



Managing performance while managing disability issues

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What will I cover?

- What does managing performance mean?
- What types of claims could arise in this scenario?
- Managing the “perpetual complainer”
- Practical pointers to manage the issues and avoid claims arising

Performance Management



- There is no one size fits all and “performance management” can mean different things

- The appraisal process: this has important consequences
 - Think about consistency of approach and the need for adjustments (and justification of your approach)
 - A number of potential claims can arise

- Consider ongoing management of performance, including training, promotion opportunities etc

What claims could arise?



- ❑ Unfair dismissal
- ❑ Failure to make reasonable adjustments
- ❑ Discrimination arising from disability
- ❑ Indirect discrimination
- ❑ Direct discrimination
- ❑ Harassment

Unfair Dismissal



- Is there a fair reason for dismissal, such as capability?
- Has a fair procedure been followed, taking account of the ACAS Code?
 - A genuine belief that the employee is incompetent which is reasonably held.
 - What evidence is there (e.g. appraisals, performance figures, complaints etc.)?
 - Be consistent and fair.

Unfair Dismissal



- Unfair dismissal and unlawful discrimination are not mutually exclusive and conduct which is discriminatory is relevant in assessing the fairness of the dismissal.
- What additional steps are needed to fairly dismiss a disabled employee who is not performing?

Failure to make reasonable adjustments



- The duty comprises three requirements:
 - The first is that, where a **provision, criterion or practice** of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

Failure to make reasonable adjustments



- The duty comprises three requirements:
 - The second is that, where a **physical feature** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

Failure to make reasonable adjustments

- The duty comprises three requirements:
 - The third is that, where the disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Failure to make reasonable adjustments



- The Equality and Human Rights Commission Code (@6.2):

“The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers unfairly and means taking additional steps to which non-disabled workers are not entitled.”

Failure to make reasonable adjustments



- Identify the provision, criterion or practice etc
- Identify the comparator group
- What is the substantial disadvantage (i.e. a disadvantage that is not minor or trivial) suffered by the disabled employee?

Failure to make reasonable adjustments

- What steps are *reasonably required* to remove the substantial disadvantage?
 - reallocating duties,
 - altering working hours,
 - training/mentoring,
 - modifying procedures for testing
 - redeployment etc.

- It may still be reasonable to make the adjustment even if success is not guaranteed.

Failure to make reasonable adjustments



- The Equality and Human Rights Commission Code (@6.28) suggests in determining whether the adjustment is reasonable the following should be considered:
 - The size of the employer
 - The practicability of the adjustment
 - The cost
 - The employer's resources
 - Whether the step would be effective in preventing the disadvantage

Failure to make reasonable adjustments



- *Langstaff J in Nottingham (2013 @17):*

“It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP... There must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP.”

Failure to make reasonable adjustments



- Lewison LJ in *Paulley* (2015 @ 42)

“It is common ground that the question whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable. The focus is on the practical result of measures that can be taken.”

Failure to make reasonable adjustments



- Elias LJ in *Griffiths* (2015 @ 65)

“Any modification of or alteration to the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.”

Failure to make reasonable adjustments



- What about modifying performance expectations or delaying/avoiding dismissal?
 - Does an employer need to tolerate lesser performance than that required from non-disabled employees (assuming all other adjustments have been made)?

Failure to make reasonable adjustments



- *Waddingham v NHS* (2013)

Reasonable adjustments during a selection process for an available role (amidst a redundancy situation) included assessing from material available (rather than interview) and appointing someone who was “competent” (but not necessarily the best)...

- What does this tell us about disability related performance issues?

Failure to make reasonable adjustments



- Can we use the reasoning from the absence management authorities when considering reasonable adjustments in performance management cases?
 - *General Dynamics Technology v Carranza* (2014)
 - *Griffiths v The Secretary of State* (2015)

Failure to make reasonable adjustments



- Could “not dismissing” be a reasonable adjustment in performance management cases?
- *Aylott v Stockton* (2010) – Dismissal could be a breach of the duty to make reasonable adjustments
- Are these issues better considered in terms of a claim of discrimination arising from disability?

Discrimination arising from disability



- A person (A) discriminates against a disabled person (B) if:-
 - A treats B unfavourably because of something arising in consequence of B's disability; and
 - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

- Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Discrimination arising from disability



- Objective justification: what does an employer need to do to justify such treatment?
 - What is the legitimate aim?
 - Is it proportionately applied? It must be reasonable, appropriate and necessary in all the circumstances.

- How will you evidence objective justification in performance management cases?

Indirect Discrimination

- A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s.

Indirect discrimination

- A PCP is discriminatory in relation to a relevant protected characteristic of B's if:-
 - A applies, or would apply, it to persons with whom B does not share the characteristic,
 - It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - It puts, or would put, B at that disadvantage, and
 - A cannot show it to be a proportionate means of achieving a legitimate aim.

Indirect Discrimination

- Thus there is a risk in managing performance of a disabled employee of a claim for indirect discrimination.
- The PCP will require to be objectively justified in relation to the particular employee.
- Evidence will be needed (not broad assertions).

Direct Discrimination



- A person (A) discriminates against another (B) if, because of a protected characteristic (ie disability), A treats B less favourably than A treats or would treat others.
- This cannot be justified (no matter what the motive is).
- What if the employee is perceived to be disabled (assuming this is possible)?

Harassment



- Harassment occurs when (A), for a reason which relates to a disability, subjects (B) to unwanted conduct which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- This could include persistent criticism, inappropriate/derogatory language and creating a culture that satisfies the legal requirements.

“The perpetual complainer”



- What if the employee continually claims disability is the reason for poor performance?
 - Take care to consider the full picture
 - Obtain evidence to ensure a fair approach is taken (including medical advice and consult with the employee)
 - Avoid victimisation and focus on business reasons (which can be justified) for all actions

Practical Pointers



- Medical input is key, not least to determine:
 - Is the employee disabled (and if so in what way)?
 - What substantial disadvantage does the employee suffer as a result?
 - What is needed to remove the disadvantage (and what is not)?

- Consult with the employee – what do they consider necessary to remove the substantial disadvantage?

Practical Pointers



- Consider your policies and approach to performance management:
 - What policies should you have?
 - How do you ensure they are implemented?
 - Seek uniformity and transparency

- Consider how to objectively justify any potentially unlawful treatment: where are the risks and identify relevant legitimate requirements and how they are applied

Practical Pointers



- What about reasonable adjustments to performance standards?
- How far do you need to go?
- How do you decide what is reasonable in all the circumstances (avoiding reliance on cost alone)?

Practical Pointers



- Be fair, consistent and transparent.
- Consider an audit of your approach to performance management.
- Can you objectively justify the treatment and evidence the specific requirements of the justification defence?

Practical Pointers



- Take positive steps to manage performance.
- Consider the EHRC Code and ACAS Publications.
- Keep records/documentary evidence to show the reason why action was taken and to justify the approach.
- Seek specialist employment law advice: it's never too late...



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