

# How to performance manage employees whose condition and medication impact their communication and capacity to participate in performance related meetings

White Paper Conference

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# Introduction

## Effective management of the process

- Mindful of legal framework and case law
- Develop a strategic and personalised response
- Lean in – accommodate where you can.

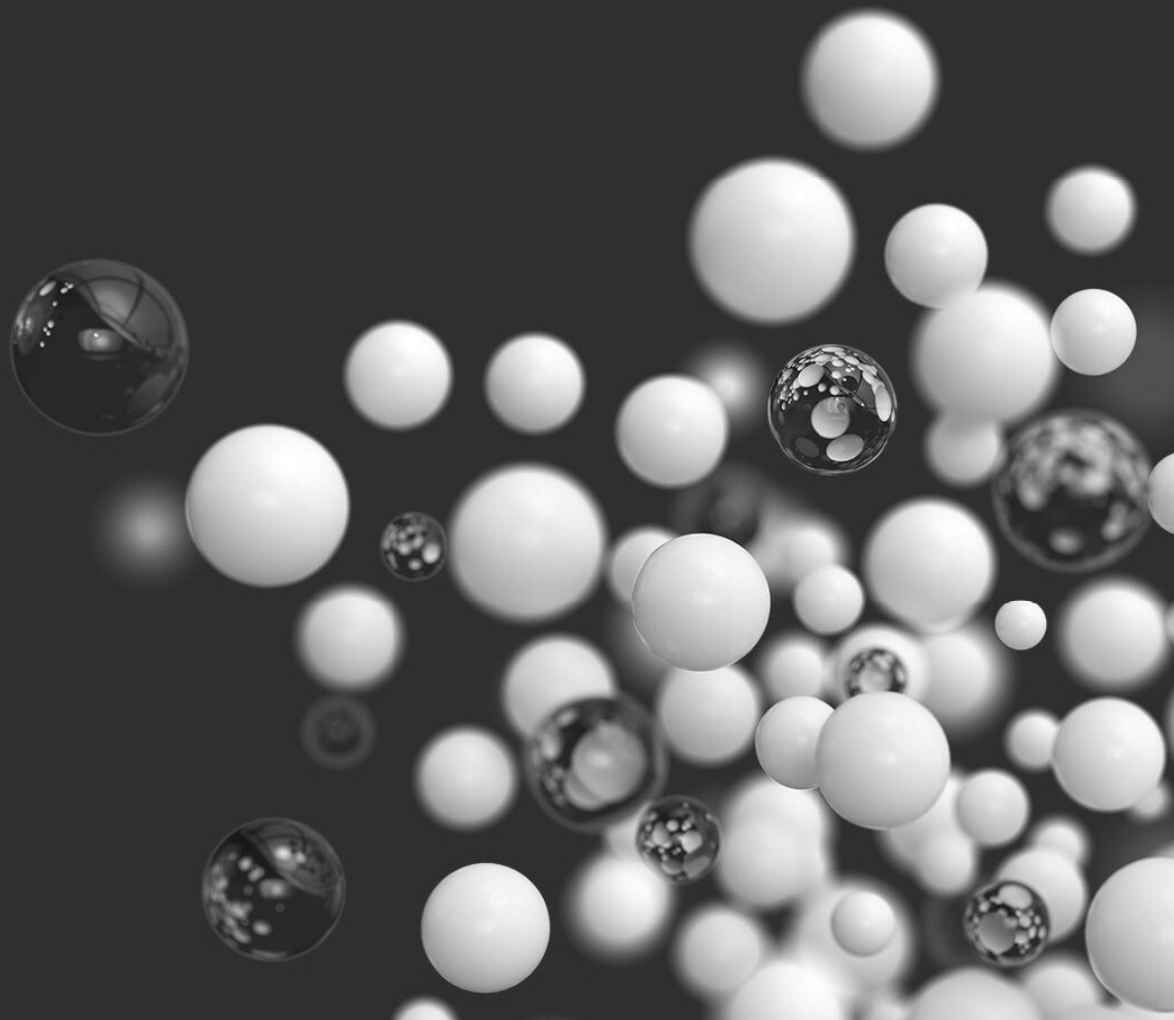




# Format

- Legislative framework
- Case Law
- Practical Guidance
- Q & A

# Overview of Discrimination within the Employment Equality Acts 1998-2015 ("EEA")



# 9 Discriminatory Grounds

## Section 6(2)

1

Gender

2

Marital / Civil Status

3

Family Status

4

Sexual Orientation

5

Religion

6

Age

7

Disability

8

Race, colour, nationality, ethnic or national origin

9

A member of the Traveller Community

# Discrimination

1

Direct Discrimination

2

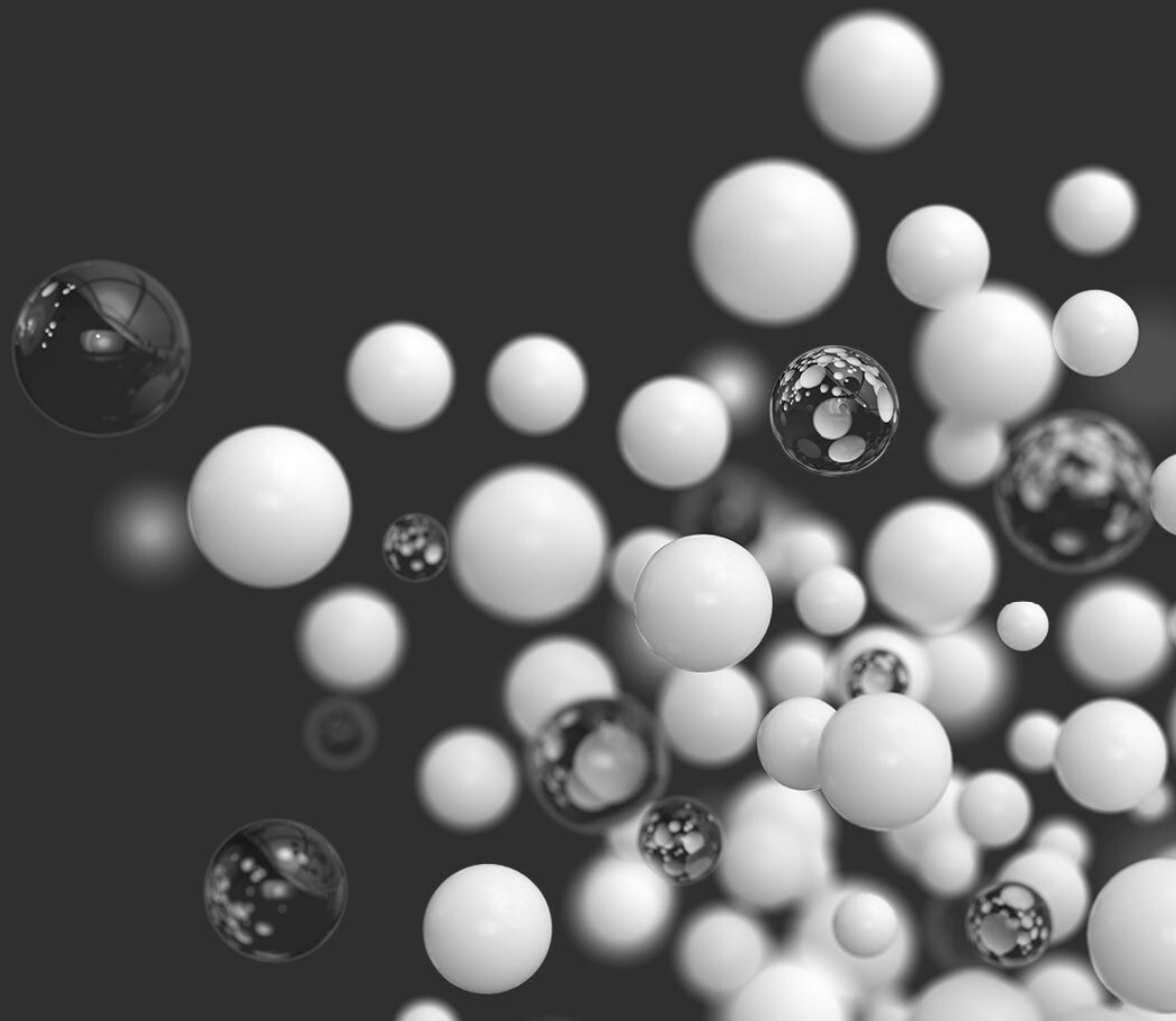
Indirect Discrimination

- Objective justification
- Legitimate aim
- Appropriate and necessary

3

Victimisation / Penalisation

# Disability within the EEA Definition, Reasonable Accommodation and Appropriate Measures



# Definition of Disability

## Section 2(1) EEA



- Broad definition
- Covers physical, mental, learning, cognitive, intellectual and emotional disabilities, and mental health issues
- No threshold of severity
- Includes current, past, future or imputed disabilities
- Exists, previously existed or exists in the future



# Reasonable Accommodation

- Access to employment
- To participate or advance in employment
- Undergo training

# Reasonable Accommodation

## Section 16(3) and 16(4) EEA

### Section 16(3)

- Employees with disabilities are assumed competent if reasonable accommodation is provided
- Employers must take “appropriate measures” unless it imposes a disproportionate burden
- Factors: cost, scale/resources, public funding

### Section 16(4)

- “Effective and practical” measures (adaptation of premises, equipment, working time, tasks, training)
- Employers must proactively remove barriers and engage in individualised assessment

## 2 Stage Process

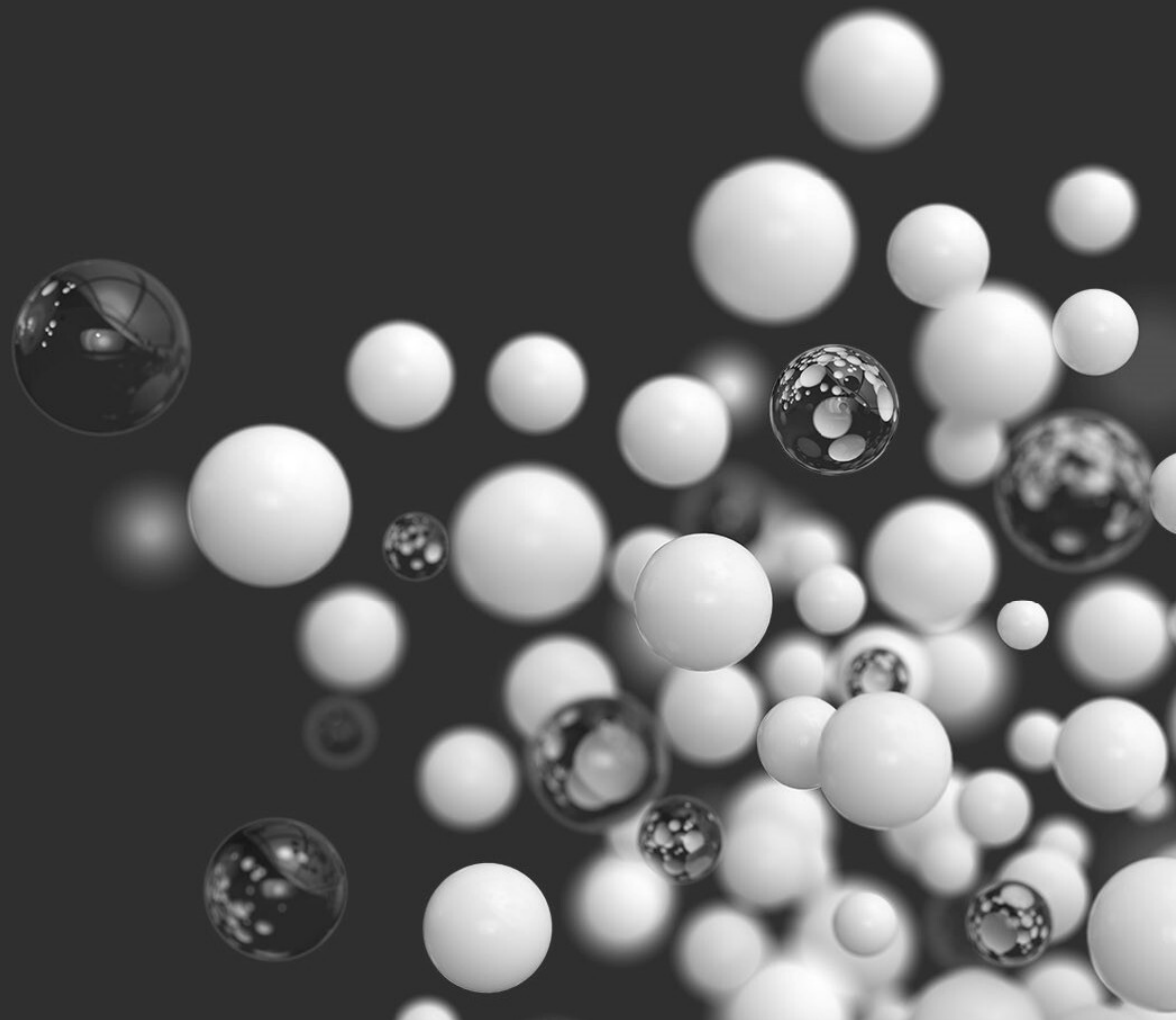
### Reasonable Accommodation

1 Establish medical situation and the degree of impairment.

2 What special treatment or facilities are required?

Employees should be allowed to participate at each level and present medical evidence and submissions.

# Case Law Irish Perspective



# Case Law – Reasonable Accommodation

## Disability Discrimination

Daly v Nano Nagle School [2025]

- SNA assistant
- Accident – wheelchair
- Diminished role and could not carry out duties
- Labour Court – redistribute duties – no reasonable accommodation – 40k awarded – High Court upheld
- Court Appeal – reversed decision
- Supreme Court –
  - Duty of accommodation is not open ended
  - Degree of accommodation – might include distribution of essential duties but did not require an employer to design a new job, airline pilot – airline steward
  - Disproportionate burden
  - Matter of degree, capable of being objectively justified



# Case Law

## Constructive dismissal

## Reasonable and contract test

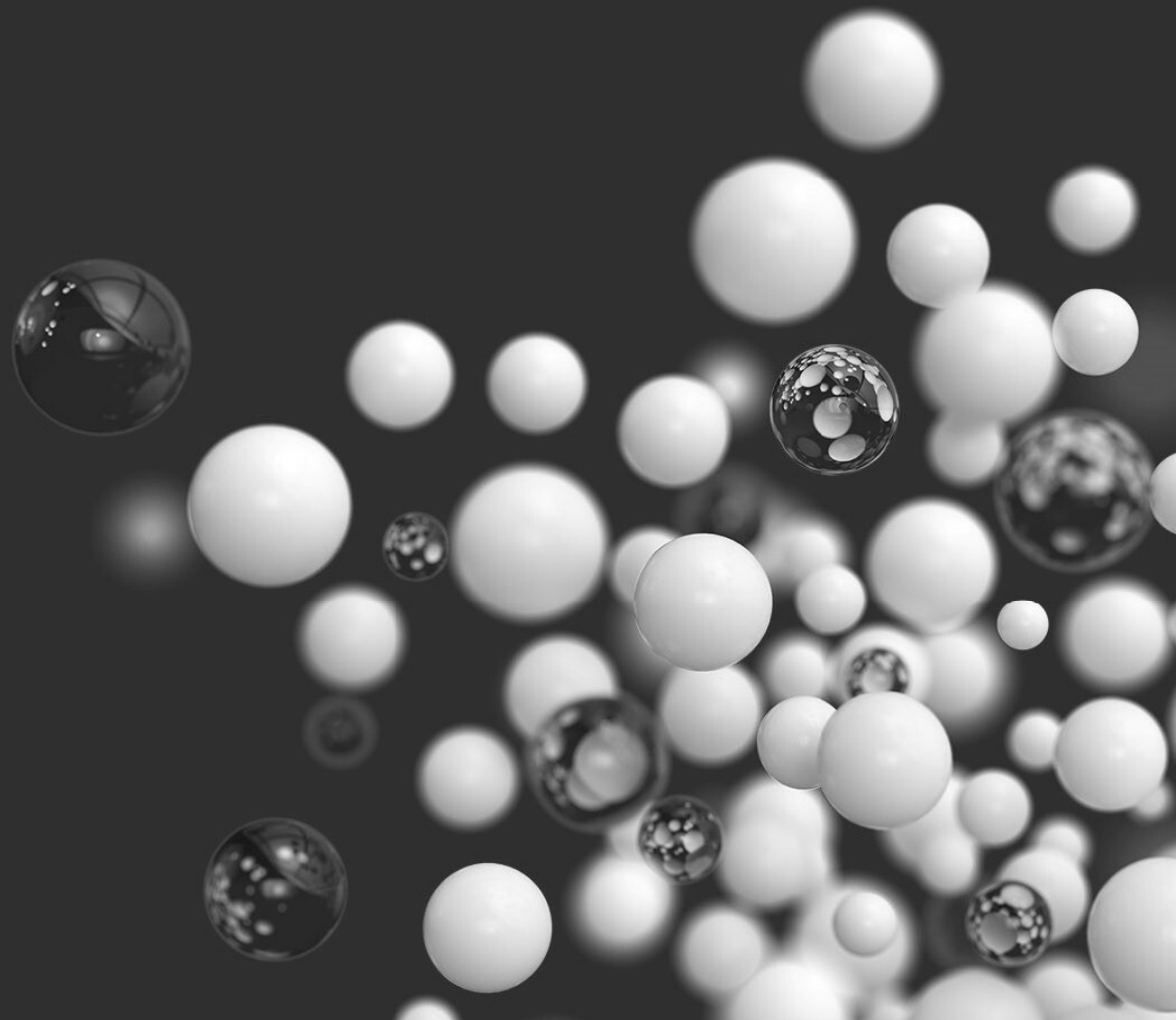
### Caroline McGarry v JTI (Ireland) Limited [2024]

- 14 years – Digital Trade Activation Manager
- March 2021 – work related stress
- 2.5 months and 4.5 months absence in 2021.
- Phased return to work – medical review - accommodations
- January 2022 Review – “needs improvement”; “inconsistent player”  
– told employer counselling/medication
- Unfair – set against goals established in 2021, did not take account of absence around period Sep-Dec 2021
- PIP for six months
- April 2022 – health issue from PIP – letter cry for help, – one line acknowledgment by employer
- May 2022 – panic attack – no referral for a medical review
- June 2022 – resigned, put health first – worked out notice.
- Claims constructive dismissal.
- Decision:
  - Did not find it was not a safe place to work
  - Failure to respond to letter April 2022, not necessary to invoke internal grievance
  - Performance objectives should have been reviewed
  - Health issues should have been considered
  - Did not respond adequately to her concerns
  - Reasonable to resign
  - Awarded €40,000
  - Unfair dismissal

## Victimisation / Penalisation

Be careful of retaliation against an employee seeking adjustments

# Case Law UK Perspective



## UK Case Law

### Disability Discrimination – Indirect Discrimination

#### Griffiths v Secretary of State for Work and Pensions [2015]

- Dismissed after her absences triggered employer's absence management policy.
- Court of Appeal – reasonable adjustments could include modifying absence triggers for disabled employees.
- Absence was disability related – post viral fatigue and fibromyalgia.
- Highlights how performance management policies like absence thresholds, must be adjusted to avoid disadvantaging disabled employees.

### Disability Discrimination – Indirect Discrimination

Buchanan v Commissioner of Police of the Metropolis  
[2017]

- Police man suffering from PTSD and depression – 8 months absence.
- Dismissed on the grounds of unsatisfactory performance after being placed on a PIP.
- Employment Tribunal - failed to make reasonable adjustments, such as modifying the PIP process or providing additional support.
- Dismissal was deemed discriminatory and unfair.

Sherbourne v N Power Ltd (Employment Tribunal  
1811601/2018)

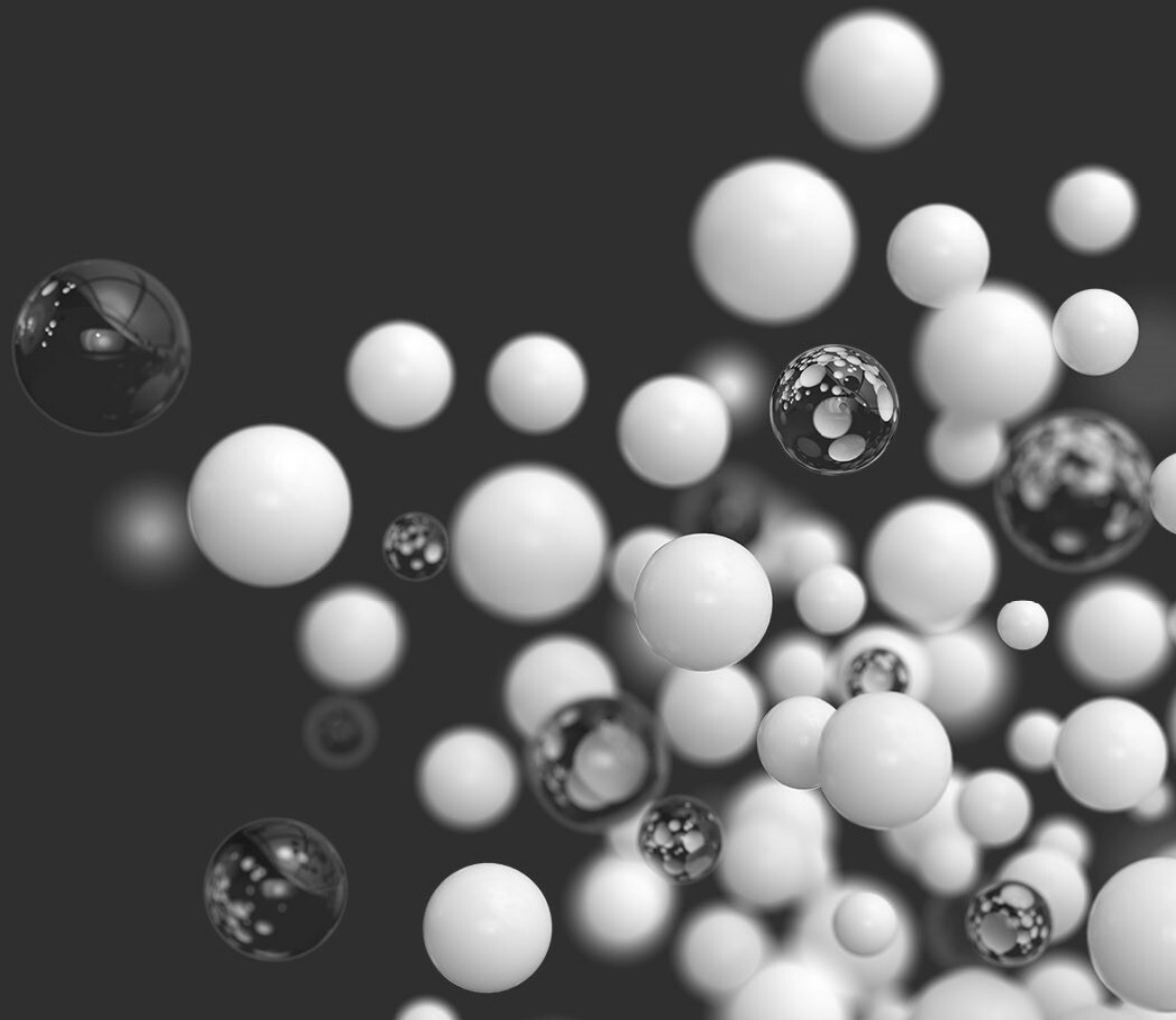
- Autism and suffering from anxiety and depression; medical review - 4 recommendations - placed on PIP due to underperformance within 3 weeks of review - dismissed
- Employment Tribunal - not made reasonable adjustments, such as adjusting performance targets or timelines.
- Dismissal was deemed discriminatory.

Performance management processes must be adapted to account for the effects of an employee's disability – must be individualised – How you respond is critical.

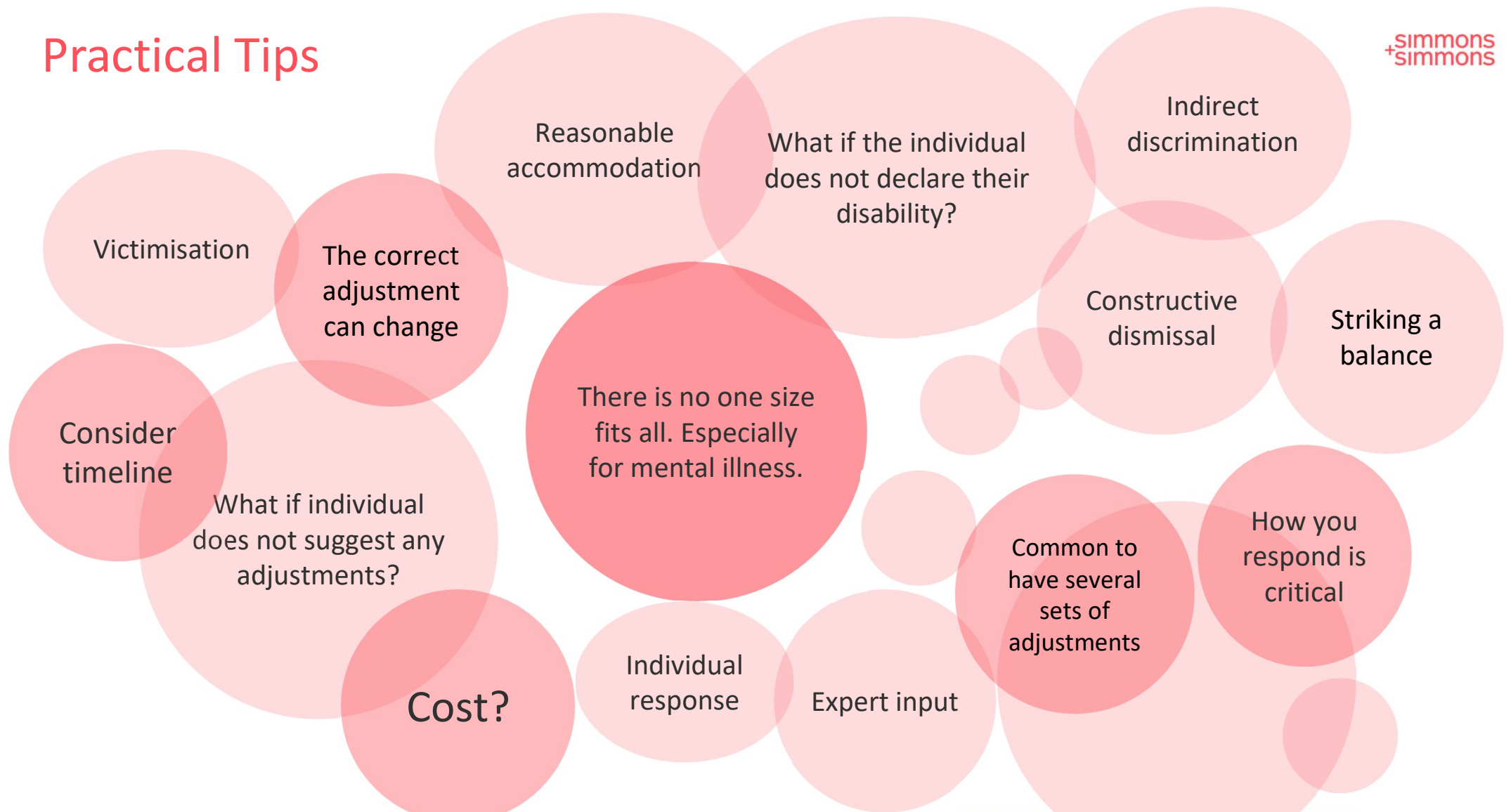


# Impact of Disability Discrimination on Employers' Actions in Performance Review Meetings

Practical Guidance



# Practical Tips



# 5 Key Points: Performance Review Meetings

## Guidance for Employers

1

Are you on notice of a condition? Pre-medical, workday, recent absence.

2

Review performance objectives after prolonged absence or disclosed conditions

3

Are you up to date on medical evidence? Do you have enough information?

4

What accommodation is required? Can you accommodate – reasonable and open

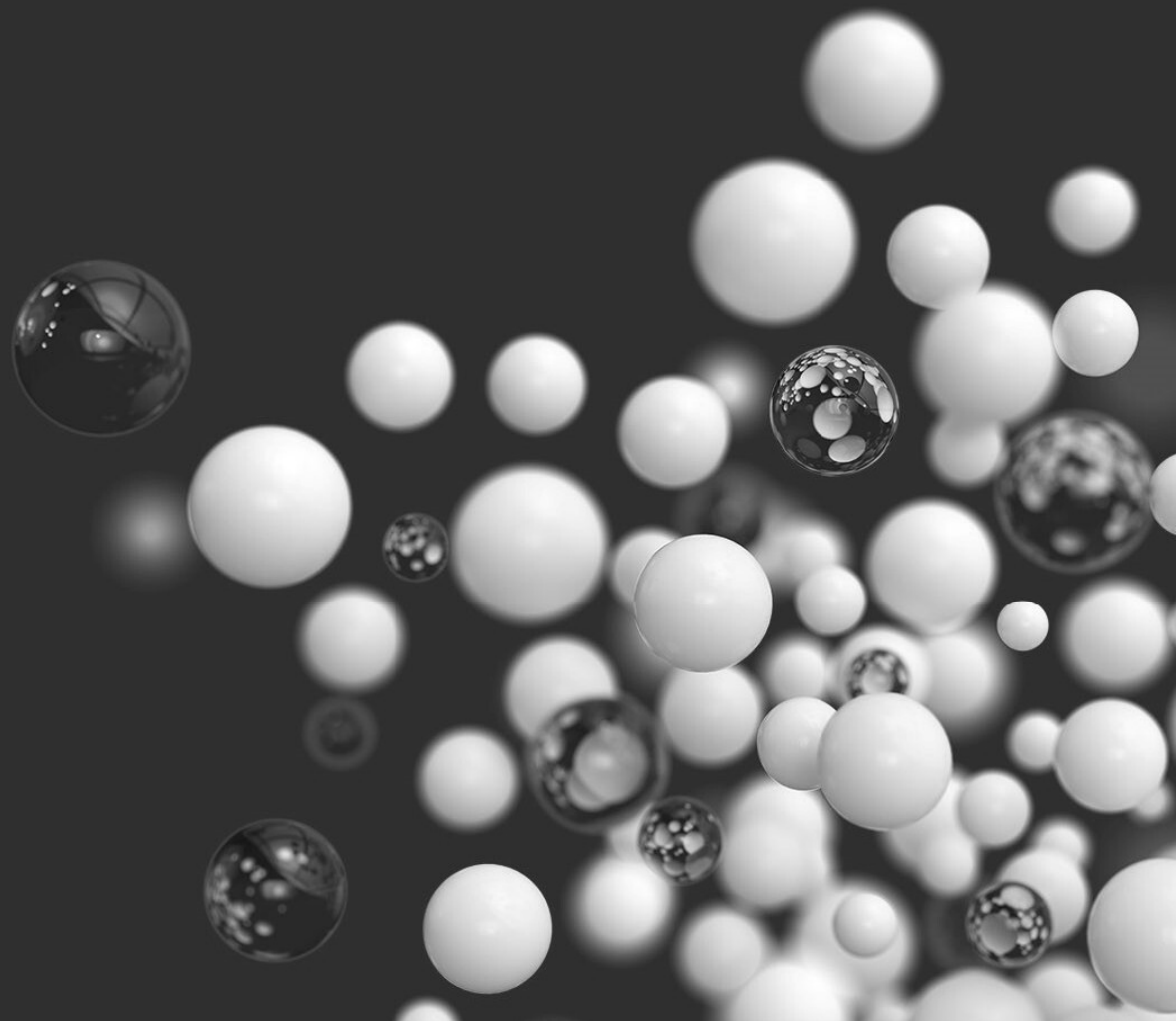
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Regular communication regarding performance issues. Respond to employees' concerns – refer for medical if required.

6

Accommodation is not open-ended.

# Q & A



## Key Contact



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