

## White Paper Conference on HR Law

Managing the performance of  
employees with depression or stress

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Paul Fontes  
*Partner*



# The Question

When PIPs can exacerbate depression and stress and undermine a return to work, how do you help poorly performing disabled employees settle back in and improve?



**What are the risks?**

# Managing the performance of employees suffering from depression or stress

What are the risks?

- Disability discrimination
- Personal injury
- Unfair dismissal

# Disability Discrimination

## Types of disability discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Duty to make reasonable adjustments
- Harassment
- Victimisation

**Does the employee have a disability?**

## Is the employee disabled?

Definition of disability

Section 6(1) of the Equality Act 2010

*A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities*

## Is the employee disabled?

Four key questions

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?



## Is the employee disabled?

Importance of medical evidence

- In *Morgan v Staffordshire University [2002] IRLR 190*, the EAT held that medical certificates issued by doctors which stated little more than that the employee was suffering from "depression" were not sufficient to establish disability
- In *Royal Bank of Scotland plc v Morris UKEAT/0436/10* the EAT emphasised importance of medical evidence in cases of depression or similar impairments
- In *J v DLA Piper UK LLP UKEAT/0263/09*, the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those that derived from a "medicalization of work problems" or "adverse life events"

## Is the employee disabled

Can work-related stress be a disability?

*Herry v Dudley Metropolitan Council UKEAT/0100/16*

EAT held:

- Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, are not of themselves mental impairments: they may simply reflect a person's character or personality
- A doctor may be more likely to refer to the presentation of such an entrenched position as "stress" than as anxiety or depression
- Medical evidence supporting a diagnosis of a mental impairment must be considered with great care

# **Managing the performance of employees with depression or stress**

# Managing performance of employees with depression or stress

Employers can manage the performance of a disabled employee, but bear in mind three key elements:

- follow the Acas Code
- consider reasonable adjustments
- if taking adverse action, can it be objectively justified?

# Follow the Acas Code

## Key principles

- Try to resolve matters informally
- Raise and deal with issues promptly and without unreasonable delay
- Act consistently
- Carry out necessary investigations to establish the facts of a case
- Inform employees of the basis of the problem and give them an opportunity to "put their case in response" before any decisions are made
- Allow employees to be accompanied at formal meetings
- Allow an employee to appeal against any formal decision

# Reasonable adjustments

## Key principles

- Knowledge
- Investigation
- Reasonableness of adjustment

## Reasonable adjustments: knowledge

No obligation to make reasonable adjustments unless employer knows or ought reasonably to know that employee is disabled and likely to be placed at substantial disadvantage because of disability

### Examples:

- *A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements. (Para 6.19, EHRC Code)*
- *A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. (Para 5.15, EHRC Code)*

## Reasonable adjustments: investigation and reasonableness

- Is the disability the cause of the employee's poor performance?
- Is making an adjustment reasonable in the circumstances?
- Would an adjustment make a material difference in assisting the employee in overcoming the difficulties they are facing?



## Reasonable adjustments: performance issues

- Aim is to enable disabled employee to remain in or return to, and play full part in, workplace
- EHRC Code recommendations include:
  - altering a disabled worker's hours of working
  - giving, or arranging for, training or mentoring
  - modifying procedures for testing or assessment
  - providing supervision or other support
  - modifying disciplinary or grievance procedures
- May therefore need to modify PIP/capability procedures
- Will the adjustment work? Will the employee be able to reach the required standard within a reasonable period?

## Indirect discrimination and discrimination arising from disability

- Indirect discrimination
  - application of capability procedures may place employees with depression/stress at particular disadvantage
- Unfavourable treatment arising from disability
  - informal action, e.g. PIP
  - formal warning
  - dismissal
- Can treatment be objectively justified?
  - legitimate aim (e.g. meeting productivity targets)
  - acting proportionately (is there no other way of effectively addressing the issue?)

# Relevant Cases

## Osei-Adjei v RM Education (2012)

### Facts

- Employee suffered from dyslexia which rendered him a disabled person
- Found job increasingly stressful
- Signed off with depression after being placed on performance improvement plan
- Raised grievance that employer had failed to make reasonable adjustments and later resigned claiming constructive dismissal
- Brought claims for failure to make reasonable adjustments and constructive unfair dismissal

## Osei-Adjei v RM Education (2012)

### Judgment

- ET held that performance improvement plan was a PCP that placed employee at a disadvantage
- Duty to make reasonable adjustments therefore applied
- Concluded that employer had failed in duty by not carrying out workplace assessment for dyslexia

# South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley (2016)

## Facts

- Employee was a data input clerk who was dyspraxic
- This condition made her more prone to error and work more slowly than her non-disabled colleagues
- Employer commissioned reports into what might be done to address her limitations
- Provision of technical aids and 50 hours of specialist tuition recommended
- Employee was dismissed on capability grounds
- Employee claimed disability discrimination and unfair dismissal

# South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley (2016)

## Judgment

- Employment Tribunal upheld employee's claims
- Tribunal found that employer had failed to provide technical aids well before the monitoring of her performance and had failed to make the reasonable adjustment of providing all the hours of the specialist tuition recommended
- Tribunal concluded that the employer did too little too late by way of reasonable adjustment, and had then treated employee unfavourably by subjecting her to performance reviews before the adjustments had been made and dismissing her before they had been fully implemented
- EAT upheld the decision. Had the suggested adjustments been made there was a chance that employee would have avoided the unfavourable treatment of performance review and dismissal to which she was eventually subjected

# Hartley v Foreign and Commonwealth Services (2016)

## Facts

- Employee had Asperger's syndrome and reasonable adjustments plan created with assistance of National Autistic Society
- By end of six month probationary period her performance was assessed as unsatisfactory
- Employee's probation was extended and she was put on PIP
- Further adjustments agreed including help with communication
- Employee did not meet plan requirements and was dismissed
- Employee claimed discrimination arising from disability and failure to make reasonable adjustments



# Hartley v Foreign and Commonwealth Services (2016)

## Judgment

- Tribunal held that dismissal was proportionate means of achieving legitimate aim and that there was no breach of duty to make reasonable adjustments
- Employee appealed to EAT alleging that her request for communication support as and when required was a reasonable adjustment and failure to provide this was therefore a breach of the duty
- EAT held that employee had not identified in any practical sense what she required by way of additional communication support. Her request for support “as and when required” was impractical

## **Key points**

## **When PIPs can exacerbate depression and stress and undermine a return to work, how do you help poorly performing disabled employees settle back in and improve?**

Key point is to be able to demonstrate reasonableness:

- Investigate the underlying issue
- Consider modifying PIP process
- Consult the employee about reasonable adjustments
- Consider whether adjustments proposed by employee are practicable
- Take specialist advice if necessary
- Give adjustments time to take effect
- Take action only once it is clear adjustments will not result in employee reaching required standard within a reasonable period

EVERSHEDS  
SUTHERLAND

**Paul Fontes**

*Partner*

**T:** +44 20 7919 4655

**E:** paulfontes@eversheds-sutherland.com

**Eversheds Sutherland (International) LLP**

One Wood Street

London

EC2V 7WS

**[eversheds-sutherland.com](https://eversheds-sutherland.com)**

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