

The logo for Weightmans, featuring the name in white text on a dark teal rectangular background with a wavy top edge.

Weightmans

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**Determining the Potential Impact of
Mental Health When Evaluating
Underperformance, Grievances or Suspension**

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A series of overlapping, wavy teal lines that sweep across the bottom of the slide, creating a dynamic, abstract graphic element.

Some general points

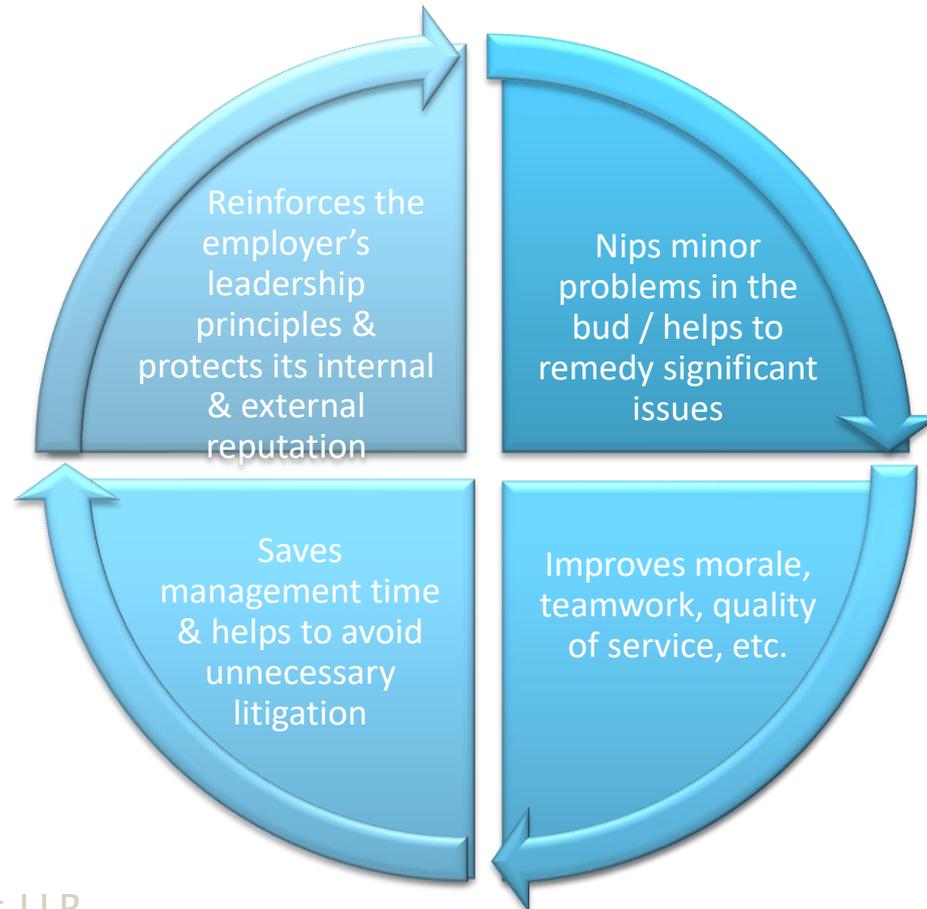
- Question: “To what extent should you consider an employee’s mental health when evaluating
 - (1) underperformance
 - (2) grievances, or
 - (3) recommending a suspensionin the absence of meaningful medical information?”

Answer: If there’s any suggestion that mental ill health may be relevant then do **not** attempt to make such an evaluation without meaningful, up-to-date medical information

Some general points

- How best to handle each case is inevitably fact-specific
- Managing the workplace impact of mental ill health will be easier if...
 - Managers understand the ethical and commercial rationale for acting promptly and effectively, including the key legal issues
 - Employees understand the ethical and commercial impact of their behaviour on their employer and colleagues
 - Managers and employees work in partnership within a culture of mutual trust & confidence

Managing cases effectively – ethical & commercial rationale



Managing cases effectively – key legal considerations

- Breach of contract (including the implied duty of trust & confidence)
- Health & Safety (including the employer's duty to create a safe physical and mental workplace)
- **Unfair dismissal**
- **Discrimination (primarily disability-related)**

Managing cases effectively – key legal considerations

The Employment Rights Act 1996 gives employees **the right not to be unfairly dismissed** (subject to certain pre-conditions)...

...For a dismissal to be fair, the employer must show that:

The dismissal was for one of five potentially fair reasons set out in the ERA (which include misconduct)

The employer adopted a fair procedure when dismissing the employee; and

That the decision to dismiss fell within the band of reasonable responses open to the employer

Managing cases effectively – key legal considerations

Key elements of adopting a fair procedure include...

- Management should adopt an accessible, well understood procedure
- Management should properly investigate:
 - Any grievance complaint (e.g. is it raised by or against an employee with potential underlying mental ill health?)
 - The cause(s) of any apparent underperformance or alleged misconduct (e.g. is mental ill health a contributory factor?)
- An employee should have an adequate opportunity to review and comment upon the evidence, and argue their case
- Management must make **well-informed** decisions throughout

Managing cases effectively – key legal considerations

- Establishing belief in an employee's guilt/determining if they are underperforming, and then deciding upon any subsequent sanction/action plan are separate exercises...

- Did the employee commit the offence or are they underperforming?
...If so, what action should be taken...
 - Gravity of offence / seriousness of underperformance?
 - Any existing warnings?
 - Any mitigating factors...including any underlying contributory health factors?

Managing cases effectively – key legal considerations

- With a grievance or conduct case, discrimination may comprise the subject matter of the alleged wrongdoing, e.g.:
 - Racially-motivated bullying & harassment
 - Sexist banter

- Discrimination may instead impact on a performance, grievance or conduct case in terms of:
 - The vulnerability of the alleged victim
 - Potential mitigation
 - A potential defence

Managing cases effectively – key legal considerations

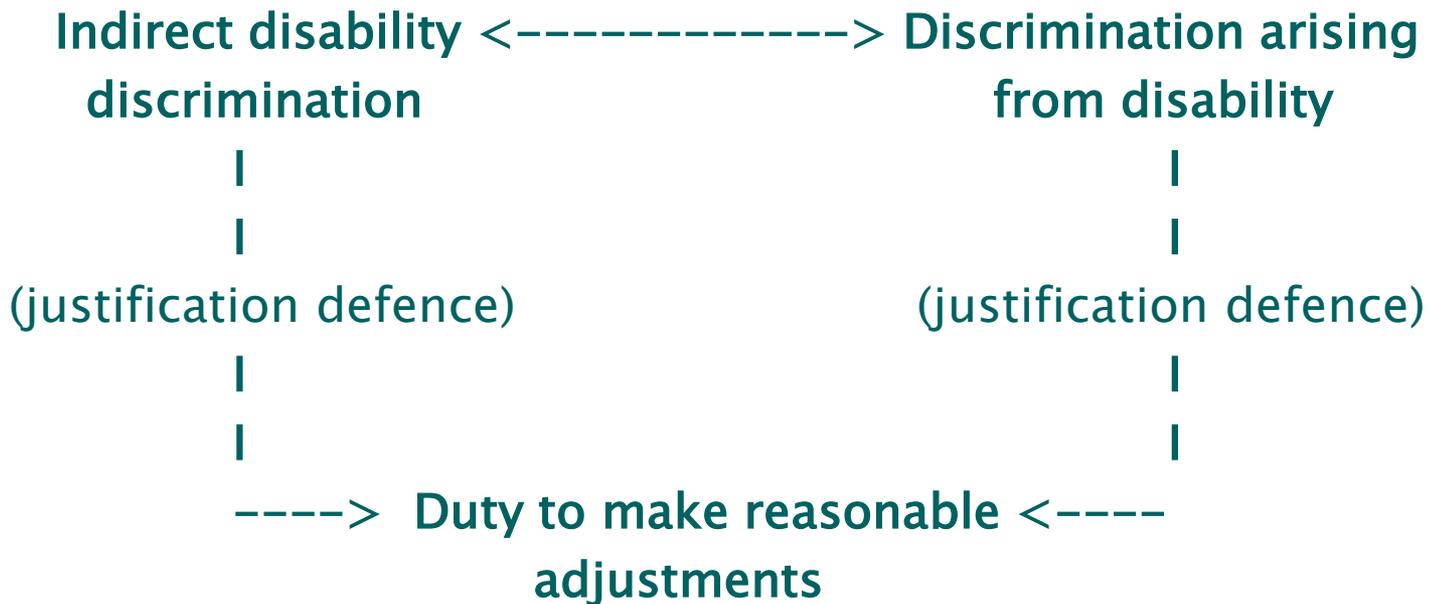
- Where mental ill health is potentially relevant, the protection against disability discrimination may impact if the ill health amounts to a ‘disability’ as defined in The Equality Act 2010

- Subjecting an employee who has an underlying mental health condition to bullying or any other form of unfavourable treatment might amount to unlawful...
 - Direct disability-related discrimination; and/or

 - Disability-related harassment

Managing cases effectively – key legal considerations

- Where an underlying disability is a contributory factor in an employee's underperformance or alleged misconduct then there are three forms of protection that might be relevant...



Conclusion

- And so...when evaluating underperformance, whether a grievance should be upheld and/or whether an alleged wrongdoer should be suspended, and where there is any indication that mental ill health may be relevant then...
 - Management must evaluate the extent to which the mental ill health impacted, both with regard to culpability and the next steps that management should take
 - Management must make well-informed decisions and avoid discrimination when doing so, which means seeking meaningful, timely medical and any other relevant expert input

Q & A

- Thanks for listening

- Any questions?



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