

A large, stylized letter 'G' is the central focus of the page. It features a vibrant rainbow gradient, transitioning from purple at the top to yellow and orange at the bottom. The 'G' is set against a dark blue background.

GORDONS

To What Extent Should
You Consider an
Employee's Mental
Health When Hearing a
Gross Misconduct Matter
or Recommending a
Suspension?

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MEET YOUR EXPERT



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SUSPENSION





SUSPENSION

- ACAS updated its guidance summer 2022
- An employer should only suspend someone if it's appropriate, such as:
 - Suspending an employee while they carry out an investigation, if it's a serious situation and there's no alternative
 - Medical suspension or pregnancy suspension to protect an employee's health and safety



SUSPENSION

- Consideration now needs to be given to welfare and mental health
- Only consider suspension if you believe it's needed to protect any of the following:
 - The investigation
 - The business
 - Other staff
 - The person under investigation



SUSPENSION

- Paper trail to record the reasons for suspension and an analysis of the mental health and welfare impact of the suspending act
- As before review suspension regularly but now have to review impact on mental health at same time
- Signpost to EAP as standard in suspension letters

DISCIPLINARY PROCESS





DISCIPLINARY PROCESS

- Disability?
 - Definition: *a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities*
- Examples of mental health conditions that may meet definition:
 - depression
 - PTSD
 - anxiety disorders
 - bipolar
 - psychotic disorders (schizophrenia)



DISCIPLINARY PROCESS

- Employers need to identify the extent of mental health issues early in the disciplinary process
- Reactive stress v mental health disability?
- Occupational Health involvement and advice



REASONABLE ADJUSTMENTS TO PROCESS?

- Examples –
 - Identity of companion
 - Location
 - Additional breaks
 - Spread over a number of days
 - Format of evidence



WHAT IS "GROSS MISCONDUCT?"

- conduct must be repudiatory, i.e. so serious that it goes to the root of the contract
- conduct must be deliberate and wilful or amount to gross negligence



BURCHELL TEST

- Did the employer genuinely believe that the employee was guilty of the misconduct?
- Did the employer have reasonable grounds for that belief?
- Was the belief based on a reasonable investigation?
- Was dismissal within the range of reasonable responses open to a reasonable employer?



BURCHELL TEST

Elements of the Burchell test potentially affected by mental health issues:

- Was the conduct deliberate and wilful or was the conduct an emanation of the mental illness – did they know of or could they be responsible for their actions?
- Has the investigation been reasonable in taking into consideration the employee's mental health?
- Even if gross misconduct found to be proven, are there mitigating factors? Even a finding of Gross misconduct should not lead to summary dismissal automatically



DISABILITY DISCRIMINATION RISK

- direct discrimination
- discrimination arising from disability
- indirect discrimination
- duty to make reasonable adjustments
- harassment
- victimisation



DISCRIMINATION ARISING

- Two elements:
 - employer treats employee unfavorably because of something arising in consequence of employee's disability
 - employer cannot show that treatment was objectively justified as a proportionate means of achieving a legitimate aim
- What does that mean?
 - If there is a link between the employee's misconduct/actions to their mental illness, then dismissal may amount to discrimination arising in consequence of a disability
 - Therefore there's a balancing act in whether the legitimate aims of the employer (e.g. a safe environment or an effective workplace) are more important than the discrimination against the employee inherent in the disciplinary findings and the consequences of those findings

CASES





METROPOLITAN POLICE COMMISSIONER AND OTHERS V EIOYACCU (EAT 2009)

- ET – Unfair Dismissal as Resp failed to take reasonable steps to ascertain CI's state of mind:

Was it, in those circumstances, permissible to simply to propel the case down the conventional disciplinary route?...Inherent in the disciplinary charges was the unspoken assertion that he had committed the acts alleged against him consciously and knowingly, or at the very least recklessly"

- EAT - No need for OH report as found as fact that CI unlikely to co-operate



BRITISH TELECOMMUNICATIONS V DANIELS (EAT 2011)

- Unfair Dismissal
- GP's letter suggested OH report before disciplinary decision
- BT refused – huge organisation with substantial resources – should have commissioned OH report to consider impact on sanction



BURDETT V AVIVA EMPLOYMENT SERVICES LTD (EAT2014)

- Culpability – had stopped medication
- Range of Reasonable Responses
- Disability Arising – Proportionate means of achieving a legitimate aim?
- Was dismissal more than was necessary?



CITY OF YORK V GROSSET (2018)

- ET - fair dismissal for gross misconduct but also discrimination arising from disability
- EAT - agreed
- C of A - agreed too -Although fair to dismiss re unfair dismissal claim. Misconduct was due to stress arising from his disability of Cystic Fibrosis
- Dismissal was a) unfavourable treatment and b) was not proportionate because ET had found that Resp had not made reasonable adjustments to relieve work pressures on CI



PLOWRIGHT V SKY -IN – HOME SERVICES (ET 2019)

- Discrimination Arising
- Reasonable Adjustments – should health and safety breaches always be bound to be gross misconduct?
- Unfair Dismissal



TAKE AWAY POINTS

- Keep mental health in mind
- Don't believe you are capable of distinguishing between reactive stress and anxiety and mental health disability. Involve OH early
- Consider impact of mental health on disciplinary process, the employee's conduct (were they culpable?) and mitigation
- Consider alternatives to dismissal

ANY QUESTIONS?



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