

Our World First

## The question

How do you handle a disciplinary in which an employee suddenly informs you of an undisclosed (potentially undiagnosed) disability?

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# Overview

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## Technical Tommy – overview of relevant the law

- Disability discrimination recap
- Developments
- S.15 Claims

## Case study

- What not to do
- A textbook approach with practical tips (a commercial approach)

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# The definition of disability

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## Definition of disability under the Equality Act 2010

- A physical or mental impairment which has a substantial and long term effect on a person's ability to carry out their normal day to day activities

But don't forget that the definition also includes

- Past disabilities
- Fluctuating or progressive conditions
- Deemed disabilities

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# Knowledge of disability

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Knowledge (actual or constructive) of the individual's disability is required for the purposes of making the following claims:

- Discrimination arising from a disability
- Direct disability discrimination
- Failure to make reasonable adjustments

Knowledge is not required for an indirect discrimination claim – i.e. where a provision criterion or practice which is applied equally, adversely affects the disabled employee and this cannot be justified

Perceived disability can also be protected

Wider definition of disability is being accepted in the UK because of European case law

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# The development of s.15 claims

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Introduced into Equality Act in 2010 – we're starting to see the impact

What is a s.15 claim?

- A treats B unfavourably because of something arising in consequence of B's disability

Two causal elements

- the “something” must arise from the disability, and
- the unfavourable treatment must be “because of” the something.

No need for a comparator – unfavourable treatment, rather than less favourable treatment, however

- An employer may objectively justify their behaviour
- The employer does not need to have knowledge of the consequences of the disability to be liable

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## The Case Study – the question in context

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**Harry works in a care home – Careless. When he applied for the position he completed a health questionnaire – nothing in the questionnaire revealed anything of concern for Careless. October 2017 – a member of staff complained about bad language – received a verbal warning. In January 2018, Harry spoke to a resident in an inappropriate manner – he tells a resident to “Shut up”. There is a disciplinary hearing – Harry mentions he has anxiety and may have PTSD. Shortly after Harry’s colleague Megan incorrectly files a form – Harry shouts at Megan – he swears and slams a door. The next day Harry is invited to a disciplinary hearing...**

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## Case study – what not to do ...

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At the disciplinary hearing, Elizabeth, Careless' manager informs Harry that she has decided to let him go

### Employment Tribunal claim

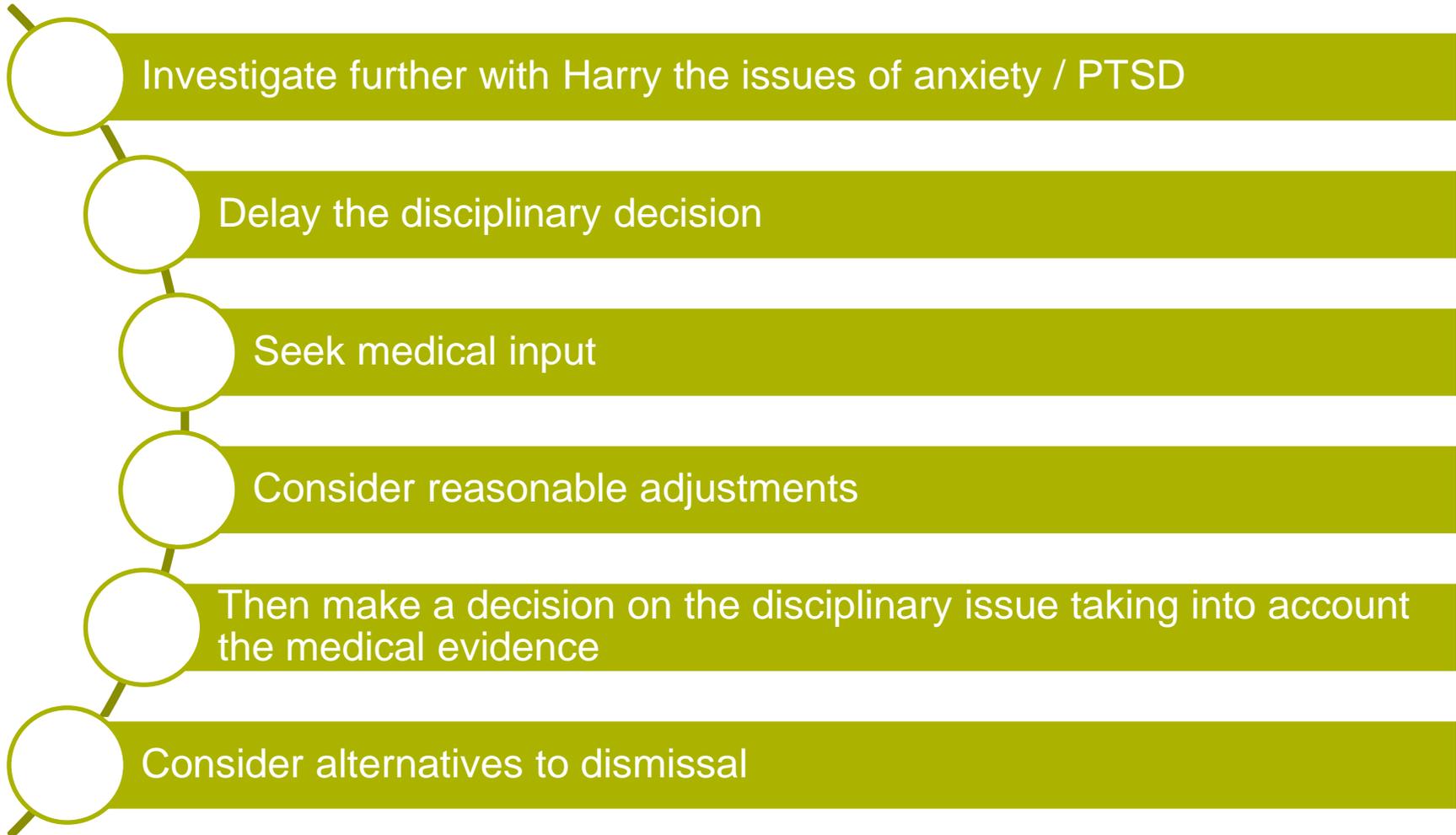
- 3 incidents that Harry lost temper or is rude
- Dismissal was unfair treatment
- Employer informed of Harry's anxiety and PTSD
- "No knowledge" defence failed. Employer had actual/constructive knowledge
- Employer did not need to know that behaviours arose out of disability

A decision on the disciplinary issue is made without taking into account the medical evidence

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## A textbook approach ...

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# Investigation and enquiries

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Harry has informed  
Careless of a condition  
that could be a disability  
– they are on notice

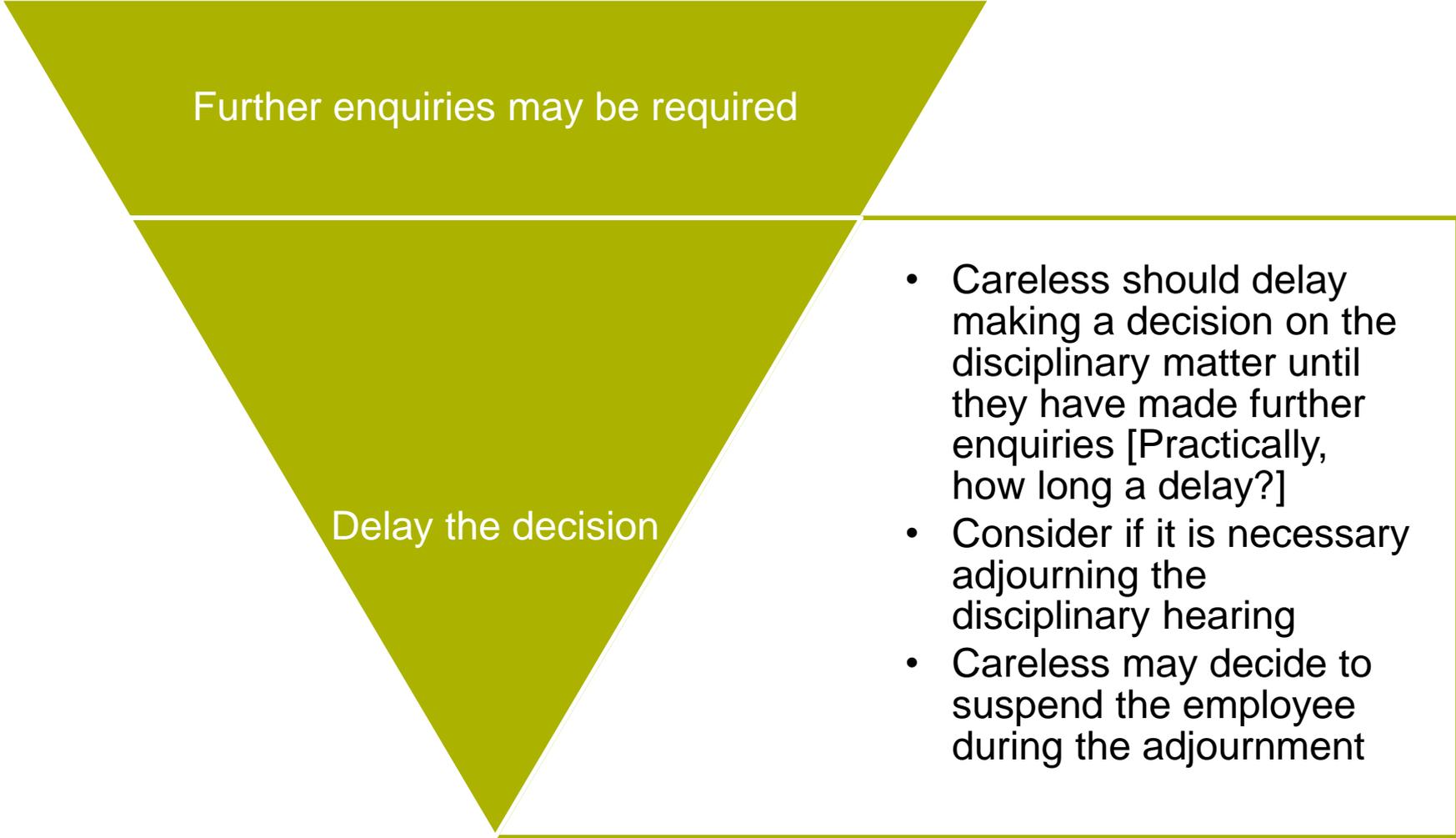
Ask Harry for more  
information relating to  
the alleged disability

- How long has he suffered from this?
- What has he been told by his doctor (what is the prognosis)?
- Consider if there a link between the potential disability and the misconduct?
- If so, in what way has the potential disability affected the misconduct which is the subject of the disciplinary

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# Consider delaying the hearing/decision

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Further enquiries may be required

Delay the decision

- Careless should delay making a decision on the disciplinary matter until they have made further enquiries [Practically, how long a delay?]
- Consider if it is necessary adjourning the disciplinary hearing
- Careless may decide to suspend the employee during the adjournment

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## Seek medical input

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### Seek medical input?

- If Careless has an occupational health team, then refer Harry to the specialists, or write to his doctor, and ask:
  - Whether Harry is suffering from a disability, or if there is no underlying medical condition
  - What impact the condition or disability has on his normal day to day activities
  - Whether there is a connection between the misconduct and the potential disability
  - What reasonable adjustments, if any, are required
- [But is medical input necessary? Can this be conducted over the phone]
- [Document discussions and issues considered]

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# Moving to a decision?

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## Factors to consider:

- Be alert to the possibility that there may be one or more hidden disabilities which could explain the behaviour or concerns identified
- Take stock before making a decision
- Consider if medical evidence is required (and in what form) but ensure you apply your own mind to this
- If disability or assume employee has a disability proceed with caution – particularly if dismissal is an option
  - Consider reasonable adjustments
  - Consider alternatives to dismissal
- Legal advice?
- Remember to document your decisions and reasoning

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## Contact us

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