

WHITE PAPER CONFERENCES:

# Law for HR: Hints, Tips and Solution-Focused Answers

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How do you handle an employee who discloses dyslexia or a mental health issue as part of a PIP or disciplinary, but not in pre-employment forms or meetings with their line manager (even after direct probing)?

# CONTENT

- Can an employer ask an employee about health conditions (pre-employment)?
- Is there an obligation on an employee to disclose a health condition?
- What protections apply in circumstances where a health condition is raised (late) in the context of a performance improvement plan (PIP)?
- What practical steps should an employer take if a potential disability is raised at a late stage in a performance or disciplinary process?

# Performance issues linked to underlying health conditions:



*Can an employer ask about health conditions  
(pre-employment)?*

# Pre-employment health questions:

- Section 60 of the EqA 2021: unlawful to ask questions about disability and health before a job offer is made.
- The purpose of Section 60 is to prevent disability or health information being used to sift out job applicants without first giving them the opportunity to show they have the skills to do the job.

## Section 60 prohibits:

- Enquiries by (or on behalf of) an employer about a job applicant's disability and health during the recruitment process up to the point when a job offer is made.
- Written and verbal questions put to job applicants and to any third party – for example, a current or ex-employer.

An employer can, however, make an offer conditional on medical checks and then ask health-related questions without being in breach of Section 60.

## Exceptional circumstances when health questions are permitted:

Section 60 allows questions about health and disability to be asked before job applicants are offered the job only when the law says they are necessary and fall within the following narrow exceptions:

To find out if a job applicant can take part in any **assessment to test their ability** or if reasonable adjustments are needed

To find out whether a job applicant will be able to carry out an **intrinsic part of the job**.

To find out whether a job applicant has a particular disability where having that disability is an **occupational requirement** of the job

To **monitor the diversity** of people applying for the job.

To take **positive action** in relation to disabled people

Where **another legal requirement** means an employer has to ask health OR to vet applicants for **national security purposes**.

*Is there an obligation on an employee to disclose  
a health condition?*

# Employees who fail to disclose health conditions:

- It's not at all uncommon for employees to fail to answer questions about health matters accurately, or avoid disclosing disabilities.
- Whilst employees have a duty to maintain trust and confidence, and generally to engage honestly with an employer, in many cases there is a real fear of stigma and / or a strong desire to keep matters relating to health private.
- The courts are sympathetic to this (and generally are not comfortable with a punitive approach).
- It is common for health issues to come to light in the context of a PIP process.
  - The issues may be real, longstanding and directly relevant to the process.
  - Health problems may be a reaction to the process itself.
  - On occasions issues raised are essentially diversionary.

# Cheltenham Borough Council v Laird [2009] EWHC 1253 HC

- In 2002, Mrs Laird was recruited as a managing director at Cheltenham Borough Council. She was appointed after filling in a pre-employment questionnaire. Mrs Laird gave answers to, among others, the following questions:
  - Q: Do you normally enjoy good health? A: "**Yes**"
  - Q: Do you have either a physical and/or mental impairment? A: "**No**"
  - Q: Have you any ongoing condition that would affect your employment? A: "**No - NB I get occasional migraine but this does not affect my ability to work or usually require time off from work**"
- After Mrs Laird's appointment, she had a series of disputes while working at the council, particularly with the council leader. She was absent for a prolonged period and her employment terminated on 2005.
- When it later emerged that Mrs Laird had a history of depression dating back to 1997, Cheltenham Borough Council brought a claim for fraudulent or negligent misrepresentation on the grounds that she had concealed her medical history during the selection process.

*What protections apply in circumstances where a health condition is raised (late) in the context of a performance improvement plan (PIP)?*

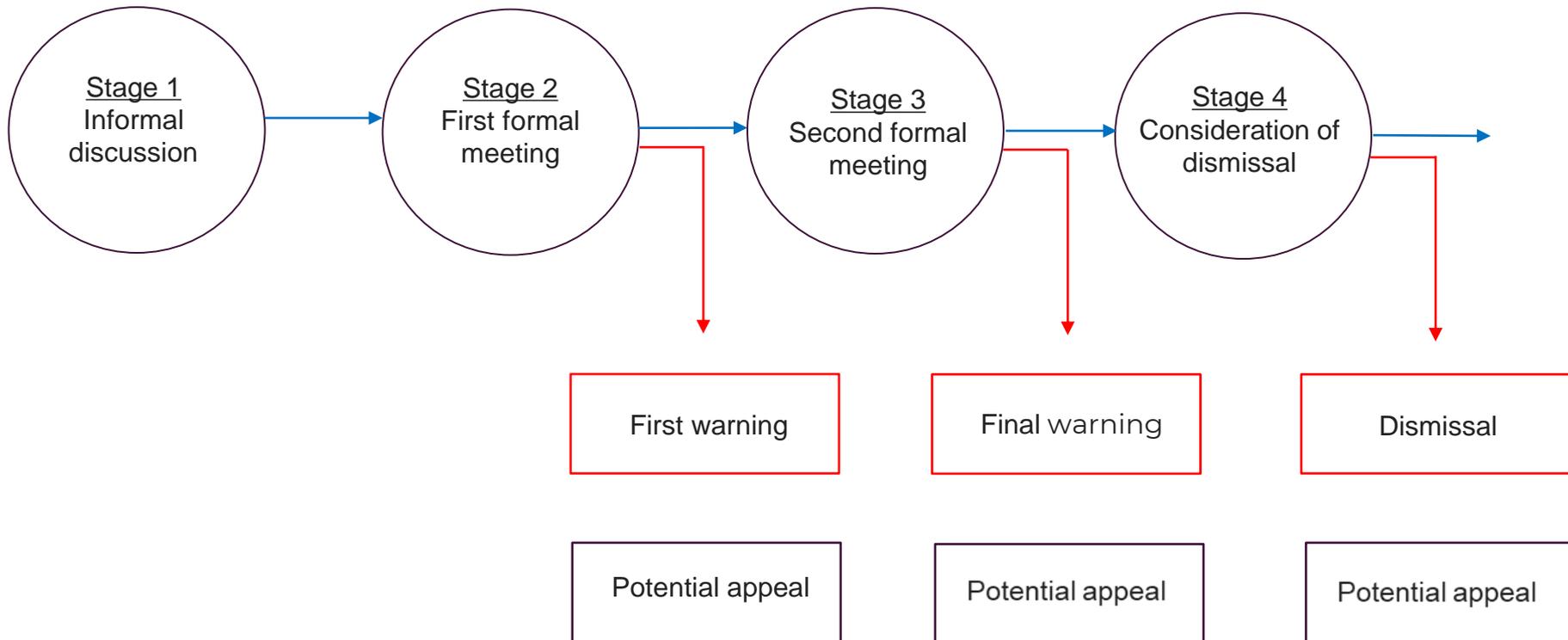
## The relevant legal framework:



*Unfair dismissal*

# Performance management process

The precise sequence and duration of a performance management process will depend on a range of factors including: (i) the length of time an individual has been employed, (ii) the extent and impact of the underperformance, and (iii) the degree to which an individual is demonstrating consistent improvement. A typical process (for an employee with more than 2 years service) will comprise:-



# *Protections under the Equality Act 2010*

# TYPES OF DISCRIMINATION:



# DISABILITY – THE STATUTORY DEFINITION (s.6 EqA 2010)



*“1) A person (P) has a disability if –*

- > (a) P has a (i) physical or mental impairment, and*
- > (b) the impairment has a (ii) substantial and (iii) long-term adverse effect on P’s ability to carry out normal (iv) day-to-day activities.”*



# DISABILITY – THE STATUTORY DEFINITION (CONT.)

The definition poses four questions:

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

A tribunal considering the question of disability should ensure that each step is considered (Goodwin v Patent Office [1999] IRLR 4 (EAT)).

# THREE TYPES OF KNOWLEDGE

ACTUAL

The employer knows the person is disabled.

IMPUTED

The employer's employee or agent knows that the person is disabled. This knowledge will usually be attributed to the employer.

CONSTRUCTIVE

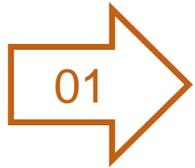
The employer has neither actual or imputed knowledge of the disability, but ought to have known about it.



# ELEMENTS OF CONSTRUCTIVE KNOWLEDGE

## Failure to make reasonable adjustments

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The employer would have to have known had they made appropriate enquiries.



The employer must have knowledge of facts relevant to the definition of disability



# Discrimination arising from disability (s15 Equality Act 2010).

*(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.*

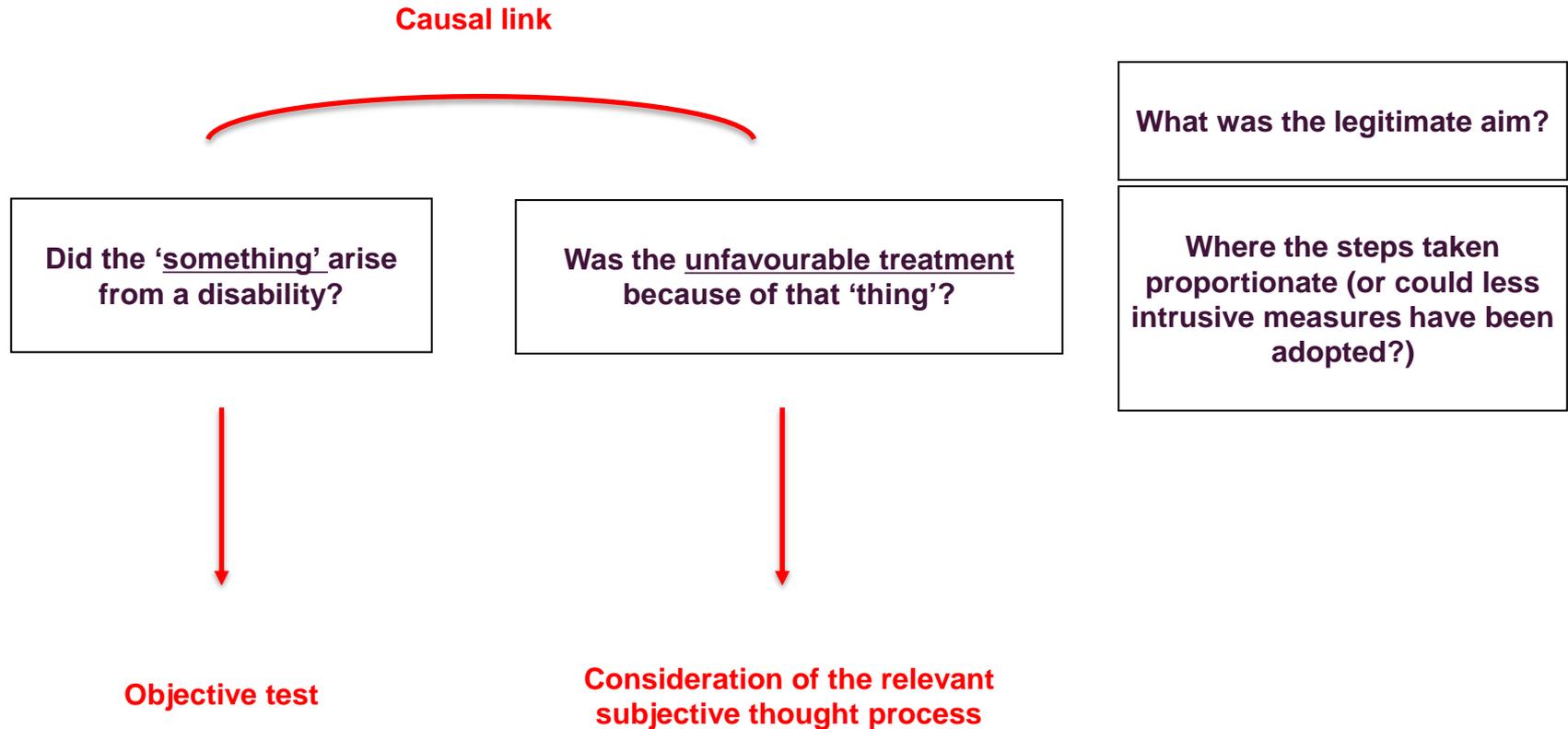
*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

# Discrimination arising from disability (s15 Equality Act 2010).

For claims of this type, there are two stages to the causation test:

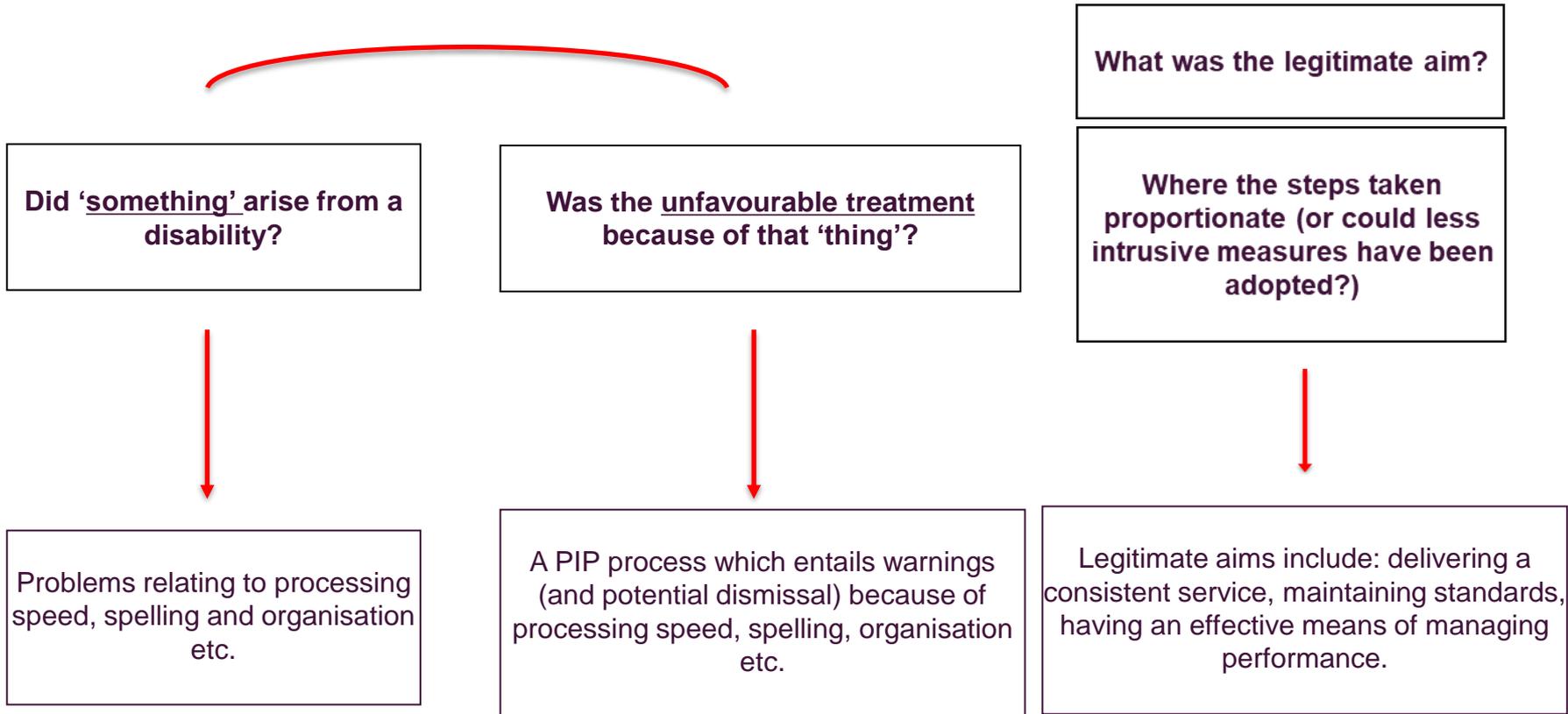
1. whether a **“thing”** arose in consequence of the claimant’s disability. This is an objective test (and it is not necessary to show that the employer was aware of this causal connection); and
2. whether the **unfavourable treatment in question was because of that “thing”**. This requires essentially the same type of investigation of the respondent’s subjective thought processes as does a claim for direct discrimination or victimisation.

# Discrimination arising from disability (s15 Equality Act 2010).



# Discrimination arising from disability (s15 Equality Act 2010).

Causal link



*“If an employer has failed to make a reasonable adjustment which would have prevented or minimised unfavourable treatment, it will be very difficult to show that the treatment was objectively justified.”*

**EHRC Code of Practice (2011)**

# The duty to make reasonable adjustments (sections 20 and 21 EqA 2010)

# The key concepts

01

**Disability** (the statutory definition)

02

**Knowledge** (actual and constructive)

03

**Provision, Criterion or Practice** (PCPs)

04

**Substantial Disadvantage** (the meaning of 'substantial', comparators and (again) the issue of knowledge)

05

**Reasonableness**

## REASONABLE ADJUSTMENTS (s.20)

1. *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
2. *The duty comprises the following ...*
3. *The first requirement 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.*
4. ...

# REASONABLENESS

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# REASONABLENESS

01

The extent to which the adjustment would have **ameliorated** the disadvantage.

02

The extent to which the adjustment was **practicable**.

03

The **financial and other costs** of making the adjustment, and the extent to which the step would have disrupted the employer's activities.

01

The financial and other **resources** available to the employer.

02

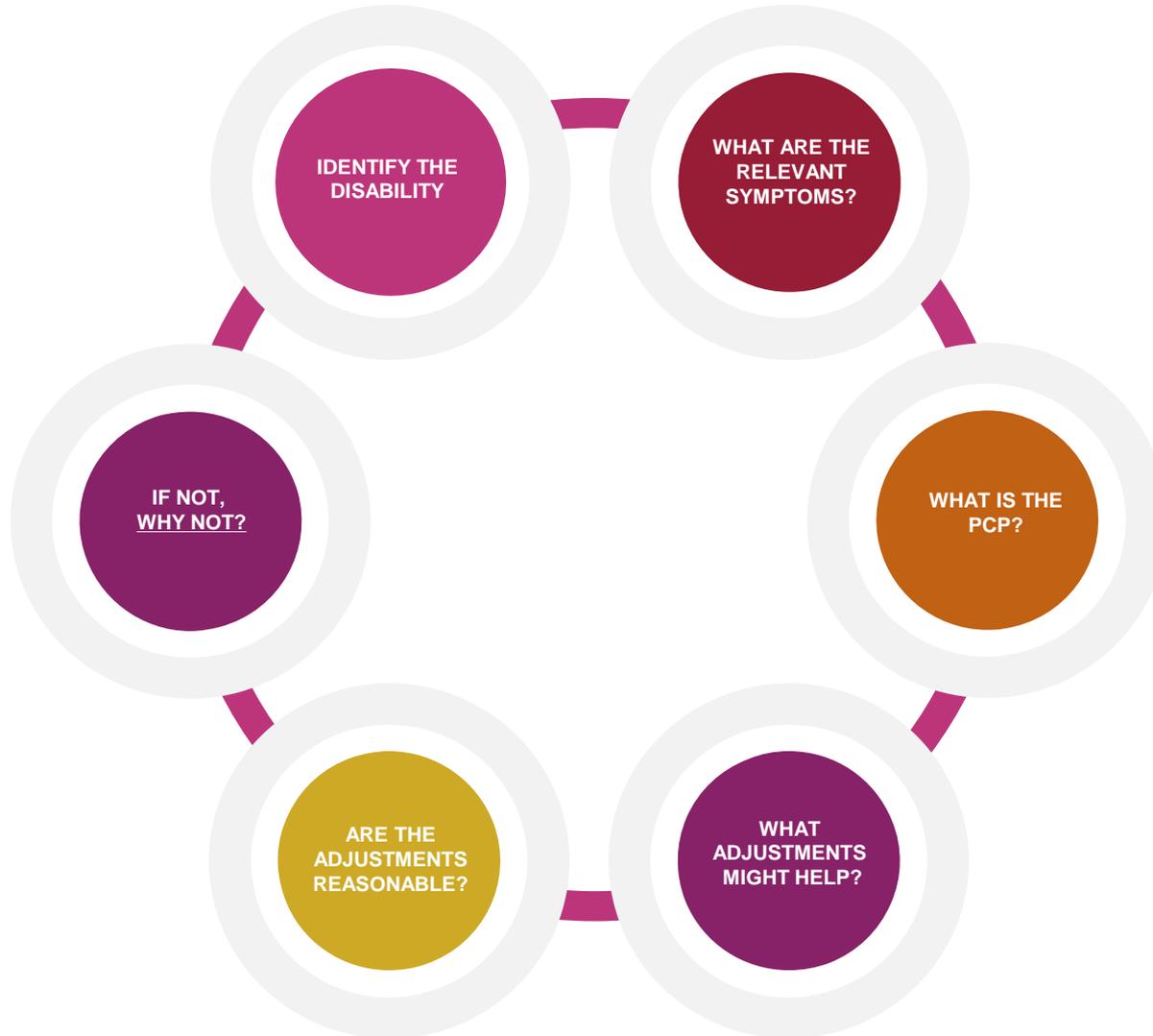
**The nature of the employer's activities.**

03

The **size** of the undertaking.

*What practical steps should an employer take?*

# KEY ISSUES / QUESTIONS



# MEDICAL EVIDENCE / OH REPORTS

01

No clear diagnosis / prognosis

02

A lack of appropriate expertise

03

No critical assessment of the employee's account

04

An unwillingness to give a decisive view

05

Risk averse

# Practical steps

01

Identify an appropriate / experienced OH practitioner

02

Ensure that the referral is sufficiently detailed:

3

Provide relevant context in the referral:-

- The requirements of the job
- The levels of sickness absence
- Areas of underperformance
- Any supportive measures considered / implemented
- Any adjustments the OH practitioner considers may assist

***With the benefit of a good OH report  
the business can:***

- (1) plot the remainder of the PIP*
- (2) decide whether adjustments are appropriate*
- (3) work through the process in an appropriately considered and informed way.*



# THANK YOU



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