discriminate against the worker because of a protected characteristic like sex, race or disability, and to make reasonable adjustments to assist a worker with a disability to remain at or return to work. Case law indicates that the employer does not have a duty to provide more sick pay to workers with a disability than to his non-disabled workers, unless the reason for their absence is his failure to provide reasonable adjustments,[116-117] but that he should take into account a worker's disability in the application of attendance procedures. Nevertheless, the law does not require an employer to maintain a disabled worker in employment indefinitely, but only for a reasonable time, which depends on the nature of the employment, the degree of disability, the employer's business needs and the medical evidence.[118-120]

6.28 In giving advice to the employer the occupational health professional must base his opinion on relevant medical evidence, which may involve obtaining a report from a GP or treating consultant, with the worker's consent, especially where the worker is at risk of dismissal. In some cases it may be thought advisable to suggest to the employer that a report from an independent expert physician should be obtained, again with consent, about the functional capacity of the worker. It is important for the occupational health professional to state clearly the questions that he wishes the clinician to answer in the letter of referral.

6.29 In cases of intermittent sickness absence of short duration for a variety of different reasons, rather than a lengthy period of absence because of a single health problem, it is important to assess whether there may be an underlying medical condition giving rise to unreliable attendance.

6.30 If a worker refuses to consent to a medical report being disclosed to his manager the occupational health professional should not give such a report, but should inform the worker that the manager will in those circumstances be able to act without medical evidence.[121] Exceptionally, where the worker constitutes a risk to other workers or the general public, the professional can make disclosure without consent, but should first advise the worker of his intentions.[2]

6.31 If in the opinion of the professional the work constitutes a risk to the worker himself, despite the employer's compliance with reasonable standards of health and safety for the bulk of his workforce, for example because of the worker's particular susceptibility to a substance or to stress or vibration, the worker should be given full information about the hazard and advised that it may not be in his best interests to continue in the job. The GMC *Guidance on Confidentiality (2009)* states that a doctor 'should usually abide by a competent adult's refusal to consent to disclosure, even if their decision leaves them, but nobody else, at risk of serious harm'.[3] Case law indicates that the employer has in general no legal duty to move a worker from a job against his wishes in order to protect him against himself. One judge said that the employer/employee relationship was not one of schoolmaster/pupil.[122] However, in another case a judge said that where there was a serious risk of death or major injury the employer may have a duty to remove the worker from the hazard against his wishes. The example given was of working at heights with epilepsy.[123]

EXAMPLE 7:

W worked in a factory. She developed dermatitis as a result of exposure to an oil to which she was particularly susceptible. The employer tried to find her work in which she did not come into contact with the oil, but she willingly remained working in the factory and her dermatitis became worse. She sued the employer for continuing to employ her in hazardous conditions but it was held that the employer was not liable because she had voluntarily accepted the risk.[122]

6.32 If the worker, having full mental capacity, refuses consent to any information being given to his manager, the occupational health professional should not normally make disclosure unless there is also a risk to others, or there is a serious risk of death or major injury. The professional is advised to make a contemporaneous note of the advice he has given and the worker's response and to keep it in the occupational health file.

Assessment of fitness to attend a disciplinary interview or meeting

6.33 It is frequently the case that a worker who is accused of misconduct or incapability and is made subject to a disciplinary procedure by his manager will go off sick certified by his GP as suffering from stress, and will refuse to attend investigation and disciplinary meetings on the grounds that he is medically unfit to do so. By virtue of the Employment Rights Act 1996, supplemented by advice from the Advisory, Conciliation and Arbitration Service (ACAS),[124] as a general rule it is unfair to penalise an employee without a proper investigation and a meeting at which the employee is able to put his side of the case, accompanied if he wishes by a colleague or trade union representative. The occupational health professional who is requested to assess whether the worker is fit to attend must ask whether he is capable of understanding the case against him and of replying to the charges, either in person or by instructing a representative. If not, he is unfit, but these cases will be rare. It will often be the case that the worker will find the proceedings distressing, but that delaying the process for a prolonged period will be likely to be more damaging to his health, especially his mental health, than continuing with it. The meeting may be held at a neutral venue, and the worker may be

permitted to be accompanied by a friend or family member for emotional support. It may be advisable to involve someone other than the worker's immediate manager if there has been a breakdown in the relationship between them which is contributing to his stress. Attempts to contact the worker or his representative by letter or telephone should be documented and kept in the file. The decision whether to go ahead in his absence is for the manager to make, but the occupational health professional must give advice based on his assessment of the situation, taking into account the welfare of the worker but also the need of the employer to reach a conclusion in the interest of the organisation and the other workers.[125] The ACAS guide accepts that a meeting may eventually be held in the worker's absence if all reasonable attempts to facilitate attendance have failed.

Ill-health retirement

6.34 Clarity of role in the mind of the occupational health professional and in the understanding of all with whom they deal is particularly critical when dealing with ill-health retirement cases. There must be a clear separation between the employment and the pension aspects of the case. In larger schemes this is increasingly achieved through a physical separation of the functions but smaller schemes may have to rely on the employer's medical adviser as the only source of competent advice on specific health-related employment issues. In this latter case, occupational physicians must be assiduous in acting, and being seen to act, impartially. Occupational health professionals advising pension schemes must remember their duties to the trustees of the scheme; this adds the potential for even greater complexity than the dual responsibility to employer and employee that is common in occupational health.

6.35 Ill-health retirement is often viewed by employees and managers alike as an alternative to resignation, redundancy or dismissal. Tribunals have held that, where the prognosis about a worker's medical condition is uncertain, the employer should consider whether the employee might qualify for ill-health retirement or whether he should remain in employment while further medical advice is sought before making the decision to dismiss.[126] Even if the worker has applied for ill-health retirement benefits the employer must ensure that employment decisions are made fairly and in accordance with both the organisation's internal procedures and relevant legislation such as the Employment Rights Act 1996 and the Equality Act 2010. Only when these aspects of the case have been properly dealt with should attention shift to eligibility for ill-health retirement benefits.

6.36 Eligibility for an early or enhanced pension because of ill-health is dependent on the scheme member meeting various criteria as set out in the rules of the scheme. Criteria vary between schemes. In the public sector some pension schemes are laid down in statutory regulations and decisions are susceptible to judicial review. It is essential that professionals are aware of the wording of the scheme in question and official guidance and case law that has interpreted its meaning. There is no substitute for examining the words of the regulations.

6.37 The optimum means of determining whether an individual is likely to meet the criteria for ill-health retirement will necessarily vary on a case-by-case basis. However, it will be usual for evidence to include an assessment of capability matched to the requirements of the job, as well as objective medical evidence about the illness or injury which allows the formulation of a diagnosis and prognosis. In most cases sufficient objective medical evidence can be gleaned from the worker's occupational health records and/or his general practitioner records, but, where this is deficient, it may be necessary to commission independent examinations and/or investigations. When requesting reports from others it should be made clear that advice is sought only on the worker's medical condition, their functional abilities and the prognosis, not on the possible effects on their employment or their entitlement to a pension.

6.38 Advice on eligibility for ill-health retirement should only be given by occupational health professionals who have suitable and sufficient knowledge of the job and the working environment, because it is usually necessary to assess whether the worker is unfit to perform his normal work as well as whether he is incapable of all work. Many pension schemes require their medical advisers to have a qualification in occupational medicine and some larger schemes operate within a quality accreditation environment with written guidelines on application of the criteria and audit of decisions. This represents good practice. All ill-health retirement processes should have a complaints procedure and an appeals mechanism. Initial assessments and assessments at the appeal stage may be undertaken on the basis of either a physical consultation or as a 'papers only' process. Neither is inherently superior from an ethical standpoint. A physical consultation may convey the perception of greater autonomy for the individual but also runs the risk of blurring the boundaries with a therapeutic relationship (which it manifestly is not). Appeal assessments are more likely to be conducted on a 'papers only' basis to try to ensure consistency and because further examination rarely provides new objective evidence.