



Stress and Anxiety

Ciara McLoughlin, Partner, DLA Piper

Dublin, 22 October 2019



The Question

"In a grievance, disciplinary or under-performance situation, what must you do - practically and legally - if the employee responds by taking long-term sickness leave, for reasons of stress or anxiety?"



Stress

"Stress is not a disease or injury but it can lead to mental and physical ill health"

Health and Safety Authority

"reasonable to assume that being subjected to a disciplinary process...are events which might be accompanied by a certain degree of stress,

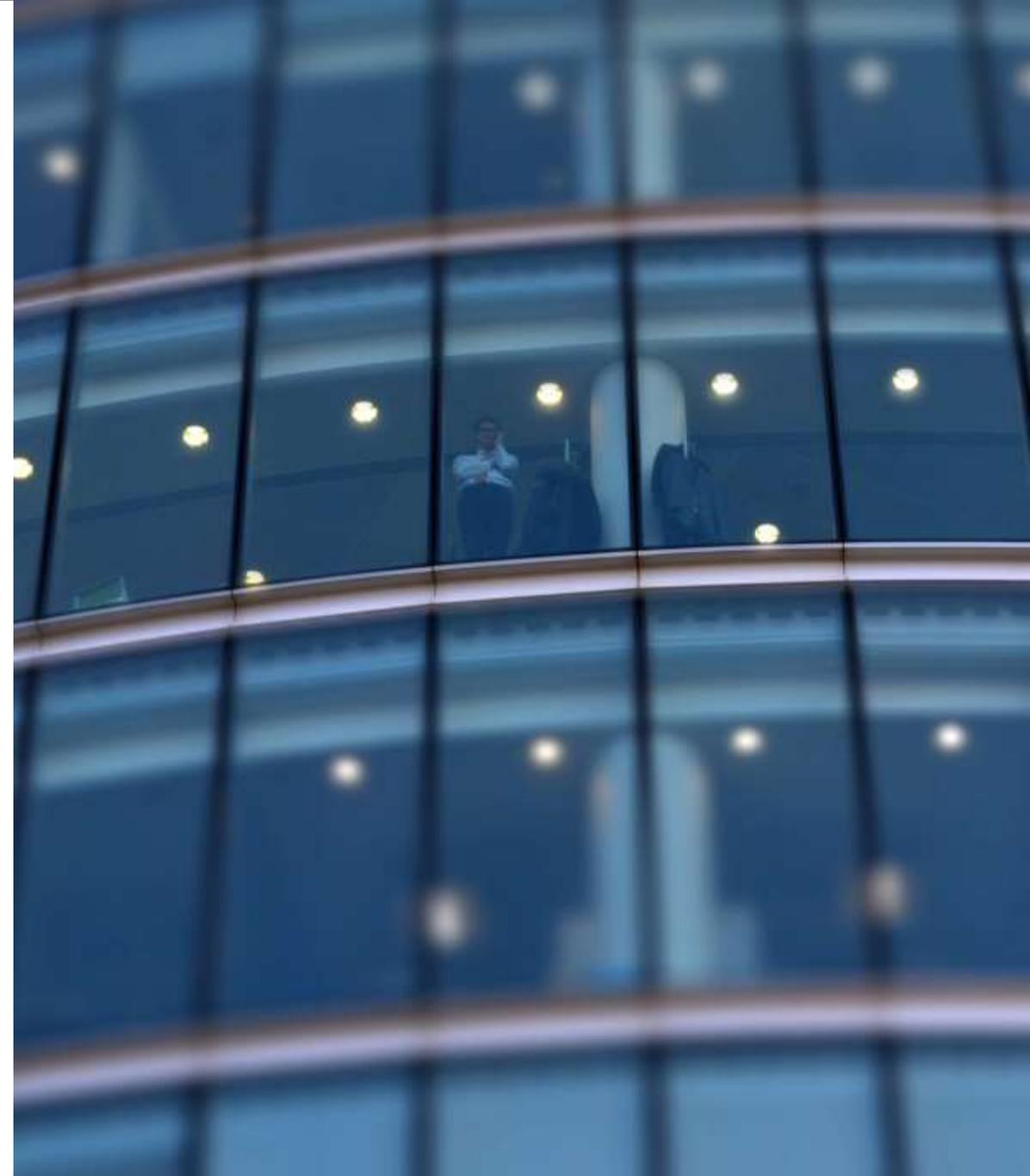
they are events which are encountered in the normal course of the management of a business or organisation.

In the absence of any reason for a contrary conclusion, an employer is entitled to assume that an employee is able to withstand such stress."

Shortt V Royal Liver Assurance Ltd 2008

Meeting with Employee

- invitation triggers "going off sick"
- attempt to stall the process?
malingering?
- consider postponement and
record rationale for decision
- "what's the rush?"



Concerns for the Employer

1. How to manage/resource the processes
2. How to keep the processes moving
3. The obligation to make reasonable accommodation
4. Avoidance of a disability discrimination claim
5. Fear of a stress claim
6. How to communicate with the employee

Parallel Processes

Absence Management

- HR2
- No pauses
- Occupational Health

Performance / Disciplinary Process

- HR1 plus "Officer" 1 from the Business
- Pause

Grievance

- HR3 plus "Officer" 2 from the Business
- Progress with all witnesses.
- Rely on witness submissions
- Outcome

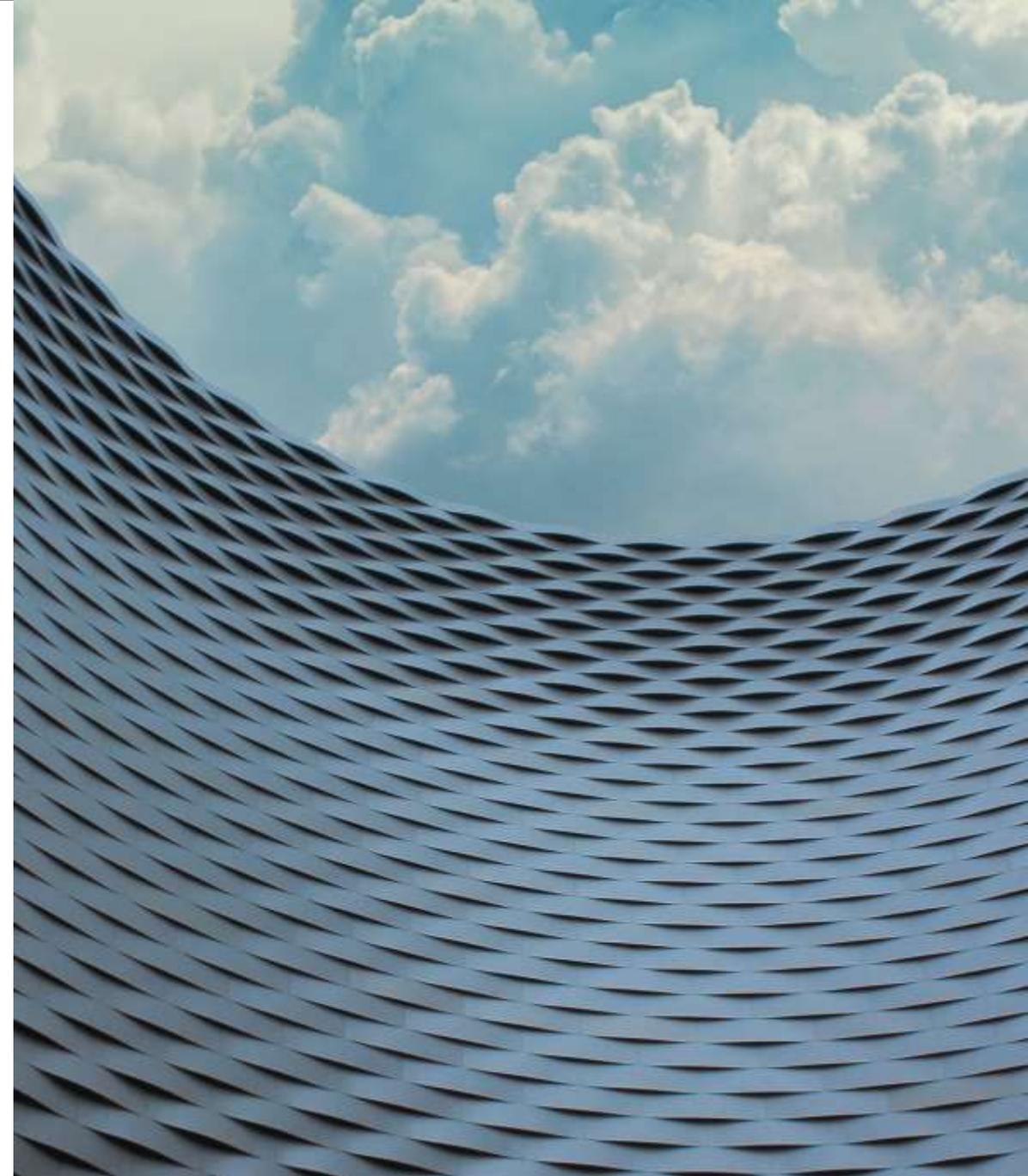
The Magic Bullet?

- Health and Work Handbook by The Faculty of Occupational Medicine, the Royal College of General Practitioners and the Society of Occupational Medicine, with the support of the UK Department for Work and Pensions:
- *"It is likely that the effects of an unresolved dispute on the employee's mental health may be greater if the proceedings are postponed."*
- *An employee may be unfit for work but fit to engage with the management process.*
- *The doctor or nurse will have to assess whether attendance is likely to cause deterioration in the employee's mental health, for example if there is a significant risk of suicide".*



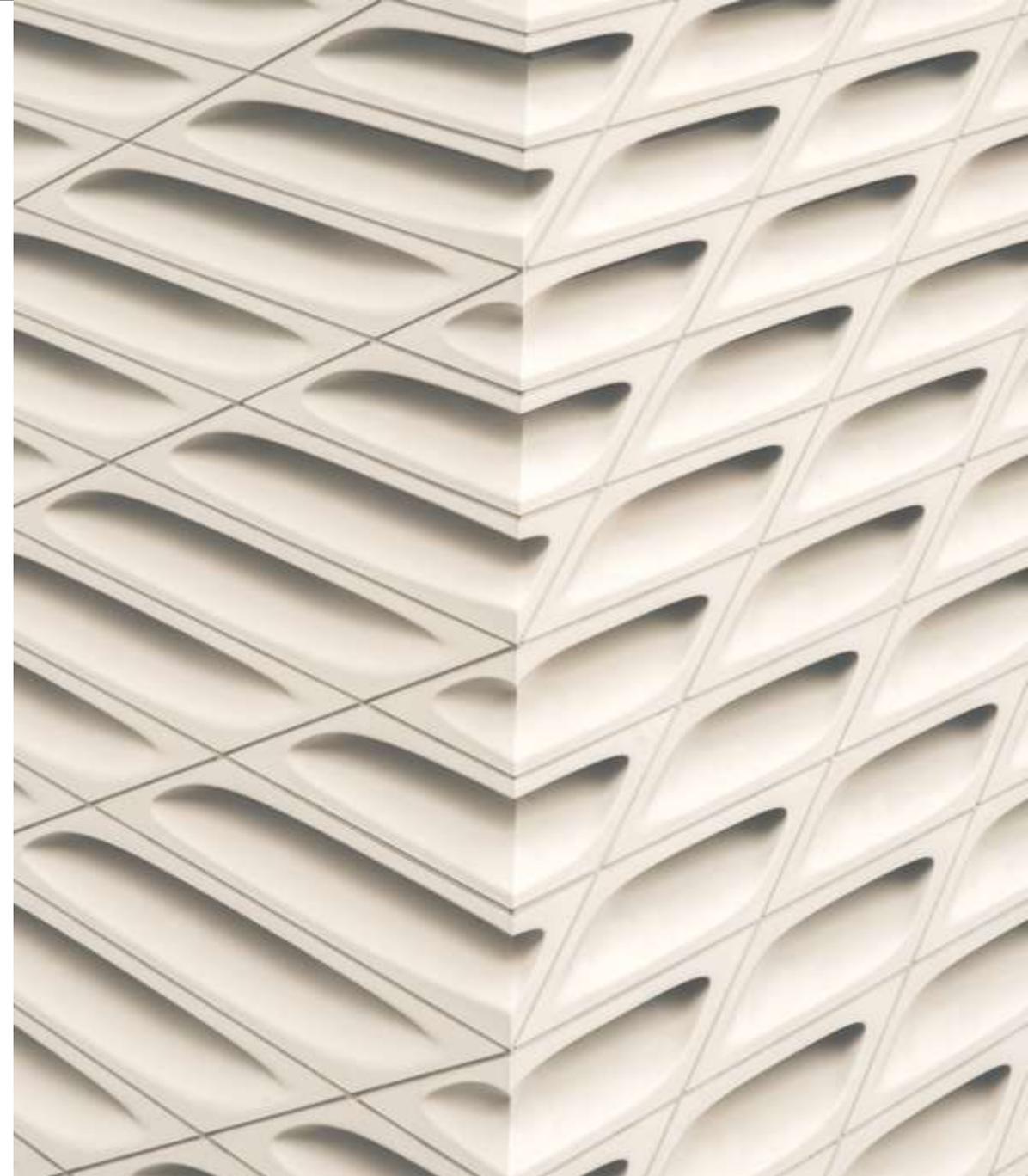
Occupational Health

1. Choose practitioner carefully
2. Carefully drafted questions
3. Right to know symptoms as they impact work
4. Reasonable accommodation to allow process to continue



What adjustments can be made to the procedure:

- Have the matter dealt with
 - in writing
 - over non standard period of time (e.g. two full days rather than one full day)
- Neutral venue
- Regular breaks
- Allowing a companion at the meetings outside of the usual employee/union official.



Ms B V A Newsagents and a Deli 2013

- Medical certificate stated that the complainant was suffering from 'work-related stress'.
- The respondent submitted that 'work-related stress' is not a disability within the meaning of the Acts.
- Adjudicator – *"In the context of these Acts, disability must be looked at 'in the round'. It cannot be reduced to a game of bingo where a complainant's doctor labels a condition on the medical certificate in a certain way and the disability provisions automatically apply and s(he) calls it something else and the disability provisions do not apply.*
- The complainant prior to the submission of the medical certificate, had told her employer that she was not sleeping and suffering panic attacks.
- *"Having received the medical certificate and in possession of this information, a prudent employer would have sought a second medical opinion before dismissing her. Later emerged that the sequelae of the complainant's condition reflected a serious disorder – anorexia nervosa. She remains under the care of a psychiatrist. Therefore I am satisfied that the complainant's condition is a disability within the meaning of Section 2 (e) of the Acts."*



2016

A Sales Representative v A Books Wholesaler

- *"There is a particular stigma about psychiatric conditions in the workplace and regrettably the complaint was punished by the respondent for revealing the true nature of his condition."*



Stress Claim

- The employer obligation is to put in place systems of work which protect employees from hazards which could lead to mental or physical ill-health.
- Psychiatric injury claim:
 - Damage – **not** ordinary occupational stress
 - Causation
 - Foreseeability – knew or ought to have known
- Counselling - EAP



Key Takeaways

- Proceed with care
- Process may not need to be delayed indefinitely or until employee recovers fully
- Consider obtaining medical report
- Employee though unfit for work may not be unfit to attend a disciplinary meeting or hearing
- Reasonable accommodations advisable
- The Reasonable Employer



Thank you

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com.

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. This may qualify as “Lawyer Advertising” requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2019 DLA Piper. All rights reserved.