



## XpertHR Podcast

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- Susie Munro: Hello and welcome to this week's XpertHR podcast with me, Susie Munro. Today I'm joined over the phone by Naeema Choudry to talk about the Fit for Work service. Naeema is a partner at Eversheds advising on employment law, and has taken a close interest in the development of the Fit for Work service.
- So there has been some publicity about the Fit for Work service since it was launched last year, but there may still be some employers who aren't aware of it. Other employers may think it's not relevant to them if they already have their own occupational health provider, for example. So we're going to be looking at how the service works and how all employers can get the most out of it.
- So thanks for joining us, Naeema. Can we start with a brief explanation of what Fit for Work is and what it offers to employers and employees? [0:00:55.4]
- Naeema Choudry: Well thank you Susie. Yes, of course. So the Fit for Work service is essentially a service that's been funded by the government and it's launched for use by both employers and employees. It's a two-pronged approach so it provides advice by telephone and online for both employers and employees in relation to health- and work-related matters. But there is also an assessment service whereby both doctors, employers and employees can refer an employee for an assessment in terms of their capability to return to work.
- There are obviously conditions attached to that. So for example, the employee has got to be off work for at least four weeks and they can't have been referred in the previous twelve months.
- Susie Munro: And I think it's important to say that it's a free service, or it's government-funded, so employers can access it without actually having to pay for the occupational health assessment. [0:01:50.4]
- Naeema Choudry: Absolutely, yes. And that's one of the great advantages because not all organisations have their own occupational health service and especially for smaller employers, SMEs, who may be concerned about the cost, this is something that is freely available and paid for, I suppose, through our taxes, so there's no additional cost.
- Susie Munro: But many employers will have their own in-house occupational health advisors or they might have access to outsourced occupational health. So how does the service that Fit for Work provides differ from occupational health services that employers might already be using? [0:02:23.0]

Naeema Choudry: Well your occupational health provider will try to get a diagnosis of what the condition is and will look at, 'This is the condition the individual has, this is what affects them, and these are the potential steps that you can put in place to enable an employee to return to work.' The Fit for Work service is not really focusing on the medical reason. What they will look at is, 'What are the barriers preventing an employee from returning to work?' So you're not going to get a medical diagnosis of the employee's condition.

What the Fit for Work service will be doing is looking at the bio-social, psychological issues that are affecting an employee's ability to return to work. So it could well be nothing related to work at all. It could well be issues that are in their personal life. So for example the employee has a lot of debt which is causing them concern, which is then making them worry and is making them take time off. So it may be factors that an employer wouldn't necessarily know of through the occupational health service, which is more focused on the medical condition.

Susie Munro: So if an employer does have access to its own occupational health provider, you think it should still consider using Fit for Work because it is a different type of service. What kind of thing should employers think about when they're deciding whether to stick with their own occupational health or go through Fit for Work? [0:03:41.5]

Naeema Choudry: I think sometimes where the employee may be reluctant to talk to the employer or occupational health, that's a good opportunity to look at, 'Well should we do a referral to Fit for Work?' Because it's a government-funded initiative not paid for by the employer, I think it can be seen to be more independent by employees.

People also may be more willing to speak to Fit for Work about these other issues that are in their private life. It may well be that a relationship has broken down, it may be debt problems, it may be a whole host of other issues. Because the important thing about Fit for Work is the employee has to give their consent and it's got to be freely given, and it's got to be given at each stage of the process. So the employee will be reassured that even though they have disclosed certain issues to Fit for Work, they will not be released to the employer without the employee's consent. So that's another good advantage.

The other area where I think it's quite sensible for an employer to consider referring to Fit for Work is where there is a potential grievance-type issue because the employee might once again be more willing to talk about other aspects of work or other areas that are affecting their ability to return to work that they might not do with occupational health, especially if it's in respect of a line manager because they may be worried about what impact it may have on their career generally.

Susie Munro: Yeah, sure. So employees might well see it as more of an independent, impartial service. [0:05:07.2]

Naeema Choudry: Definitely.

Susie Munro: So can we look briefly at how the process works and maybe touch on the practicalities of what might be different between a Fit for Work

assessment and a normal occupational health assessment?  
[0:05:21.1]

Naeema Choudry:

The referral can be done, as I said, in one of three ways. So it can be done via the GP. The employee themselves can make an application to be referred for assessment. And then finally the employer can do it as well. And it can be done online, so the employer would have to fill out a form, give as much information as it can about its workplace, what the employee's job is, what the duties are, what the potential issues are. It's important to remember that Fit for Work won't necessarily contact the employer to get this information, nor will it necessarily know how the employer's business works, so it's important that when the referral application is filled out, the employer gives as much information as it possibly can.

The employer will have to have the employee's consent and it has to be given freely. A copy of the consent doesn't have to be provided when you fill in the form online but the employer will have to tick a box to say, 'Yes, I have got the consent.' So the consent should be taken down in writing, just because you don't want an argument about this later, and the employer should keep a copy of that consent.

So that's the practicalities as to how you actually go about referring somebody.

Susie Munro:

So it's important for the employer to actually discuss it with the employee at a very early stage to make sure they're happy with the referral. [0:06:37.1]

Naeema Choudry:

Oh, most definitely because the last thing you want to do is for the employee not to give their consent or reluctantly give their consent for the assessment but then not give their consent for any return-to-work plan to be disclosed because it's just a waste of everybody's time. Therefore you should be liaising with your employee at an early stage to say, 'Look, we want to help you come back to work. We want to see what the barriers are, how we can facilitate your return, how we can support you.' So it's got to be done in a positive manner to engage the employee, to see that actually there are advantages for them in engaging in this process. 'Cause you won't be able to refer the individual if there is no consent in the first place.

Susie Munro:

And I think it's worth saying again that if it's the employer making the referral they can only do that if the employee has already been off work for four weeks. [0:07:27.7]

Naeema Choudry:

That's right. So there is that limitation of a four-week period because you're going to have to wait a certain period of time and you won't necessarily know whether the individual, how long they're going to be off for. But I think it's quite important to emphasise that the service is not meant for those short, intermittent absences that often employers find difficult to manage because you don't know whether somebody's going to be back tomorrow or they're going to be off for another three days. The service isn't really meant for that. It's meant for longer-term conditions to enable somebody to come back with adaptations if necessary.

Susie Munro: So once the referral's been made, can you take us through a bit of the process after that? [0:08:05.9]

Naeema Choudry: Yeah. It's quite a speedy process actually, which is one of its great advantages. So it's much quicker, potentially, than occupational health. So what happens is following the referral, the Fit for Work service generally will make contact with the employee within 48 hours to schedule an assessment. Now the assessment generally will take place over the phone, which is not like occupational health, 'cause most occupational health referrals will be done face-to-face, although you will have the odd one over the phone.

So the expectation is that there will be a telephone assessment lasting for about 45 minutes, but obviously that will depend on each particular case. There is provision for a face-to-face assessment if it is considered necessary by Fit for Work, but my understanding is that this is going to be in very limited circumstances and certainly the view of DWP, as set out in the GP's guidance, is that this will only be required in a minority of cases. So the employee should expect for the assessment to take place over the phone, as opposed to in person.

Susie Munro: I suppose that one of the benefits of that is that it can be done more quickly if you don't have to arrange a face-to-face interview. The idea is that the process does actually happen within a very short period of time. [0:09:19.6]

Naeema Choudry: Exactly. Yeah. You would normally still be sorting out your appointments within 48 hours, as opposed to having contact. The whole process, you should normally get your return-to-work plan within five days of the assessment. Everything is meant to happen at a much quicker speed. And probably one of the reasons for that is that another one of the limitations of the Fit for Work service is that it only lasts for twelve weeks, so even if the employee is still off after twelve weeks, the Fit for Work service will discharge the employee from its service. So the whole purpose is to get in there quickly to see what can be done early on to facilitate a return to work.

Susie Munro: So that might be where it would be beneficial to have the employer's own occupational health provider involved as well, if it is going to go on for longer than the involvement of the Fit for Work service. [0:10:07.2]

Naeema Choudry: Most definitely, especially where somebody's got a longer-term condition because the twelve weeks is going to be inadequate and you're not going to be able to do another referral for another twelve months 'cause there can only be one referral in twelve months. And what you don't know, say for example you've taken on a new employee, is whether they've already been referred in the previous twelve months by another employer.

If you have your own occupational health service, you may still want to have them involved. It's not an either/or, but I think Fit for Work can complement an in-house occupational health service because the occupational health service may well be able to make contact with Fit for Work and discuss issues that have come out of the return-to-work plan.

Generally speaking, the Fit for Work service won't automatically contact the employer or occupational health, but it might do so if it feels that it is helpful or especially if the employee has suggested that they do make contact.

Susie Munro: And what kind of thing would be included in a return-to-work plan? [0:11:07.9]

Naeema Choudry: It very much depends upon the circumstances of the case. If you've got somebody who is facing, for example, debt problems it could involve suggestions that they're given some time off to go and see a debt counsellor. It might be the provision of debt counselling. It may be a whole host of other things. It could be reduced hours, it could be letting the employee have further training. Whatever the issue is that is personal for the individual. It's not a limited amount. It will depend on what the circumstances are of that particular individual.

Susie Munro: It might be related to the workplace, it might something to do with their hours or their duties, or it might be something... [0:11:42.0]

Naeema Choudry: Exactly, in their personal life that they need some time off to go and address those issues and get some support. It may well be that there's a suggestion that the employee needs, for example, cognitive behaviour therapy and the employer may be able to facilitate that more quickly than somebody being on the NHS which you might not have known about.

Susie Munro: If the return-to-work plan does suggest something like that, does the employer have to implement the suggestions in the return-to-work plan? [0:12:08.7]

Naeema Choudry: No, there is no compulsion. Just as the employee doesn't have to consent, equally the employer doesn't have to carry out the suggestions in the return-to-work plan.

However, a couple of caveats as there always are in life, if the individual's condition amounts to a disability under the Equality Act, then the suggestions in the return-to-work plan could be seen to be adjustments and if an employer fails to carry them out, it could be seen to be a failure to carry out its duty to make reasonable adjustments.

Now the employer may have legitimate reasons as to why they haven't carried out those suggestions. It may well be that the cost of the adaptations is disproportionate or the benefit that the employee will get out of it is disproportionate to the effort it will take. But the key issue is the employer has got to address its mind to it, and if it decides it isn't going to put them in place, to have a reason for it that would be justifiable in an employment tribunal.

And similarly, if you were relying on an individual's absence to dismiss them on the grounds of capability, if there's a return-to-work plan and you don't follow the suggestions that come forward, then a tribunal will consider why you didn't when deciding whether or not the employer was reasonable in dismissing the employee for capability in the first place.

So while there isn't any immediate compulsion to comply, there could be inadvertent consequences if the individual brought a claim under the Equality Act or if they were dismissed, and brought a claim for unfair dismissal.

Susie Munro: So it would be obviously in the employer's best interests to show that it's actually put its mind to it and it's made a considered decision, and to keep a clear record of why those decisions were made. [0:13:51.8]

Naeema Choudry: Most definitely. And I think that's the important thing because sometimes people might think about it but not record it and then people move on and nobody really knows why a decision was made in that way. And it may well be that it would be sensible to sit down with the employee and say, 'Look, we've had a look at this. We don't think this is going to work because of x, but we think this might work. What do you think?' The whole point is to be open and transparent, sit down with the employee and discuss it, you might want to have some discussion with occupational health as well, and then most definitely, Susie, do a note to record the conclusions that you've come to and the reasons why.

Susie Munro: I said that you'd been following the developments of the new service. Do you know what take-up has been like so far? [0:14:34.5]

Naeema Choudry: The assessment service was finally launched to all employers from July of last year. But the take-up from what I can see has been generally quite low. We at Eversheds did our own survey earlier on this year and what we found was that almost 90% of the people who replied to our survey were aware of the service, but 90% hadn't even used the helpline service, and only 13% of the respondents had referred an employee for assessment. So the take-up of it seems to be quite low, and I'm not really quite sure why it's so low, given the fact that it is a free service, and I can't believe that all employers have their own occupational health facility.

Susie Munro: Well hopefully we've helped to give employers a clearer idea of how the Fit for Work service can be used and how employers can get the most out of it. So thanks, Naeema, for taking us through that.

For more information on the Fit for Work service, I'd like to point people in the direction of our 'how to' guide on XpertHR and that's *How to engage with the Fit for Work service about an employee on sickness absence* and Naeema worked with us on preparing that guide.

We've also got some model policies and documents which employers can use to inform line managers and employees about the service.

So thanks again for joining us, Naeema.

Naeema Choudry: Thank you.

Susie Munro: That's all for this week. Thanks for listening and join us again next Friday for the next XpertHR podcast.