

How do you handle a disciplinary [process] in which an employee suddenly informs you of an undisclosed (potentially undiagnosed) disability?

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When and why.....



Necessary assumptions

- ▶ We shall assume:
 - That the disclosure to the employer is new;
 - That the disclosure relates to an impairment;
and
 - That the employer did not previously **perceive** the employee to be disabled

Other end of the telescope

- ▶ What are the likely claims that may be pursued if such a disclosure is accidentally or deliberately ignored?
 - **EqA 2010:**
 - Most obviously sections 15 and 21 EqA 2010;
 - Less obviously s.27 EqA 2010;
 - Personal liability of individual tortfeasor;
 - **Injunctive relief**

What is disclosed (Part 1)

- ❖ It is for employer to consider disability
 - ❖ ***Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211,**
- ❖ It is a question of fact whether employer could reasonably be expected to know of a person's disability
 - ❖ ***Jennings v Barts and The London NHS Trust* [2013] EqLR 326**
 - ❖ So don't be dismissive of such a disclosure just because you think something was mentioned in passing

What is disclosed (Part 2)

- ▶ Section 6 EqA 2010 is well trodden ground, but.....
 - *Treatment? Recurring effects? Progressive conditions?*
- ▶ Also a need to remain alive to:
 - Avoiding an allegation of ‘perceived’ disability
 - Avoiding associative discrimination
- ▶ Ask if in possession of any further information:
 - Doctor’s reports/referral letters/prescriptions

Bring together all impairment-related info...

- ▶ Consider suspending the meeting in order to make further enquiries;
- ▶ Ask relevant questions in writing to employee, OH and doctors where consent has been gained;
 - If specialist input is required it is (probably) not a false economy to seek the same during the process;
 - Keep in mind the need to keep the process moving

Bringing it all back together

- ▶ Options:
 - Abandon disciplinary process
 - Continue with/without adjustments
 - Continue regardless

- ▶ Record in writing your chosen route together with the reasons for it

- ▶ What if they raise an impairment for first time on appeal?

Some examples

1. An employee says at a disciplinary hearing that they have suffered from headaches for the last three months at work which caused them to forget to fill in timesheets correctly
2. An employee is called into a disciplinary but says that they cannot attend for the second time because they are suffering from anxiety
3. An employee says on appeal that they should not have been dismissed because they are nervous in interviews and may not work again

So, back to the original question

- ▶ ***“How do you handle a disciplinary [process] in which an employee suddenly informs you of an undisclosed (potentially undiagnosed) disability?”***
 - *Gather sufficient information on the disclosed impairment;*
 - *Deduce the necessity for adjustment to the disciplinary process and/or the decision-making process; and*
 - *Record the inquiries and conclusions reached in writing*

An important 'side note' to the main question

i. Take care when asking for medical reports:

- *Is there an express contractual provision?*
- *Is that Access to Medical Reports Act 1988 applicable?*

ii. Never forget to consult the written disciplinary process

- *Is it contract and are you missing anything out of your proposed process?*
- *Even if non-contractual, you will want to make sure that nothing in it to harm your position (e.g. a failure to a particular step advocated for OH)*

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Any questions?

Thank you

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