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DISABILITY IN THE WORKPLACE

WHAT THE LAW SAYS:

Under the Equality Act 2010 a person is disabled if they have a physical or mental impairment which has a substantially adverse and long-term effect on their ability to carry out normal day-to-day activities. In the workplace such activities are taken to include things like using a telephone or computer, interacting with colleagues, following instructions, driving and carrying everyday objects.

The Act provides disabled people with protection from discrimination in a range of areas, including employment.

THERE ARE ESSENTIALLY FIVE MAIN TYPES OF DISABILITY DISCRIMINATION:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation
- Failure to make 'reasonable adjustments'

EMPLOYERS SHOULD ENSURE THEY HAVE RULES IN PLACE TO PREVENT DISCRIMINATION IN:

- recruitment and selection
- determining pay, terms and conditions
- sickness absence
- training and development
- promotion
- dismissal
- redundancy

WHAT COUNTS AS WORKPLACE DISABILITY?

Do you know what counts as a disability in the workplace?
It's a minefield and an area of employment law that all employers – large and small – really need to be aware of.

One of the main issues seems to lie with the definition of disability.

What we may normally consider to be an illness could well count as a disability in the workplace. If you have any doubt as to what constitutes disability, read on...

HOW IS DISABILITY DEFINED, AND HOW SHOULD WE RESPOND?

Under UK law, someone is defined as disabled if they have:
“a physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on [their] ability to do normal daily activities.”

For most of us who are not legal professionals that definition is pretty unclear. Essentially, if your employee has a mental or physical health issue which makes it difficult for them to do normal daily activities, and impacts part or all of their job, they could be classed as having a disability in the eyes of the law.

A GREY AREA THEN?

It's an extremely grey area and one that small employers should be aware of. It's common to think that ‘daily activities’ are those which are not carried out at work; things like shopping, making a cup of tea and cleaning.

However, a recent case at the Employment Appeals Tribunal highlights why this understanding is incorrect. In the case of *Banaszczyk v Booker Ltd* the EAT ruled that lifting heavy loads of 25kg constituted a daily activity.

Mr. Banaszczyk was employed to lift and move goods in a warehouse, and claimed disability discrimination when his employer dismissed him for incapacity. This came after a car accident from which he had developed a long-term back condition, limiting his ability to carry out this work.

The judge explained the decision by saying that lifting heavy loads is a normal daily activity for many workers throughout the UK. Although, this is clearly not ‘normal’ for every employee in the UK, and what is not clear is how often someone would have to undertake an activity for it to become ‘normal’.

So you can see it is an extremely grey area. Our advice? Always seek help from a qualified HR professional before terminating someone's employment, especially if the poor performance could have something to do with their mental or physical health.

WHAT IF I AM NOT SURE IF SOMEONE'S DISABLED?

Sometimes it's not immediately obvious that someone is disabled. For example, mental illness such as anxiety or depression might not be outwardly visible, but can certainly affect an employee's performance.

That's why, when an employee's performance drops, it's best to have a meeting to discuss the issue and see if they have had any problems. This is when they will likely tell you if they have a mental or physical issue which is affecting their work.

Be cautious not to jump to conclusions about the reasons for an employee's poor performance without investigating properly first.

Starbucks recently found themselves in hot water for this reason. *Ms Kumulchew, a supervisor in Starbucks, was responsible for taking the temperatures of fridges and water and recording the results. Starbucks accused Ms Kumulchew of falsifying records, reduced her duties and told her to retrain.*

She alleged disability discrimination as she suffers with dyslexia and maintained that she had told Starbucks about it.

It might not surprise you that at the employment tribunal Starbucks were found to have been wrong in their handling of this, and they were also found to have victimised their employee.

Cue a great deal of negative press coverage for Starbucks.

This is a fairly cut and dried example. If one of your employees ever mentions a health problem that could be constituted as a disability, and is affecting their performance, you must look to make what are called reasonable adjustments

WHAT COUNTS AS A REASONABLE ADJUSTMENT?

What counts as a reasonable adjustment?

There are many ways that you can make a reasonable adjustment for an employee, depending on the type or severity of their disability.

This could include:

Making access to your building easier for someone who has trouble walking – e.g. a ramp for wheelchair users

Changing the equipment they use – e.g. providing a special keyboard for someone with arthritis

Offering flexible hours to those that are stressed or get tired easily due to a physical or mental disability

Letting the employee work from home – e.g. if they suffer from anxiety or find it difficult getting to the office because of their disability

Visually showing an employee how to perform a task, as in Ms Kumulchew's example. People with Dyslexia have difficulties with words and numbers and find it easier to be shown how to do tasks visually.

These are just some examples of reasonable adjustments. In essence, they are changes that your business can make to ensure the employee is able to do their job effectively, without causing damage or interruption to your business.

PROPORTIONALITY

The size of your business will be taken into account when determining how reasonable an adjustment is. Larger businesses would be expected to be able to do much more for disabled staff, including things that a small business couldn't realistically afford to do while trying to run a viable business.

For example, as a small business you might employ someone who needs a helper through a 'buddy system'. For smaller employers, this might be too much of a strain on a small number of employees. However, if you are a large business, and have a large number of staff you would be expected to do much more to accommodate and overcome such a problem.

Even if you don't make reasonable adjustments, you need to be ready with evidence to prove that you've taken them into consideration. This can help you to demonstrate your business' justification for not making adjustments.

HOW SHOULD I MANAGE LONG-TERM ABSENCE IF I SUSPECT IT'S RELATED TO A DISABILITY? AND WHEN CAN I TAKE FORMAL ACTION?

The most important thing here is communication.

Not only will the staff member feel grateful that you're taking the time to speak with them as opposed to sending formal letters, but you could also help them return to work that bit sooner.

Try and start this process before the 4-week mark, and as soon as possible. Taking notes of your first call and what was discussed is also a good idea, just in case. Depending on the health issue, the amount of communication will change over time.

Should the employee be off for 4 or more weeks, with little chance of imminent return, this is when you'll likely consider taking some form of formal action or arranging a home visit. However, a recent tribunal between the DWP and a disabled employee has shown that you may need to make a reasonable extension to this 4-week period, to avoid a potential discrimination claim.

Remember though, the government's Fit for Work service is available to help when going through formal proceedings. It's designed to help employees on long-term sick leave get back to work as soon as possible, and taking some of the strain off employers.

Therefore, if you have an employee on long-term sick leave, it's best to keep lines of communication open. Issuing formal warnings is often the last resort and should only be done when you have taken some advice from a qualified HR professional.

Disability is a tricky area for employers, but we hope to have helped you understand why and how you should tread carefully – even if you only suspect an employee has a short-term health problem.

Disability at work is a complex area and 1500 words don't do justice to the complexities and bear traps that lie in wait for the unwary. If you have any whisper that one of your employee's performance might be affected by a disability you are strongly advised to seek HR advice to help you stay safe.

Acknowledgement of Part 2 of these notes to Kirsty Senior, www.citrushr.com

Should you need any help, contact us at AFVS or Kirsty at Citrus HR

Daryl Martin – October 2018

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