we have very provisional figures that I can give to you just at the moment. We are still in the process of cleaning the data but the median figure that we would be particularly concerned about show that this year, amongst our survey sample, the cost of sickness absence per employee was £458. This is based a sample size of 152 which isn't a bad sample size at all because historically we've known, since we started this, that very few people actually have the figure or are confident enough to provide us with the figure that they would put to the cost of absence. And I suppose that we know with the increase in HR metrics etc., and the interest in that that our samples, our research is telling us that people are more likely to gather data in this area. So, £458 is a little higher than last year but isn't a huge increase in, kind of, the figure that we would expect in this area and as usual there's higher in the public sector.

Rob Moss: Okay, thank you Noelle.

We now have a message from our sponsors.

Video narrator(s): Those of us in the HR profession know that the world of HR, it's not straightforward.

We have quite a diverse workforce on site here, so lots of different people, working lots of different hours and lots of different roles with lots of different needs and lots of different demands.

If you're a HR professional you have no time whatsoever to stand still.

We need a tool that's really intuitive and it needs to operate really as one of the HR team. It needs to be able to relieve administrative burden, it needs to be able to maintain accurate flow of information. We want to be able to create management reports in an instant. We have to be able to showcase just how much strategic value we can deliver as a team in the boardroom, otherwise HR really doesn't have a place.

We need to be able to do our jobs to the best of our ability. We need to be able to empower managers and employees to be able to do their jobs to the best of their ability as well. And if we can do that, it will mean that the organisation will reach its full potential.

And we do all that with Cascade.

Rob Moss: Okay, and thank you, so...

Okay, thank you to Cascade for that message. Let's move onto a final Q&A session, lots to talk about, lots and lots of questions coming in. Someone just asks Noelle whether or not that £458 figure was for the private or the public sector? It was for both, that's across all sectors and Noelle's just told me in the public sector it rises to £819. That's per year isn't it?

Noelle Murphy: Yes. Per employee.

Rob Moss: Per employee, per year.

Okay, right. Let's have a look. Ceri and Marie I imagine you've probably had a chance to look through some of the questions, are there any that you particular want to answer?

Marie Walsh: Yeah, we've had a few questions come through which have been repeated actually in the actual webinar itself. Well, some of the trends have been repeated. So, one of those was about

holiday and sick leave and there's been a reaffirmation of a case today, hasn't there Ceri about if you take holiday and you're sick during your holiday what happens to your holidays, can you take them again?

Ceri Widdett: Well, if you're off for the whole year then you would have to be paid for your four weeks holiday and that's been reaffirmed in a recent European Court of Justice case, which has just really reaffirmed the previous case of Stringer.

Marie Walsh: Yes, so the answer is it can't be both, it's one or the other isn't it?

Ceri Widdett: Yes.

Marie Walsh: Holidays for rest and recuperation and sick leave is certainly not that. Yes, it does have to be one or the other.

There's been another question come through, I don't know which one, Ceri, you'd highlighted there.

Ceri Widdett: That's was there. There's a couple that a fair way dealing with someone on long-term sick leave again, I think we've gone through that. A fair way would be just to go through the policies and procedures and make sure that you follow the seven steps and dismissal is a last option, effectively, you can't even get them back to work.

Marie Walsh: It is, we've had a couple of questions about contractual sick pay as well. This seems to be a common theme. So I think there seems to be a theme of employers who have a good contractual sick pay scheme running but they feel fearful of seeking to dismiss an employee on long-term sickness until they've exhausted all of the sick pay, as if it's a given right to be sick for as long as the scheme pays you without any consequences and that's just simply not the case, is it Ceri?

Ceri Widdett: It isn't, no.

Marie Walsh: So, you know, if you've got a good sick pay scheme that's fine, it's beneficial to the employees but if there really is no realistic prospect of the employee returning to work and you follow the processes fairly and clearly, the fact that the contractual sick pay scheme is still running, is not a barrier to you seeking to deal with that particular employee. And one of the questions I think we had somebody on long-term sick leave for two years and certainly I would have been dealing with it sooner than that.

Ceri Widdett: I think so, if you look at your policies, well it's really important to actually follow them because if you start not following the policies and you start to treat people differently then employees can get very upset about that and they can actually issue claims on the back of that. So, make sure you're fair and consistent and that means actually do follow your policies, unless it's unreasonable to do so, for example, of the trigger points. If someone's out by a day then it might be reasonable to extend that.

Marie Walsh: Yeah, so I've had another question about permanent health insurance as well, which is the best way to deal with employees who are on long-term sick but being paid by a permanent health insurance? Well, I think the firm's issue apply if they're not legitimately returning to work you need to be speaking to the insurer. I mean I've had instances in the past where the insurer has helped companies to deal with and assist the employee following termination in various ways such as ex-gratia payments, settlement agreements and it's been a work together so everybody gets a good outcome including the permanent health insurer because it is in their interest to deal with long-term sickness absence as well. We've got another one there Ceri that came in.

Ceri Widdett: Yes, there's a question about writing to doctors four times requesting input but no response. How do you suggest we proceed? Well the Fit to Work scheme could help there. If you can't get anything from the doctor, well then you've just got to go on the basis of the evidence you've got.

Marie Walsh: Yeah and also if you've an unhelpful GP who's not responding, there are a lot of independent occupational health companies out there who you can bring in to do a full assessment and, in my experience, it's not prohibitively expensive and it does give an element of impartiality on that basis as well for you and the employee, so that's quite helpful.

Ceri Widdett: A couple of people have, kind of, pointed out some issues with fibromyalgia and ME, and I've put them in the chronic very difficult long-term sickness absences in the turf with mental health as well. So you do need particular skills to be able to deal with those, they can be intermittent; again it's not obviously apparent to you as a broken arm.

Marie Walsh: Yeah, okay, I'm just going through some of the questions on the question box now. I don't know if we've got time. Have we got time Rob to...

Rob Moss: Yes.

- Marie Walsh: ...keep going?
- Rob Moss: Keep going, while you have a look...
- Marie Walsh: Just cut us off...
- Rob Moss: Don't worry, if you keep looking to see if there's any more that interest you there. Just in the meantime, I'll just direct a couple to Noelle.
- Noelle Murphy: Okay
- Rob Moss: We had two questions around the Bradford score, so the Bradford factor as a way of, kind of, measuring the impact of sickness, absence is that right?
- Noelle Murphy: Well it's a means of dealing with it, so it allows you to identify triggers. So, you know, if an individual has had a certain amount or a certain number of days sickness and, you know, that Bradford factor basically is a trigger and triggers are very important because that's, you know, how you can identify when you need to start implementing things like return to work interviews etc.
- So one of the questions there was about managing absence within a company with 70 employees spread over five countries would the Bradford factor be a realistic option? I suppose the thing is that it can be if you want but what I would be doing in order to give as much context as possible to the figure that you're going to use is to try and identify some absence rates specifically in those five countries that you're operating in, so that it gives more meaning to the trigger that you then will come up with because if the sample size that you use needs to be meaningful etc., so with 70 employees spread across five countries I'd do a little bit of research there within each of the five countries that I operate in.
- Rob Moss: I'd imagine that sickness absence rates across the global vary.
- Noelle Murphy: Yes they do, they do for many reasons. One is the amount of statutory sick pay that's available etc., and so it's important to take a look at what's happening on a more local level.
- Rob Moss: Okay, great, thanks Noelle. Marie have you found any more questions you'd like to address?
- Marie Walsh: Yeah, we've a couple of questions about if people want to take different types of leave but don't like the unpaid factor in relation to that leave which is a common theme, can you swap it for holiday, can you encourage them to take holiday? Well the answer to that is yes, you can be flexible as long as you're

fairly flexible. What I have come across in the past is employers who allow their line managers, for example if they're using a Bradford factor type system, to take holidays instead of sick pay if they're keen on that particular employee but then operate a very strict application of no holiday swapping if you're sick to other employees, you know, who might not be as popular. And all I would say there is if you are going to do that, do it consistently but certainly offering the option of taking holiday is certainly not a problem.

We've had a couple of other ones. They're questions about when employees book holidays at the start of the year and then leave them with little or nothing to take at second half in relation to booking holidays. Well, what I would say to you there is you can, as employer under the Working Time Regulations, direct to some degree when staff take their leave. So if you've seen in many policies you might have, that certain amounts of leave are taken on or before this date and then two weeks in the holiday and, or if you're down at Christmas. So, I'd say there if you need to plan your workflow around when employees can take holidays, you certainly can manage it and you don't have to allow somebody to take all of their holidays in the beginning of the section of the year.

Rob Moss: There's a question about pregnancy, Marie, about whether or not sickness in relation to pregnancy should be dealt with in the same way?

Marie Walsh: I think that's difficult. As the discrimination issues potentially there and obviously you would need to be careful if you were dealing with a pregnant employee who was ill as a result of the pregnancy and that wouldn't necessarily be a disability issue, would it Ceri?

Ceri Widdett: No. You've got to have a long-term effect, so it might not be a disability. So I think just treat them fairly the same way that you would treat any other employee but have an eye on the discrimination legislation with regards to pregnancy because there are some quite strict rules about preference in terms of treatment.

Marie Walsh: Yeah, I mean if there is a specific scenario, then happily if you want to email us after the webinar we'll take a look at it for you, won't we Ceri?

Ceri Widdett: Yes, absolutely.

Marie Walsh: It's difficult to do it in a one-off, though.

Rob Moss: Great, okay. We've got about five minutes left. I've just spotted that Sam's asked a question about whether shared parental leave will be one of the policies that fall away with the Brexit vote? Of course, I don't think anyone knows the answer to that yet but I don't think so.

Marie Walsh: I don't, you know, its...

Rob Moss: ...from Europe.

Ceri Widdett: It's going to be very interesting if after Brexit there's no way they're going to undo all the legislation that's come on the back of the European legislation. It's deeply entrenched in our legislation now. I think, I cannot imagine— It would take years and years and years to remove it and I can't imagine they're going to. So what I think at the point that we come out, they'll be no further European legislation but we'll be stuck with what we've got. That's just my view.

Rob Moss: Well, I agree there, we do have a webinar tomorrow on Brexit. Have a look on personneltoday.com/webinars and I'm sure we'll be dealing with questions like that.

Maybe if we could just turn our attention to the last few minutes to some of the questions that relate to the first part of the presentation that Marie gave around leave other than sickness absence. I've seen a few questions asking about the deferral of jury service, what are the rules on that?

Marie Walsh: Yes, so I think I covered that, I'm not sure I covered in on the way through but in relation to jury service it's normally for ten days at a time, isn't it, it can be less or it can be more if employees find a case say the last Thursday of the second week, they can be asked to stay on. I mean in relation to jury service, you can ask to defer, I'll just find the exact situation for it now because I've brought this in with me... Just bear with me. If it's going to cause disruption to the business you can ask the employee to defer it. It says there's no direct right for an employee to take time off work if they're called to do jury service but they're protected from being subjected to a detriment or dismissed as a result of being summoned to attend. So, although, you know, they said there's no direct right to take time off, there's not many employers that would say you can't take the time off and also many employers do provide paid leave for employees who are called to do jury service. So, the answer is that there isn't a direct right for them to take off but in my experience you generally do and you'd have a policy to deal with it. But if you do allow an employee to take time off

for jury service, you should be subjecting them to any detriment or being dismissed as a result of it.

Rob Moss: Okay. There's also a question on whether there is any update on commission payments during time off. So this relates to— Is it Lock or Bear Scotland, I forget which is which?

Marie Walsh: The holiday?

Rob Moss: Yeah.

Marie Walsh: Bear Scotland. Yes, so we're looking at Lock and Bear Scotland, well it's all in one now, isn't it? At the moment, in so far as I understand it, and I will be corrected if anybody else has got anything more up-to-date, I think we are looking at in the inclusion of holiday pay any bonuses and commissions which would otherwise have been payable, so, you know, you do need to do some calculations looking at sort of twelve week average prior to taking the leave when you're looking at calculating pay due if that includes regular bonuses and commissions then it should be included. I mean in the Lock case of course it made a massive difference didn't it, to the pay that was received after taking the leave. We're still there with that, it's still all included to best of my knowledge there haven't been any changes yet.

Rob Moss: We have had a couple of my colleagues have been to the latest hearing on that yesterday and there's been no judgement yet but as far as I understand it's been to the European Court of Justice and it's come back to the UK now, so there should be some closure soon.

Marie Walsh: Oh, hopefully. Will it ever be closed? It's on-going, isn't it?

Rob Moss: Who knows? Who knows?

Okay, time for one more question I think Marie and Ceri...

Ceri Widdett: I've got one, how do you deal with employees who are either under disciplinary investigation or being performance managed do you then block with draft? That's quite a familiar situation; certainly I've come across that. Again it will really depend how serious is the investigation, how long is the illness, you know, supposed to last. The view is that if it is long-term in terms of stress, has the stressed been caused by the investigation, has it been caused by other things? And it's really what is reasonable and whether you can justify the dismissal. There may come a point in time, if someone was, sort of, off long-term with stress and you can't get them in for a disciplinary

investigation hearing, you have to conduct it without them but that would be in the most extreme circumstances.

Marie Walsh: It would. I've had clients in the past who have built into their policy a trigger that if there's a contractual sick pay entitlement that ceases if a disciplinary process has been started and the employee then goes off sick.

Ceri Widdett: Yeah.

Marie Walsh: I don't know how they'd get away with that in the tribunal, they probably would if it was contractual and a policy but...

Ceri Widdett: Potentially.

Marie Walsh: ...you know, it's certainly acted as a deterrent in the past.

Ceri Widdett: I think the key is to just make sure that your policies are very clear that you do try and anticipate all of the situations and if you do have very clear policies then, you shouldn't have any problems.

Marie Walsh: Yes.

Rob Moss: Okay. Well that's great, thank you both so much and thank you Noelle. That is all we have time for. Do take a moment to provide some feedback as you leave the webinar. We will be circulating a handout from Marie and Ceri, we'll circulate the slides, we will circulate a full transcript although that might take us a couple of days. So look out for those in your email and we'll also be circulating a link to an on-demand version that takes a couple of hours before that's ready but you can share that with your colleagues if you wish or watch again. Okay, it just leaves me to thank my guests, Ceri Widdett, Marie Walsh and Noelle Murphy...

Ceri Widdett: Thank you.

Marie Walsh: Thank you for listening.

Noelle Murphy: Thank you.

Rob Moss: You've been listening to a PersonnelToday webinar in association with Cascade HR Software. Thank you for joining us and goodbye.