

Managing Mental Health in the Workplace and the Legal Issues Which Arise

WELCOME TO CLARITY

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Context

- Mental ill health is the most common cause of long-term absence
 - The pandemic has exacerbated rates of stress and anxiety for many
 - CIPD: 66% are concerned about the impact of the pandemic on employees' mental health
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CIPD Health and Wellbeing at Work Survey 2022

- 79% reported some stress-related absence in their organisation over the last year
 - Just over half believe their organisation is effective in tackling workplace stress (52%)
 - Causes of stress:
 - Workload (60%)
 - Non-work factors (27%)
 - Management style (26%)
 - Covid-19 related anxiety (24%)
 - Demands due to homeworking (23%)
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Recognising a mental health condition

- Warning signs
 - Poor performance
 - Bad attitude
 - Intermittent absence with no obvious reasons
 - Poor timekeeping
 - Are there underlying mental health problems?
 - Mental health can be a classic example of an “invisible disability” (though lack of employer knowledge will impact on liability in certain claims)
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Legal framework

- Duty of care to take all reasonable steps to ensure health, safety and wellbeing of employee
 - Duty of mutual trust and confidence
 - Constructive dismissal
 - Personal Injury – reasonable foreseeability:
 - excessive workload/hours
 - bullying
 - mishandled disciplinary procedures
 - traumatic jobs
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Legal framework

- Health and Safety at Work etc Act 1974: To assess risk and take measures to control that risk
 - Management of Health and Safety at Work Regulations 1999: assess the risk of stress-related ill health arising from work activities
 - Working Time
 - annual, weekly or daily rest, annual leave
 - 48 hour week
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Legal framework

Equality Act 2010 - Disability Discrimination

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability
- Failure to make reasonable adjustments
- Harassment related to disability
- Victimisation

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Disability discrimination

When will mental health amount to a disability?

- mental impairment
 - substantial and long-term adverse effect
 - on the ability to carry out normal day to day activities
 - Substantial – more than minor
 - Long term – has lasted or is likely to last at least 12 months or the rest of the life of the affected person
 - Effect of medication should be ignored
 - Normal day to day activities interpreted widely
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Is stress a disability?

Herry v Dudley Metropolitan Council [2017] ICR 610

- Tribunal found Claimant's stress was "unhappiness due to what he perceives to have been unfair treatment" and a "reaction to life events" and not a disability
 - Dearth of medical evidence supporting claimant and OH report said he was physically and mentally capable of work
 - EAT – "is class of individual who will not compromise on issue at work or return to work but normal day to day activities are otherwise unaffected"
 - "Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, are not of themselves mental impairments: they may simply reflect a person's character or personality"
 - Labels such as "stress, depression and anxiety" should not be relied upon to demonstrate disability
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Knowledge

- Employer cannot be liable for direct discrimination, discrimination arising from disability or failure to make reasonable adjustments unless it knew or should have known about the employee's disability
 - No statutory requirement for knowledge in indirect disability discrimination claims
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Knowledge

- It is the employer's assessment which counts taking into account all relevant information
 - DO NOT accept brief /poorly reasoned OH/GP report at face value
 - **Gallop v Newport City Council [2013] EWCA Civ 1583**
 - Employer simply relied on its unquestioning adoption of OH's unreasoned opinions that the employee did not meet the statutory test of disability
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Knowledge

Sullivan v Bury Street Capital Ltd [2021] EWCA Civ 1694

- Employee suffering from paranoid delusions at various points over 4 years
 - Dismissed for poor performance, time-keeping etc.
 - Dismissal unfair but not disability discrimination
 - Employer had not known and could not reasonably have been expected to have known that he had a mental impairment that had a substantial long term adverse effect
 - Poor performance was an issue before the onset of the alleged disability
 - Colleagues observed no significant changes
 - Claimant had not discussed the effects of his condition with his managers
 - Medical evidence recorded that a lay person would have difficulties in identifying any disorder
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Knowledge

Scott v Ralli Ltd [2021] IRLR 148

- Paralegal dismissed due to poor performance
 - Disclosed depression at appeal stage
 - Alleged dismissed because of something arising in consequence of her disability
 - Held: employer entitled to say that they were unaware of her disability when they dismissed, knowledge acquired after the dismissal was not relevant
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Discrimination arising from disability

- Occurs when
 - an employee is treated unfavourably because of something arising in consequence of their disability and
 - the employer cannot justify the treatment as a proportionate means of achieving a legitimate aim
 - No need for a comparator
 - Justifiable if unfavourable treatment is proportionate means of achieving a legitimate aim
 - If employer has failed to make reasonable adjustments difficult to show treatment was objectively justified
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Discrimination arising from disability

Burdett v Aviva Employment Services Ltd UKEAT/0439/13

- Paranoid schizophrenic dismissed for sexually assaulting female colleagues and members of the public after discontinuing medication without medical approval
 - ET held that dismissal was discrimination arising from disability but was justified
 - EAT disagreed, finding ET had failed to consider whether mental illness meant employee was culpable for misconduct
 - It was also not clear the ET had carried out balancing exercise when deciding that dismissal was proportionate and had given too much weight to employer's legitimate aims over the discriminatory effect of the dismissal
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Discrimination arising from disability

DL Insurance Services v O'Connor UKEAT/0230/17

- Disabled employee was issued with a warning after 60 days absence
 - Employer pursuing aims of ensuring adequate attendance levels and seeking to improve employees' attendance
 - Employer accepted employee was genuinely ill and could not explain why issuing warning would assist in reaching aim
 - EAT held employer failed to justify written warning
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Reasonable adjustments

Duty to make reasonable adjustments where:

- a provision, criterion or practice applied by or on behalf of the employer; or
 - a physical feature of the employer's premises; or
 - the non-provision of an auxiliary aid or service...
 - puts a disabled person at a substantial disadvantage in comparison with non-disabled people,
 - the employer must make reasonable adjustments to prevent that disadvantage
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Reasonable adjustments

- Re-allocating duties
 - Transferring to fill an existing vacancy
 - Altering hours of work
 - Assigning a different place of work/ home working
 - Allowing a disabled worker to be absent for rehabilitation, assessment or treatment
 - Training or mentoring
 - Providing supervision or other support
 - Modifying performance, absence, disciplinary or grievance procedures
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Duty to make reasonable adjustments

Hinsley v Chief Constable of West Mercia Constabulary *UKEAT/0200/10*

- Probationary officer resigned while depressed but there were no indication of health problems at the time
 - A Chief Inspector delayed processing it and urged her to rethink however she wrote a second letter of resignation shortly afterwards
 - On subsequently being diagnosed as depressed she asked to be reinstated on basis she had made a hasty decision while suffering from depression
 - Constabulary refused request on the basis the Police Regulations required ex-officers who wished to re-join to make a fresh application
 - EAT: allowing re-instatement would have been a reasonable adjustment to make
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Practical tips

- Good absence management practices
 - Identifying underlying causes – not just in long-term absence cases but intermittent absences too
 - Considering phased return to work and/or other reasonable adjustments
 - Obtaining meaningful occupational health advice at an early stage and regularly thereafter
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Practical tips

- Support and training outside of absence management
 - Employee assistance programme
 - Access to counselling service
 - Increasing awareness of mental health issues across the workforce
 - Mental health first aid training
 - Promotion of flexible working options
 - Mental health/wellbeing champions
 - Training managers to support staff with mental ill health
 - Training for staff to build personal resilience (eg coping techniques, mindfulness)
 - Increased focus on identifying mental ill health among staff who work remotely
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Practical tips

- Employment documents
 - Ensuring appropriate signposting for employees who need mental health support and developing consistent policy and good practice
 - E.g.
 - Stress risk assessment
 - Return to work processes
 - Bullying & harassment policy
 - Whistleblowing
 - Maternity and other family policies
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Questions?

