



How to Balance Mental Health with Poor Performance and Misconduct

Who are we?



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The Equality Act 2010

- Employees/workers/applicants are protected from discrimination
- If they have a protected characteristic
- Disability



Disability - s6 Equality Act 2010

- Physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on your ability to do normal daily activities.
- Does the employer know of the disability and the impact?
- *Nally v Freshfields Care* – employers should make enquiries where performance/ misconduct COULD be because of mental ill health.
 - Liability can arise if there were clues that should have put the organisation on notice of enquiry.
 - Key principle - If an employer knew, or ought reasonably to have known, that an employee’s performance or conduct was the result of a disability, the employer may risk a finding of discrimination if it ploughs ahead regardless or without further enquiry

DISABILITY

- Lots of mental illnesses and neurological conditions that will satisfy the legal definition of a disability.
- Long-term impact – consider fluctuation if mental ill health
- Consider deduced effect – medication.

Disability Discrimination

- Direct Discrimination (s13)
- Unfavourable treatment arising from a disability (s15)
- Indirect Discrimination (s19)
- Failure to make reasonable adjustments (s20)
- Harassment (s26)
- Victimisation (s27)



Trust...

- “If people are lying about their mental health problems to get time off, then you have some issues, some big issues. Most people are good people and do not want to do that. If you, the employer, think that's what people will do, then you have some real trust issues yourself.”

- James Routledge

Poor Performance Arising from Disability

An Employee With Dyslexia

- In *Kumulchew v Starbucks Coffee Company UK Limited and others*, Ms Kumulchew was a shift supervisor whose dyslexia meant that she had difficulty with spelling and comprehension of information. Her employer was aware of her dyslexia.
- She was disciplined for mistakes and falsifying records in relation to a requirement to log fridge and water temperatures in a duty roster notebook. The disciplining manager required proof of her dyslexia and suggested that she obtain a certificate from her doctor. No medical assessment was undertaken and Ms Kumulchew was issued with a warning.
- Wait to later when we find out what happened in this case....

Misconduct Arising from a Disability

- Employee with post-traumatic stress disorder
- In *Nally v Freshfield Care Limited*, Mr Nally had worked in a care home for elderly residents for 18 months (ET/2401774/14). Two incidents arose:
 - 1) He told one resident to “shut up” and, having explained to his employer that he had post-traumatic stress disorder (PTSD), he was told that his performance would be monitored.
 - 2) Two weeks later, he argued with a work colleague as a result of which he was dismissed.
- Claimed in ET (not long enough for UD only discrimination)
- Wait for outcome later.....

Practical Tips (1/3)



- Actively listen and don't make assumptions.
- Be empathetic.
- Could their conduct be because of mental ill health? If this is possible then make sensitive enquiries and investigate fully, including consulting with the employee and experts.
- Follow up the company processes and policies but adjust these to account for the disability, if needed.
- Don't jump straight to formal processes this can make it worse!

Practical Tips (2/3)

- Be alert to the possibility that there may be one or more hidden disabilities which could explain the behaviour or concerns identified.
- Do not medicalise the matter. There is a difference between the diagnosis of the medical condition and the impact that it has on the employee.
- It is only by understanding the latter that an employer can assess the employee's ability to undertake the work and identify what adjustments and support it can provide, prior to making any decisions .
- Keep a paper trail in case your decision is challenged to illustrate you have taken these steps before deciding on a sanction of misconduct. (also helps with any defence)

Practical Tips (3/3)

- Do not focus solely on the employee's areas of difficulty; consider also which tasks play to their strengths. – consider redesigning a job role; for example, a person with ASD may have strengths including attention to detail and accuracy but may need a structured working environment and routine.
- Keep in mind that:
 - Management processes, for example, performance management, could trigger symptoms of PTSD or depression.
 - Workplace concerns, for example, a personality clash, performance concerns or misconduct, may be as a result of a hidden disability.

The Role of Occupational Health

- OH or a GP can provide guidance on whether an employee is disabled.
- What adjustments would help?
- Are there other third parties e.g. Counsellors?
- OH – look at SimplyPeople.co.uk



Case Study – What do you think?

Kumulchew v Starbucks Coffee Company UK Limited and others

- Employee has dyslexia and struggled with comprehension.
- Disciplined for falsifying records in relation to logging fridge temperature. Investigator asked for “proof” of dyslexia and asked for certificate, made no adjustments. Given warning.
- Claimed “arising from” and failure to make adjustments

Successful

- Disciplinary was unfavourable treatment which was not justified
- Starbucks failed to make reasonable adjustments in the way that notes of the disciplinary process were provided.

Case Study – What do you think?

Nally v Freshfield Care

- Mr Nally worked in a care home and told one resident to “shut up”. He then informed employer of PTSD.
- Two weeks later, argued with a colleague and was dismissed.
- Claimed s15.

Successful

The tribunal concluded that the employer had been put on notice and should have been aware that Mr Nally’s behaviour could be because of his PTSD.

Rather than moving to dismiss Mr Nally, the decision could have been delayed while other steps were taken, including investigating his condition and considering alternative measures to terminating his employment, such as demotion or suspension.

Case Study – What do you think?

City of York Council v Grosset

- Employee suffering with stress due to cystic fibrosis.
- Showed 15 year old children an 18 rated film.
- He was dismissed as a result, for gross misconduct.
- Claimed s15 and unfair dismissal.

Successful

- The CoA found the employer could not justify, especially considering the impact of the disability.
- Unfair dismissal claim failed.

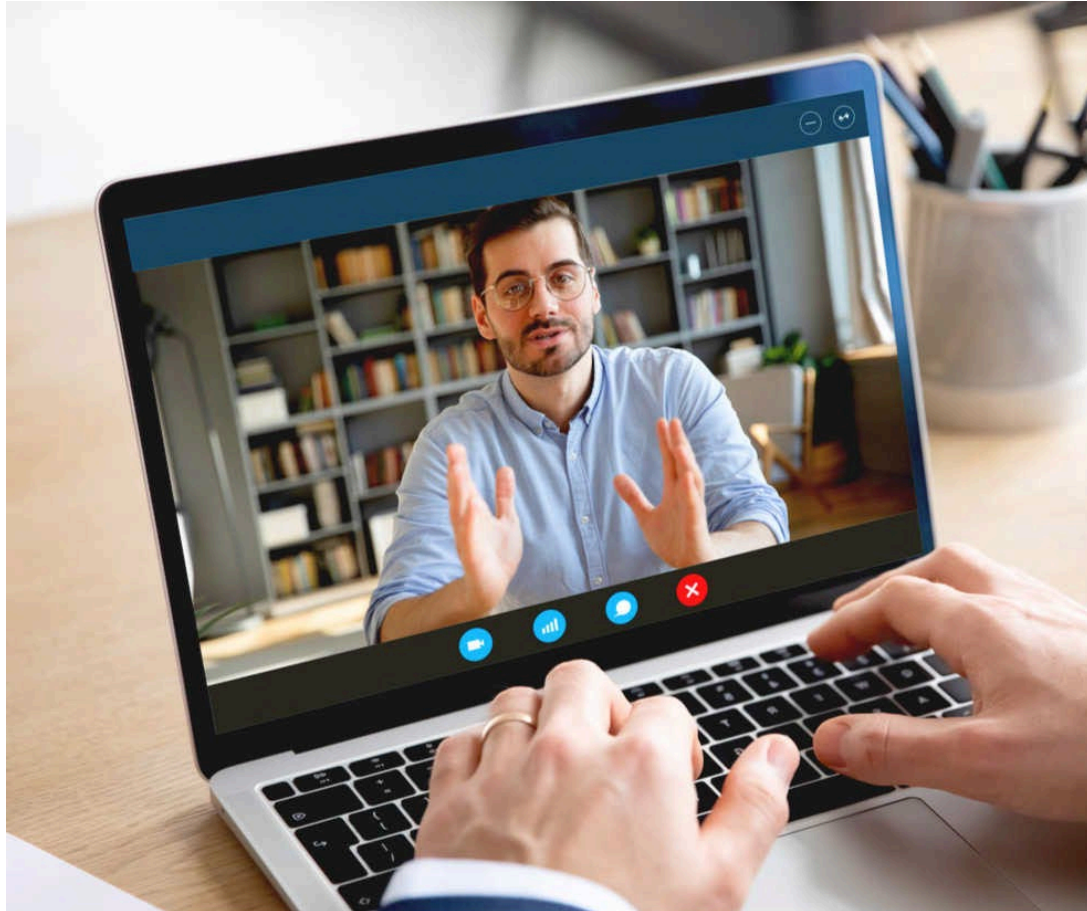
Case Study – What do you think?

McKenzie v AA Insurance

- Punched a senior colleague at social event, brought about by “months of overwork” and diagnosed with GAD and depression.
- Psychiatrist noted symptoms were anxiety, sleep disturbance, concentration issues and outbursts of anger.
- Dismissed – claimed unfair, wrongful dismissal and “arising from”.

Ongoing...

What are the Risks?



- Disability discrimination claims (in particular s20 and s15 claims).
- Unfair Dismissal, wrongful dismissal or Constructive Unfair Dismissal.
- Employees have three months less one day to bring a claim.

Helpful Links

- YouTube – has lots of helpful videos
- www.thrivelaw.co.uk - helpful blogs

Any questions?