

To what extent should you consider an employee's **mental health** when evaluating (1) **underperformance**, (2) **grievances**, or (3) **recommending a suspension** – in the absence of meaningful **medical info**?

WHITE PAPER CONFERENCE

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01 Mental health in the workplace

Understanding mental health

*Mental health includes **emotional, psychological and social wellbeing**. It affects how we think, feel and behave (Acas)*



Mental health problems can happen suddenly, build up over time, be hidden and hard to spot and fluctuate over time



Good mental health is a state of wellbeing in which every individual realises their own potential, can cope with the normal stresses of life, can work productively and fruitfully and is able to make a contribution to their community (WHO)



Recognising the signs of a mental health problem

Appearing tired, anxious or withdrawn 1	Being late to work 2	Frequent sickness absences 3	Deterioration in standard of work 4	Reduced focus 5
Forgetfulness 6	Changes in usual behaviour 7	Loss of interest in tasks previously enjoyed 8	Low mood/irritability 9	



Legislation and guidance

Employers have a **duty of care** to protect the safety of their employees under common law and the Health and Safety at Work Act etc 1974. This includes physical and mental wellbeing



A mental health problem can, but will not necessarily, amount to a disability for the purposes of the **Equality Act 2010**. Employers may have a duty to make reasonable adjustments for disabled employees



The EHRC's Employment Statutory Code of Practice offers guidance on the duty to make reasonable adjustments. Acas has produced **guidance on reasonable adjustments for mental health** and on managing work-related stress. The HSE has also produced guidance on mental health conditions, work and the workplace





02 Obtaining medical information

Obtaining medical information

In conversation

- Open conversations about mental ill health can be difficult but are an important part of managing the issues
- Considering options and seeking the employee's view can allow employers to take a more informed approach where problems persist



Occupational health

- An opinion from an independent medical specialist is usually most help in informing an employer's approach
- Where OH's advice is ambiguous, the employer should seek clarification
- Employers should beware of following OH advice "unthinkingly"



GP/ consultant

- Seeking a medical report from the employee's GP or consultant is another option but their advice will not be independent
- GP reports often take longer, and employers must comply with AMRA 1998 (e.g. by obtaining the employee's written consent to the preparation of the report)



03 The big questions...

Commonalities and differences

STEPS COMMON TO THESE ISSUES, INCLUDE:

- Follow the relevant internal policy – if one applies. Consider carrying out a (stress) risk assessment
- Discuss the issue with the employee, listen to their views and provide support
- Seek medical advice. Where it's ambiguous, seek clarification
- Where an employee refuses to cooperate with a request to obtain medical information, or there is no meaningful medical information, proceed with caution based on the evidence available. Internal processes need not be paralysed
- Document decisions and steps taken

DIFFERENCES:

- Consequences and legal risks will vary (e.g. underperformance could result in dismissal although poor handling of any internal process could result in personal injury (psychiatric harm) claims)
- Mental health problems will differ from person to person. Managers should consider past performance and whether behaviour is unusual
- Different considerations may apply depending on the sector in which the employer operates, and the regulatory landscape





Question 1 - To what extent should you consider an employee's mental health when evaluating **underperformance?**



Underperformance



POLICY?

Follow any capability procedure. Give timeframes for support / improvement before moving to formal action. Consider whether any aspects of the policy should be adjusted to take account of mental ill health (e.g. longer timeframes etc).

CONSULT/SUPPORT

- Explore the reasons for poor performance, particularly when a mental health problem is known or suspected.
- Discuss the concerns with the employee and consider and agree on any additional support.
- Consider and implement any reasonable adjustments and allow time for improvement before taking formal action.
- Monitor and review the effectiveness of those adjustments. Make changes as necessary.
- If the problems persist, then formal action is more likely to be necessary/ justified.

QUESTIONS TO ASK

- Is performance really the issue?
- Has adequate support been provided?
- Should the performance process be deferred while attempts are made to obtain medical evidence?

LEGAL RISKS

- Unfair/ constructive dismissal
- Discrimination arising from disability
- Failure to make reasonable adjustments (inc avoiding dismissal)
- Personal injury

Dolan v Chief Constable of Avon and Somerset Constabulary (2006)

Sinclair v Governors of Bishop of Llandaff Church in Wales High School (2015)

CASE LAW



Underperformance – key points



Mental health is a relevant consideration for determining appropriate support and also whether it is necessary to make reasonable adjustments for an underperformer

Mental health should **not** be a reason not to tackle, or an excuse for, poor performance

Cases of underperformance should be considered on a case by case basis – it may sometimes be appropriate to exercise greater leniency

Where there is a lack of meaningful medical information, employers may need to adopt a pragmatic approach



Question 2 - To what extent should you consider an employee's mental health when evaluating **grievances?**



Piepenbrock v London School of Economics and Political Science [2018]

Private Medicine Intermediaries Ltd and others v Hodkinson (2016)

CASE LAW

Grievances



POLICY?

Follow any grievance procedure as well as the [Acas Code of Practice on disciplinary and grievance procedures](#). Consider modifications to the procedure such as allowing the employee to be accompanied by a relative or agreeing to adopt a written procedure.

CONSULT/SUPPORT

- Mental health may be a factor in workplace disputes.
- Aim to address problems early to avoid an escalation of the issue, and consider what additional support an employee may require during the procedure and afterwards (e.g. counselling).
- Grievances can be very stressful. An employer should carefully balance the employee's wellbeing and the need not to delay a procedure unnecessarily to avoid exacerbating mental health symptoms.
- Take care with the tone, content and timing of any correspondence.

QUESTIONS TO ASK

- Should any other internal procedure (e.g. performance management) be delayed while a grievance is considered?
- Should the grievance procedure be delayed while attempts are made to obtain medical evidence?
- Are the issues serious enough to justify progressing a grievance while the complainant is off sick?

LEGAL RISKS

- Constructive dismissal
- Disability related discrimination
- Personal injury

Grievances – key points



Mental health may mean that an employer needs to adapt its standard grievance procedure

An employer may need to consider providing extra support, more frequent contact, allowing communications in writing or an alternative companion at the grievance hearing

An employer may also need to consider how it communicates the grievance outcome to the employee – are they more vulnerable and is it possible their emotional reaction may be stronger?

Where there is a lack of meaningful medical information, employers need to adopt a sensitive and more considered approach



Question 3 - To what extent should you consider an employee's mental health when recommending a **suspension**?



MJ Taplin v Freeths (2020)

Sansome v Leicester City Council (2015)

CASE LAW

Suspension



POLICY?

Suspension is usually addressed in a disciplinary policy and procedure. Consider any necessary adjustments to the procedure where a mental health problem is known or suspected.

CONSULT/SUPPORT

- Suspension can affect mental wellbeing. It could lead to a new mental health issue arising or an existing one returning or getting worse.
- An employer can prevent mental health issues arising or getting worse by communicating clearly, making clear that suspension is a neutral act and that no decision has yet been taken, maintaining regular contact and keeping the suspension as short as possible. Any decision to suspend, and the employee's mental health, should be regularly reviewed.
- Suspension letters should signpost to available support e.g. an employee assistance programme.

QUESTIONS TO ASK

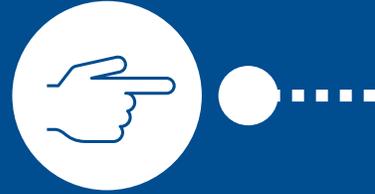
- Is suspension really necessary?
- What is the likely impact of suspension on the employee's mental health?
- What can be done to protect the employee's mental health during suspension?

LEGAL RISKS

- Breach of duty of mutual trust and confidence (constructive dismissal)
- Unfair dismissal
- Discrimination arising from disability
- Personal injury



Suspension – key points



Mental ill health may mean that suspension has a greater impact on the employee

An employer should avoid making stereotypical assumptions about an employee's likely behaviour based on limited knowledge of a mental health condition (e.g. they are more likely to be aggressive)

Where the potential risks are significant, an employer may be justified in erring on the side of caution and taking a decision to suspend, with appropriate wellbeing safeguards, even in the absence of meaningful medical information

04 Summary

Summary

Q. To what extent should you consider an employee's mental health when evaluating (1) underperformance, (2) grievances, or (3) recommending a suspension – in the absence of meaningful medical info?

A. This will vary depending on the nature and extent of the mental health problem, the other evidence available and the legal risks involved.

An employee's mental health should always be considered, but the existence of a mental health problem should not prevent an employer from following workplace procedures and making managerial decisions when problems arise. A lack of meaningful medical info should not be a barrier either, although generally necessitates a more cautious approach and is likely to involve a more protracted process in order that the legal risks are appropriately managed.

Questions?



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