

Legal focus: the workplace and mental health

Cindy McAlister

Director of Compliance and Communication

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A high proportion of disability discrimination cases being brought before employment tribunals relate to mental health conditions. It is important, though not always straightforward, to understand how decisions around this complex area translate into workplace practices and protocols.

The Equality Act 2010 imposes a duty upon an employer to make an adjustment if they know, or could be reasonably expected to know, that an employee is disabled and that the individual is at a substantial disadvantage compared with a non-disabled employee, as the result of a provision, criterion or practice in the workplace. An employer must provide any adjustment which could remove or reduce that disadvantage, if it is reasonable to do so.

Failing to provide a mental-health related adjustment can result in claims for disability discrimination under various sections of the Equality Act. Even with extensive knowledge about mental health conditions and their symptoms, the legal pitfalls can be difficult to navigate. Here, we highlight some of the key issues that employers need to be aware of.

Duty to make enquiries

If an employer has reason to suspect that one of its employees has a mental health condition, it must do everything it reasonably can to ascertain whether this is so, and if it is, what adjustments are needed. To do this, the employer will need as full an understanding as possible of how the condition impacts that particular individual. If an employer makes enquiries but the employee insists they either don't have a condition, or don't wish to discuss it, no claim can subsequently be brought for failing to provide adjustments.

An employer is permitted to request that an employee seeks a formal diagnosis where none exists, or ask to see medical or occupational health reports. An employee can refuse all of these requests, but may not then receive the adjustments they need.

Data protection laws mean that any conversation between an employee and occupational health is strictly confidential. Confusion can arise where an employee discusses their condition with occupational health professionals, expecting this to result in managers or human resources being informed of the adjustments that are required; but it is not, since consent hasn't been asked for or given to share the information. It's important that internal processes involving occupational health make it clear that consent should be systematically sought, to ensure the employee receives the adjustments they need.

Behaviour and disciplinary procedures

Mental health conditions can cause behaviours which would ordinarily result in disciplinary action. These may include inappropriate outbursts or comments, difficult relationships with co-workers, poor performance and repeated absences. It is crucial that HR professionals and managers when faced with issues of this kind, question whether a mental health condition could be playing a role, and if so, consider what adjustments might be available.

Where disciplinary proceedings are initiated against an employee who is known to have a mental health condition, consideration should be given to what impact the proceedings themselves might have. If necessary the process may need to be adjusted to avoid exacerbating the condition.

In the case of a suspension, where an absence from work aggravates the employee's pre-existing anxiety and depression, allowing them to return to work can be a reasonable adjustment. Conversely, rigidly adhering to standard disciplinary procedures may be discriminatory.

If a person's mental health has impacted their performance to the extent that they can no longer perform their duties, the employer should consider any suitable alternative role as a reasonable adjustment.

Work-related stress

If work-related stress lasts or is likely to last for at least a year, and significantly impacts the person's ability to do normal activities, it is a disability. Employers may be liable for causing a stress-related mental health condition, where they breached their duty of care. Separately, if an employee becomes disabled as a result of stress, employers should take steps to assess and provide the adjustments that might be relevant.

Disclosure

Applicants are not required to tell a potential employer that they have a mental health condition, and except for military and security posts, employers are not permitted to ask about any health-related matters until after an offer of work has been made.

Once in work, an employee is not required to tell their employer that they have a mental health condition unless they wish to. They are free to disclose this fact at any point (for example if due to particular circumstances they find they need an adjustment or because they change their mind). Not only must an employer provide reasonable adjustments irrespective of when a person asks for them, there must be no reprisals or negative comments as a result of the information not having previously been shared. A suggestion by an employer that the employee's failure to mention their mental health condition was deceitful or duplicitous, is direct discrimination.

Harassment

Comments about absences, attitude, aggressive behaviour or poor performance which are the result of a person's mental health condition, can amount to harassment under the Equality Act. An employer is liable if one of its employees harasses another. Educating employees about behaviours which may be symptomatic of mental health conditions, can minimise the risk of harassment. Where it does occur, it is a reasonable adjustment to ensure that the disabled person no longer has to work with those who committed the harassment.

If you are an employer who would like to understand more about these issues and their implications for your organisation, or to find out about our mental health and well-being training, our Adjustments@Work service or confidential support we can offer to your employees, please contact EmployAbility at info@employ-ability.org.uk

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