

White Paper Conference on Discrimination

Performance Management and Disability Discrimination

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Managing Performance

How do you overcome the perpetual worry of managing performance when there is an ongoing disability or propensity to claim discrimination?

Key Principles

How to manage performance

ACAS Guide

Managing underperformance

- Regular feedback
- Support and coaching
- Need for difficult conversations
- Disciplinary/capability procedure
 - Identify the performance issue
 - Explain the improvement required
 - Set a timescale for the improvement to be achieved
 - Fix a review date
 - Confirm support (including training) employer will provide

Disability Discrimination

Definition under Section 6(1) of the Equality Act 2010

“A person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities”

–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 the effect substantial?
- Is the effect long-term?

–Deemed disabilities

–Progressive conditions

–Past disabilities

–Effect of medical or other treatment

Disability Discrimination

Types of disability discrimination

- Direct discrimination
 - less favourable treatment “because of” disability
 - cannot be justified
- Discrimination arising from disability
 - unfavourable treatment “because of” something arising in consequence of disability (e.g. absence from work)
 - knowledge of disability required
 - can be justified
- Indirect discrimination
 - PCP which puts employees with a particular disability at a particular disadvantage
 - knowledge of disability not required
 - can be justified

Disability Discrimination

Types of disability discrimination (continued)

- Duty to make reasonable adjustments
 - Arises where PCP puts disabled person at substantial disadvantage
 - No obligation unless employer knows (or ought reasonably to know) that employee is disabled and likely to be placed at substantial disadvantage
 - Potential adjustments
- Harassment
- Victimisation

Case Study

Case Study

Zac has been employed in your sales team for seven years. Three years ago he was off work for 12 months with “depression” following the break-up of his marriage.

His performance since his return to work two years ago has been solid if not spectacular.

He recently applied for the post of Director of Sales and was disappointed that an external candidate, Sadiq, was appointed instead.

Case study

Shortly after Sadiq starts work, Zac complains to HR that he is being given too much work to do by Sadiq, that Sadiq's instructions are not clear and that Sadiq has been unjustly critical of his work.

Sadiq has separately fed back to you that Zac seems demotivated, has been obstructive in team meetings and his sales have dropped off.

What do you do?

Case Study

Do you:

- A. treat Zac's complaint as a grievance and start an investigation?
- B. start a formal performance management process in relation to Zac?
- C. have an informal chat with Zac about his concerns and his performance?
- D. get Sadiq and Zac together and try to get to the bottom of what is going on?
- E. something else?

Case study

You speak informally to Zac about the issues he has with Sadiq and feed back to him Sadiq's concerns about his performance. Zac reacts very badly to the issues raised about his performance. Following the meeting he is signed off work with "work related stress/anxiety".

After three months Zac's sick pay expires. He remains off sick, but three months later he is ready to return to work.

The company's OH advisers have recommended a number of adjustments to help facilitate Zac's return.

Zac has also requested a number of additional adjustments of his own.

Which of the following would you implement?

Case study

OH recommendations:

- a phased return starting with Zac working three days a week for three months before returning full-time
- that the company carry out a stress risk assessment
- weekly meetings be held between Zac and Sadiq to monitor his progress and workload

Zac's requested adjustments:

- a change in his line manager as he no longer wants to report to Sadiq
- a reduced sales target going forward to reflect his phased return
- payment for the period when he was in receipt of nil pay because the company was responsible for his ill health
- waiver of the rule in the company's discretionary bonus plan that an employee with more than three months' sick leave in a year is not eligible for a bonus

Case study

Zac returns to work and continues to report to Sadiq for the next three months. However, his performance continues to deteriorate. Sadiq reports that Zac is increasingly difficult to manage and unduly sensitive to any form of criticism.

You therefore decide to implement the first stage of the performance management process. The meeting does not go well and Zac refuses to acknowledge any failings.

Immediately after the meeting he is signed off work with “work-related depression”. He also writes to the company to say that he has been subjected to “a campaign of bullying, harassment and discrimination” by Sadiq and does not want to be contacted by the company in any circumstances as he is too unwell.

What do you do?

Case study

The company writes to Zac to ask if he wants to raise a grievance.

As it is year end, it writes to him separately to confirm that he is not eligible for a bonus as he was off sick for more than three months in the year.

Zac then resigns and says that his solicitors will be writing to you shortly.

A week later you receive a letter from his solicitors alleging that Zac has the following claims:

Case study

- A. Constructive unfair dismissal due to: (i) the institution of the performance management meeting, (ii) the company's refusal to comply with his request not to contact him, and (iii) failure to pay him a bonus
- B. Disability-related harassment due to: (i) the performance management meeting, and (ii) the company's refusal to comply with his request not to contact him
- C. Failure to make reasonable adjustments owing to the failure to change his reporting line
- D. Discrimination arising from disability as a result of the fact that he is not eligible for a bonus

Which of the above claims cause you concern?

Is there anything the company should have done differently?

Key points

- Obtain medical advice and follow recommendations
- Carry out risk assessments
- Carry out return to work meetings
- Keep notes/minutes of all communications with employee
- Follow the performance management procedure (but consider adjustments)
- Consider alternative roles/another manager. If this is not practical, can you explain why?
- Role of dismissing manager

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