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AMENDING TRIGGER POINTS

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The Question(s)

Trigger points

When, and by how much, do you amend trigger points and progress warnings for frequent short-term absences and/or under-performance because of a difficult mental health condition?

The Essential Issues...

- (1) What are the Legal Duties?
- (2) How do they Interact?
- (3) How to stay the right side of the line?



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1. What are the Legal Duties?



Disability

- Likelihood that serious mental health condition will be a disability (s6 Equality Act 2010 –“EA”-)
- Safe assumption is that it is a mental impairment which:
 - Has a substantial
 - Long term
 - Adverse effect
 - On the ability to carry out normal day today activities



The Duties that this Engages

- Direct discrimination unlikely to be engaged (***Owen-v-AMEC Foster Wheeler*** [2019] EWCA Civ 822)
- Indirect Discrimination (as addresses group disadvantage) unlikely to be the best manner of formulating a claim



Duty to Make Reasonable Adjustments (ss20-1 EA)

(3) ...is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Reasonable Adjustments

- Provision, Criterion or Practice (“PCP”)
- Places disabled person at substantial disadvantage
- By reason of disability
- Duty to make such adjustments as are reasonable in the circumstances to avoid or limit the impact



S15 EA

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and**
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

S15 Analysed

- Test is 'unfavourable' as opposed to 'less favourable' treatment. Assess through ordinary experience of life per ***University of Swansea-v-Williams*** [2018] UKSC 65
- Arises in consequence of disability not because of the disability; e.g. absence from work which is linked to but is not the disability (see e.g. ***Pnaiser-v-NHS England*** [2016] IRLR 170)

S15 Cont

- Open to justification but needs to be:
 - Proportionate means of achieving
 - A legitimate aim



2. How Do They Interact?





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General Dynamics-v-Carranza
[2015] ICR 169 (HHJ Richardson)

The claimant suffered from stomach adhesions and was disabled for the purposes of the EA. After long periods of absence from work, for both disability and non-disability reasons, the employers issued him with a final written warning, and, following further absence for a shoulder injury and medical advice that periods of absence were likely to continue, he was dismissed. In between the warning and dismissal two periods of absence had been discounted.

Relevance of Reasonable Adjustments?

“

The procedures were, however, already modified to cater for disability. It is, I think, unsatisfactory to define a [PCP] in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. It should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.

”

Relevance of Reasonable Adjustments?

“

Secondly the fact that the employers had not dismissed the claimant for two relatively short periods of absence following the final written warning provides no basis in itself for saying that disregarding the final written warning was a step which it was reasonable for the respondent to have to take. It would be remarkable and in my view regrettable if an employer, by showing leniency to a disabled person in respect of some short periods of absence late in an absence management procedure, thereby became required by law to disregard all disability-related absence prior to that time whatever the impact on the business of doing so.

”

S15 Better?

“

34 In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15.

”

S15 Better?

“

If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse—for in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make allowances for a person's disability. If the case had been put that way it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were “unfavourable treatment”. But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim.

”

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Griffiths-v-DWP [2017] ICR 160
(Elias LJ)

“

I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature...But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

”

But...

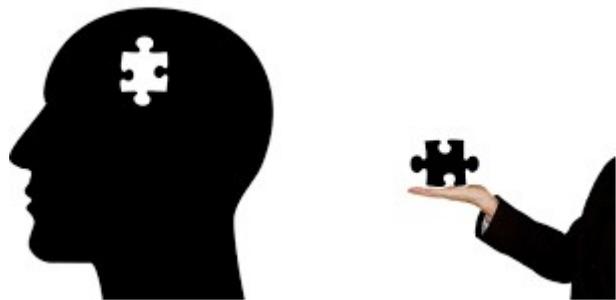
“

The employer is under the related duty under section 15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.

”

Reminder of the Question

When, and by how much, do you amend trigger points and progress warnings for frequent short-term absences and/or under-performance because of a difficult mental health condition?



The Response

- No 'one size fits all' response
- Consider the employer's legitimate aims
- Consider the proportionality of the employer's response
- Reflect those considerations in any written decision





Consider

- Sickness absence policies already shift the normal position in favour of the disabled person
- An employer is entitled to expect an employee to attend work and provide regular service
- Yet an employer ought to exercise a degree of compassion. Consider 'the extra mile'

Consider (cont)

- Nature of the business
- Impact of the absence
- Period of absence
- Supportive steps



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Best Guidance



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QUESTIONS



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