



Where is the **tipping point**
when **personal** problems
are impacting **capability**
and **attendance**?

WHITE PAPER CONFERENCE

Gillian MacLellan

Introduction

- Impact of pandemic on “the social contract” between employer & employees
- More focus on values & bringing your whole self to work

Is there
a tipping point,
when employers can
say that personal
circumstances are
having (too much of) an
impact on performance
and attendance?



.....there can be a tipping point



- There may be situations where an employee's expectations around their personal problems become unreasonable or the desired support or change is beyond what is operationally possible

What type of personal issues are we talking about?



FINANCIAL
DIFFICULTIES



ADDICTION



CLINICALLY VULNERABLE
RELATIVES



MENOPAUSE



DOMESTIC
ABUSE

Common themes and differences

STEPS COMMON TO ALL OF THESE ISSUES, INCLUDE:

- Follow the relevant internal policy – if one applies
- Discuss the issue with the employee and providing support
- Where appropriate involve specialists like occupational health
- Give timeframes for support/improvement before moving to formal action

DIFFERENCES?

- Legal risks will vary depending on the matter – e.g. addiction is excluded as a disability
- Each employee will be different, managers should consider their attendance and performance in the past and query whether this is out of keeping with past performance
- Also sector issues will have an impact

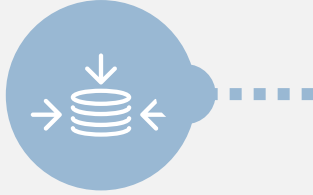
Document steps taken

- CIPD report that 1 in 4 employees say that money worries affect their ability to do the job
- With the cost of living crisis and rising energy costs, this is a topical issue

CONTEXT



Employees experiencing financial difficulties



POLICY?

Unlikely employers will have a policy on this, although many employers offer employees hardship loans, salary advances or referral to advice for support on this issue

CONSULT

Speaking to employees to support them with these issues and encourage them to come forward at an early stage

LEGAL RISKS

- If an employee is absent or underperforming because of money worries then taking disciplinary action/dismissal is going to exacerbate the issue
- Within the banking sector this is a major issue – most retail banks insist their employees are their customers, and will not give a contract of employment to someone who they would not bank with, so financial mismanagement will have an impact on their employment

As Alcohol Change UK explains: “Workplaces don’t just suffer from the effects of alcohol – they can exacerbate the problem.”

CONTEXT

Alcohol addiction



POLICY

Most policies stipulate that disciplinary consequences should only follow if an employee does not meet required steps/ or if their conduct/absence affects performance

SPECIALIST SUPPORT

- There needs to be input from occupational health/referral to addiction services to determine support levels
- A timeframe should be given for improvement

EXCEPTIONS

In safety critical industries there will be a zero tolerance approach to alcohol consumption

LEGAL RISKS

- Unlike many other health issues, addiction is specifically excluded from being a disability in the Equality Act – however the underlying condition may be a disability – for example, a history of depression
- This is an area where employers have greater scope to take disciplinary action

Where is the tipping point...





Clinically vulnerable family members

CONTEXT

What happens if an employee refuses to return to the office because of the risk (or their view of the risk) to a vulnerable family member and wants to work from home?

POLICY

Is there a hybrid working or home working policy?

CONSULT

Engage in individual discussions and look at individual circumstances and options can the employee work full time from home?

LEGAL RISKS

- The duty to make reasonable adjustments does not apply where a family member is disabled – associative disability discrimination does apply to direct/indirect discrimination/harassment
- If full time home working is not an option an employer should document alternative options before issuing an instruction to return and be prepared to demonstrate that this is a reasonable instruction
- Failure to comply with a reasonable instruction is a disciplinary matter



Menopause



POLICY

Many employers are now developing their own bespoke policies on menopause with menopause champions to provide support groups and educating staff/managers on the impact of the menopause

CONSULT

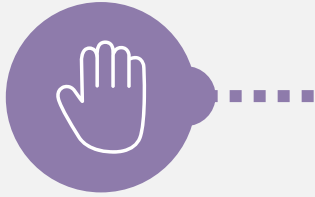
Where a woman's health is affecting performance/attendance managers should take a supportive approach and consider carrying out a risk assessment, followed by discussions around adjustments such as better ventilation, altering hours, flexible working

LEGAL RISKS

- Tribunal claims are rare but increasing; this is an issue which can invoke protection on the grounds of sex discrimination, age discrimination and disability discrimination
- There is also a health and safety aspect to this health issue

Menopausal symptoms vary but some women are seriously affected by the menopause and it can affect their attendance and performance at work

CONTEXT



Domestic abuse

Is it an employer's business?

POLICY?

Some employers have started to develop policies on this but this is a new workplace policy area

CONSULT/SUPPORT

- The idea is to encourage employees to speak to their manager to know that they will be given support and offer flexibility around appointments and time off to deal with this
- EHRC and CIPD produced guidance in September 2020 *"It's not for employers to 'solve' the problem, but to enable their employees to access professional support, whether that be legal advice, financial advice, housing support, counselling or arranging childcare."*

LEGAL RISKS

This is not an area of the law which is protected in relation to discrimination. Employees do have different rights to time off, so parental leave may be an option here, using holidays or taking a flexible approach

- The TUC reported that 1 in 5 employees may need to take time off work to deal with domestic abuse
- The Government recognise that a workplace can be a place of safety for abuse victims

CONTEXT

Where is the tipping point...

Summary

Q. Where is the tipping point when personal problems are impacting capability and attendance?

A. the answer to this is that it will vary depending on the type of personal problem and the legal risks involved, the values of the employer and to some extent the person

- Most employers will want to take a supportive approach but set boundaries/timescales around this
- In some cases if these standards/requirements are not met then moving forward with disciplinary action/dismissal may be possible, but
- If, for example, an employee has been subjected to domestic abuse and has fled to a refuge and needs time off work, is that really the sort of situation where an employer wants to take disciplinary action for absence?



Wider considerations

- Be mindful that while a course of action may be legally possible it would not be seen as “the right thing to do”
- Employers who sign up to ESG standards will be judged on how they behave towards their employees in a time of crisis
- The reality is that careers are marathons and not sprints; there will be times in people’s lives when problems arise
- Employees can quickly move to social media to call out an employer’s harsh (albeit potentially lawful) behaviour
- But there is a balance and in my view, yes, there is a tipping point

Contact us



Gillian MacLellan

Partner | Glasgow

+44 141 304 6114

gillian.maclellan@cms-cmno.com





Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS Locations

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

cms.law