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Discrimination:

**Hints, Tips and Solution-Focused Answers
for Employers**

White Paper Training – 8 June 2017

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The Thorny Question!

What is expected of you if a disability (such as depression or anxiety) is manifesting itself through low level unfriendliness, attitude or non-team player traits (i.e. the condition is difficult to measure and can't be seen)?

Answering the Thorny Question

- Some cases
- Some principles
- Some scenarios
- Some answers

Some Cases – is the employee disabled?

- Claimant failed to show that stress had a ‘substantial adverse effect’ on his ability to carry out day to day activities.
- EAT stated that ‘unhappiness with a decision or colleague’ or a ‘tendency to nurse grievances’ were not ‘mental impairments’

Herry v Dudley Metropolitan Borough Council

Some cases – is the employee disabled?

When considering the question of impairment in cases of alleged depression, tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. While both can produce symptoms of low mood and anxiety, only the first condition should be recognised.

J v. DLA Piper

Some cases – Reasonable Adjustments

- Employer had failed to make reasonable adjustments by decreasing dyslexic employee's workload.
- Did not matter that the employee had not herself requested a reduced workload.
- Important to 'take the initiative' with reasonable adjustments.

Home Office (UK Visa and Immigration) v Kuranchie

Some Cases –reasonable adjustments

- Duty to make reasonable adjustment applies to any provision, criterion or practice that “bites harder” on disabled employees.
- Shifts thinking on reasonable adjustments from legal technicalities to practical considerations.
- Blanket policies will rarely be acceptable.

Perratt v. Cardiff City Council

Some cases – relationship breakdown

- Director of Finance of NHS Trust
- Employed there 16 years.
- No issues of technical competence or integrity.
- Problems were his personality and inter-relationships with colleagues
- Employee makes allegations about integrity of CEO
- Employee dismissed. Employer relied on conduct and SOSR
- ET accepted both but dismissal procedurally unfair.
- However decided on 100% contributory conduct/Polkey reduction

Perkin v. St Georges Healthcare NHS Trust

Some Principles – One

- Sometimes we have to work with people we don't like!
- Sometimes at work, we have to do things we don't want to do!

Some principles – 2

One to One/Appraisal/Review processes

- Use them appropriately and to full extent
- Are they part of your organisation's culture?
- Do they assist with effective management?

Some principles –3

- Use internal policies (Grievances/capability) effectively
- Encourage informal resolution – “*nipping in the bud*” – including workplace mediation where possible.
- Maintain an appropriate momentum to processes.

Some principles –4

Occupational Health Advisers

- Establish a good working relationship
- Appropriate referral mechanisms
- Provide appropriate background
- It MAY be necessary to go beyond initial OH adviser

Some principles – 5

- The duty to make reasonable adjustments – all pervading.
- Assuming there is a disability – is there an understanding of what it is and what impact it has?
- Understand the PCP which puts the disabled person at a substantial disadvantage
- Consider whether and to what extent that disadvantage can be overcome.
- Reasonable adjustments can only be made with the employee's consent.

Some principles –6

- Fairly dismissing for a breakdown in trust and confidence (“SOSR”) is not easy.
- It is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason was not available or appropriate to be used as a convenient label for dismissing an employee

Some scenarios – One

- A applies for employment with JobsR Us. He succeeds at interview.
- References and checks reveal he has a history of paranoid schizophrenia and has assaulted his manager in the past.
- JobsRUs decide to withdraw their offer.
- A claims disability discrimination – discrimination arising from a disability.

Some scenarios – 2

- Employee of Coverall plc suffers from depression
- Employee caught indecently exposing himself at motorway services on his way back to the office from a work meeting.
- In the course of his criminal mitigation he explains that his behaviour has been brought on by his depression.
- Coverall plc wants to dismiss Employee.

Some scenarios –3

- Mona commences work within hospital department.
- Mona makes various allegations which question the competence of her colleagues and the clinical governance of the hospital
- Colleagues raise a collective complaint effectively saying that they find it impossible to work with Mona and – it's either her or them.

Some Answers

Answer One

It depends!!

Some Answers – 2

Your Toolkit

- Effective management communication
 - Team meetings
 - One to ones
 - A culture of dialogue
- Pre Termination Negotiations?
 - Pros and cons
 - Consider its appropriateness
 - Consider the chances of success
 - Assume an ET will have sight of any proposal made

Some answers – 3

Your toolkit – cont'd

- Objective setting – can include “soft” objectives as well as hard targets
- Understanding medical position
 - Remembering DPA issues
 - With the employee’s knowledge and consent
- Understanding any possible reasonable adjustments.
 - Discuss with employee
 - Raise with OH/appropriate health expert

Some answers -4

Your toolkit – cont'd

- Tackling relationship breakdowns
 - mediation?
 - Relocation with consent?

- Tackling unacceptable behaviour
 - Initial informal process may be appropriate

Some answers –5

Your toolkit, cont'd

- Dismissal. For a fair reason?
 - Conduct?
 - Capability
 - SOSR?
- Consider appropriate process
- Is dismissal an act of discrimination arising from disability? – if so, is it a proportionate means of achieving a legitimate aim?



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