



DAC BEACHCROFT

HEALTH AND WELL-BEING FROM AN EMPLOYMENT LAW PERSPECTIVE

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Agenda

Managing health & well-being: the practical context

Managing health & well-being: the legal context

Case study

What's on the horizon?

MANAGING HEALTH & WELL-BEING: THE PRACTICAL CONTEXT



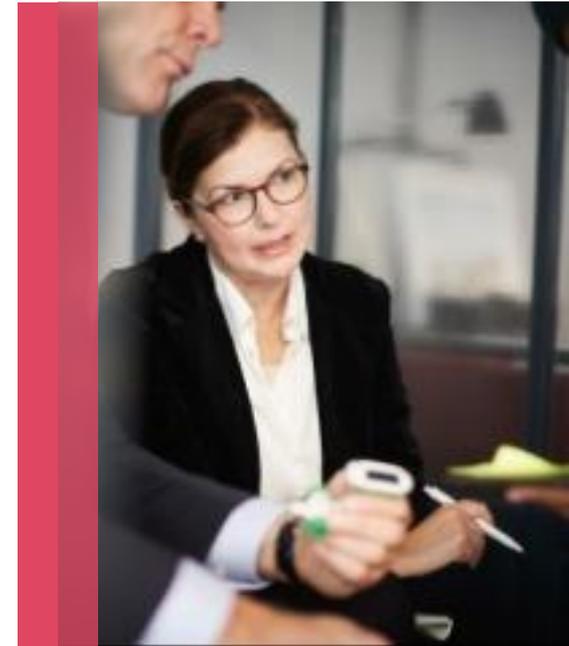
The Times They are a-changin'

- People are living and working longer: 50% of babies born in 2007 expected to live to 103 (c.f. in 1947 this was 85).
- Longer lifespans fuelling changing social views on work. Workers often view themselves as having multiple identities and may live within dual career couples. Balancing these can create tensions and lead to an adverse impact on health and well being.
- By 2036 UK population is expected to reach 71.8m of which the 75+ age group is expected to be the largest growing group with a CAGR during the 20 year period to 2036 of 2.5%
- However around 20% of our lives are spent in poor health. We are living with complex illnesses for longer and this trend is set to continue with the proportion of those aged 65+ with 4+ diseases set to double by 2035.
- Ill-health which prevents people working costs the economy around £100bn a year and sickness absence costs employers around £9bn year.
- By 2020 depression will be the leading cause of disability according to the WHO.
 - 49% of workers feel uncomfortable talking to their employer about their mental health
 - 95% of workers off with stress told their manager a different reason

The challenges for employers

Potentially problematic for managers:

- do they have the requisite skills, experience and training to spot ill health (particularly mental) issues in the workplace?
- can they have an appropriate conversation about health issues?
- are they confident to manage issues arising from employees suffering poor mental or physical health?
- how do they prevent a temporary short term contained issue escalating into a longer term problem with a wider impact?



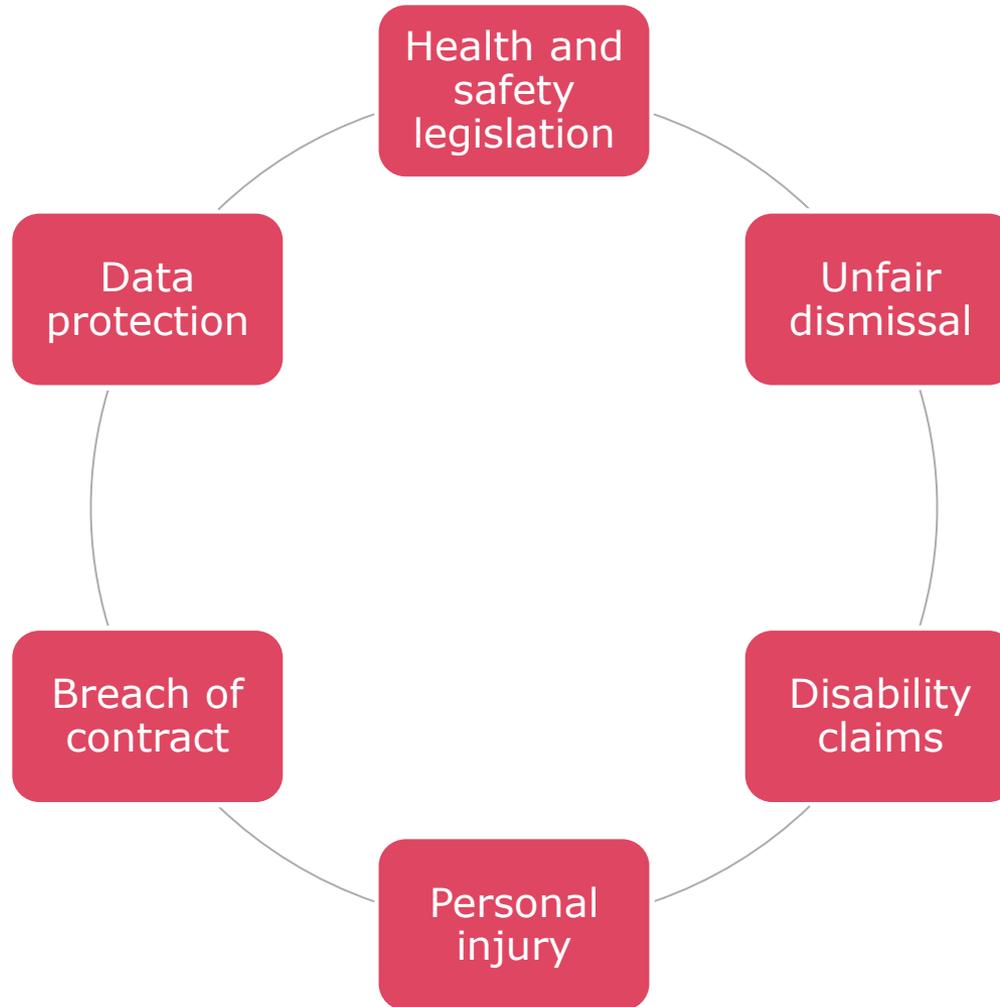
Spotting poor mental health: early warning signs

- Performance deteriorates: missing deadlines/below par work
- Attendance deteriorates: poor time-keeping/persistent lateness/increased sickness absence/unexplained absences
- Poor judgement/indecision/procrastination
- Unusual displays of emotion/uncharacteristic behaviour e.g. frequent irritability, tearfulness, withdrawal
- Constant tiredness, frequent headaches and backaches
- Overworking: late nights/taking on too much
- Unusual exuberance
- Increased use of alcohol, tobacco or caffeine
- Have other staff members mentioned anything?

MANAGING HEALTH & WELL-BEING: THE LEGAL CONTEXT



Legal risks



Disability discrimination



Q: Is stress a disability?

- A. Yes, but only if an employer knows about it
- B. Yes, provided it satisfies the legal definition
- C. No, as it's not a medical diagnosis it can never be a disability
- D. Not if it's only noted on a fit note

B

Yes, provided it satisfies the legal definition

- *Must have substantial and long term (12m+) adverse effect on ability to carry out normal day-to-day activities*
- *Cannot blindly rely on OH findings*
 - need to assess OH reports critically*
 - hold return to work interviews*
 - consider involving GP as a last resort*
- *Without more, stress caused by difficulties at work unlikely to be a disability*

Reasonable adjustments

Duty on employers to make reasonable adjustments where they know, or could reasonably be expected to know that:

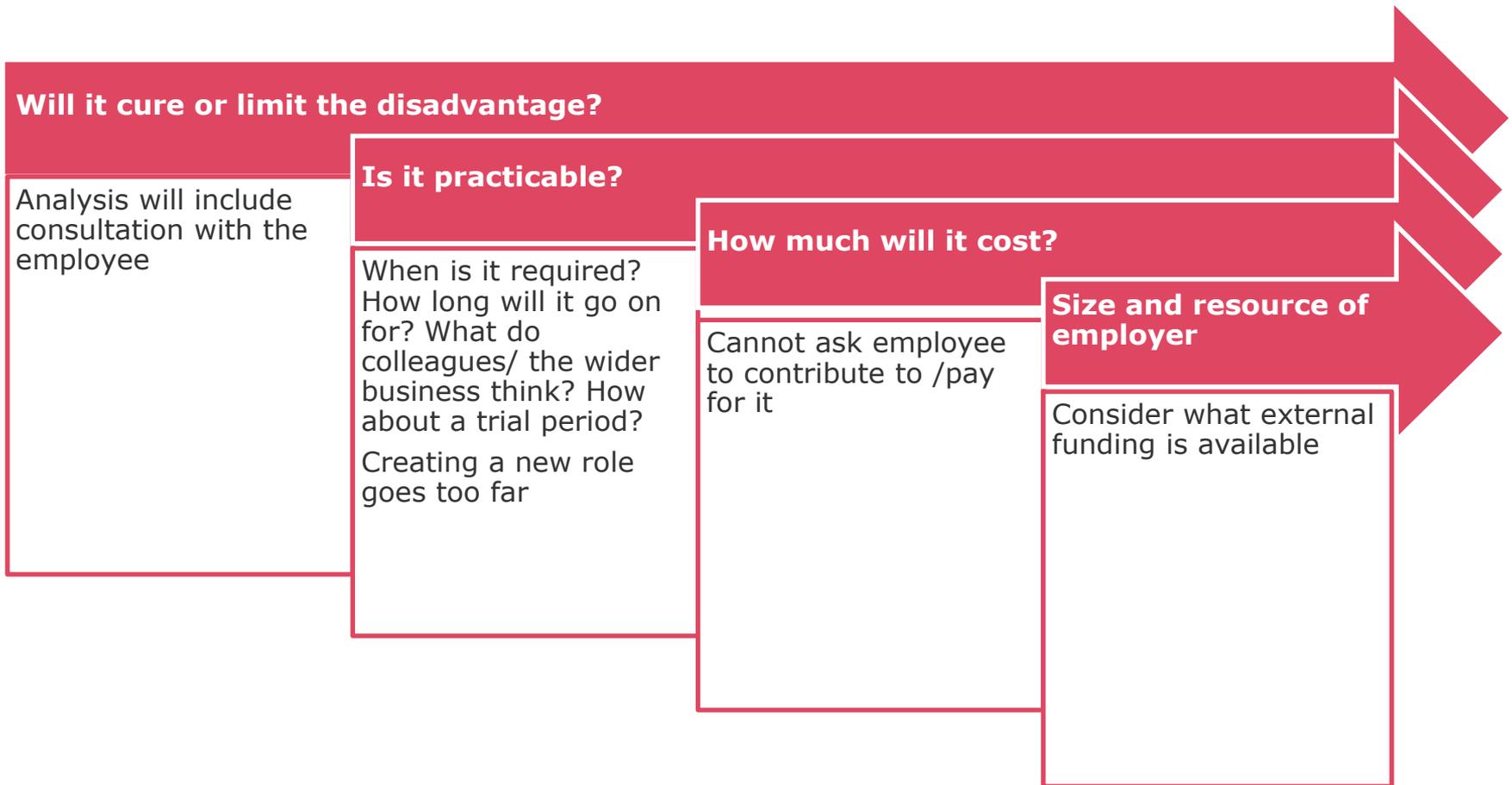
- a PCP places a disabled person at a substantial disadvantage;
- an adjustment can be made which will cure the disadvantage; and
- the adjustment is reasonable



Reasonable adjustments and sickness absence

- The employer doesn't have to accept long term or severely disruptive sickness absence
- The employer can apply a trigger system to disability-related absence but must do so with care
- The employer must however, have considered:
 - the level of disruption of the absence on the business
 - if all reasonable adjustments have been made
 - if the employee is likely to sustain the same or an increased level of absence in the future and if so if this will mean they cannot undertake their role to a satisfactory level of standard
- It is a legitimate business aim to require a certain level of attendance
- Employer must show the level of attendance is required and there is no lesser discriminatory way of dealing with the matter

Reasonable adjustments checklist



CASE STUDY



Background

- Carla has been a researcher in your team for the past 2.5 years. She is a strong performer. At her last appraisal meeting you pointed out that she had been abrupt with colleagues - you had seen this a couple of times and felt it on one occasion yourself
- Carla said that recently she has found it harder to deal with people and felt a little low. She has had a few odd days off in the past few months which is unusual
- You asked Carla if there was anything more you could be doing to support her with this at the moment. She said no
- Carla's overall appraisal rating was good, as she had met her hard objectives producing some excellent research and reports and in the early part of the year she was impressive in meetings

What do you do after the appraisal meeting?

What do you do after the appraisal meeting?

- A. Note the conversation in the appraisal form
- B. Note the conversation in the appraisal form and set some SMART objectives around communicating with colleagues
- C. Make a referral to Occupational Health about Carla's low mood
- D. B & C



B

Note the conversation in the appraisal form and set some SMART objectives around communicating with colleagues

Fast forward 3 months

- Despite the SMART objectives things have not improved. In fact they are worse. Carla has consistently made mistakes, and has been very irritable with colleagues when they have pointed this out
- Carla tells you she has suffered from bouts of depression on and off for the past 10 years, which you think is likely to be a disability under the Equality Act 2010
- Carla says that she is optimistic that with help she will not make more mistakes but she had not been sleeping well; this has now improved

What do you do next?

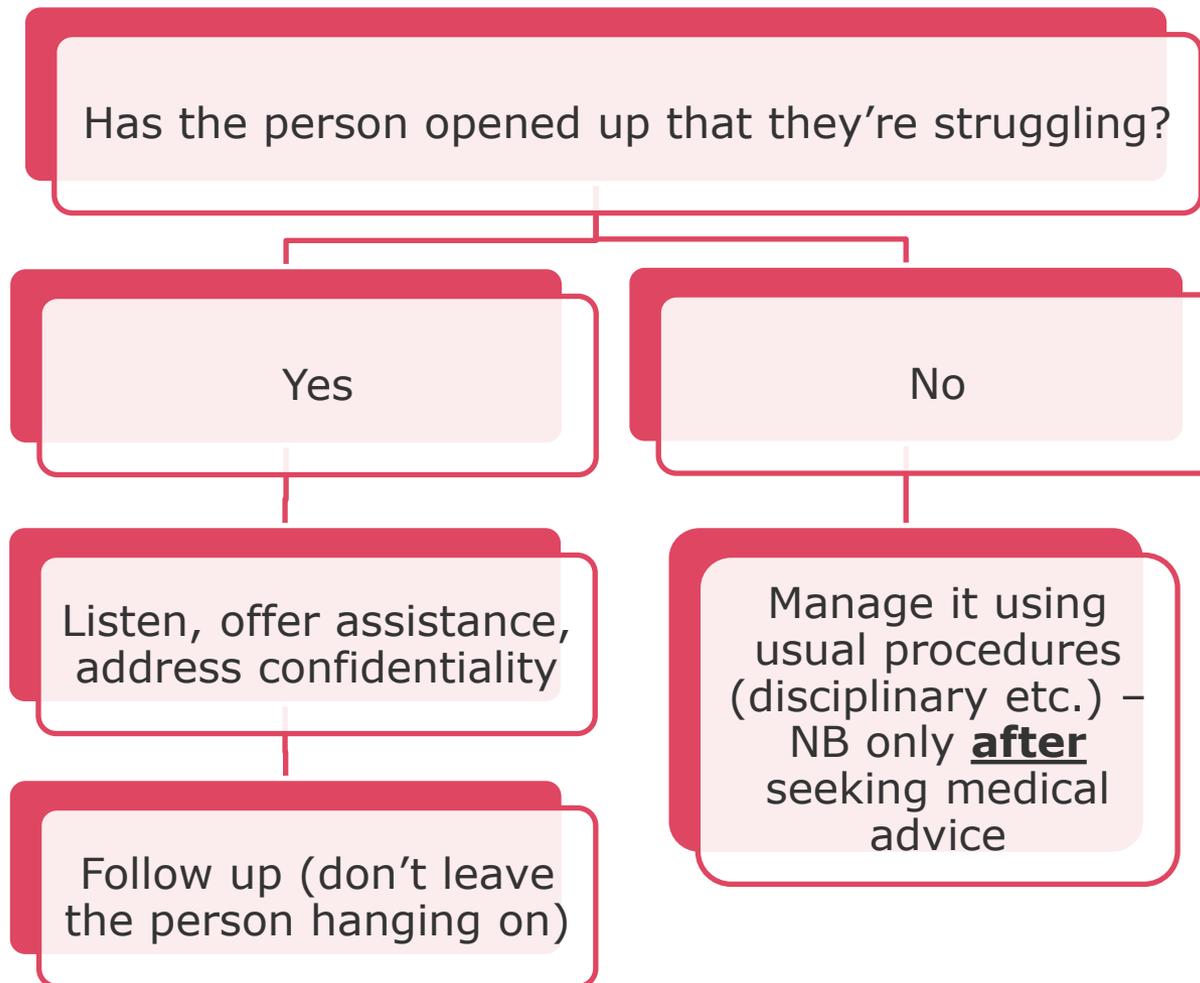
What do you do next?

- A. Commence a performance management procedure - there is no connection between Carla's behaviour, mistakes and her health
- B. Tell your team that Carla is feeling low and ask them to help her
- C. Speak to HR about reasonable adjustments to be made – the company has knowledge of Carla's potential disability and there is a risk of a discrimination 'arising from disability' claim
- D. Do nothing for now – Carla says she is starting to feel better and her sleeping has improved, so wait and see if her performance improves before taking further steps

C

Speak to HR about reasonable adjustments to be made – the company has knowledge of Carla's potential disability and there is a risk of a discrimination 'arising from disability' claim

What to do if there are concerns about an individual's mental health



Handling a mental health disclosure

Confidentiality

- Agree with the employee who can have access to their health information: HR/their team/line manager only
- A line manager only needs to know what impact the condition has in the workplace in order to support/make adjustments: diagnosis is not necessary
- It will be a breach of implied term of trust and confidence to disclose employee's health information beyond the agreed circle without their permission
- If someone is so distressed you think they may commit suicide you may breach confidentiality

Data protection considerations

- Health information is special category (i.e. sensitive) personal data under the DPA 2018
- Information about a worker's health can be processed by the employer in connection with the individual's employment (e.g. to make reasonable adjustments/ refer them to OH)
- Key is not to overshare – tell line managers only what they need to know

In summary - What employers are expected to do

- Be aware of and survey workplace health risks under health and safety legislation
- Spot and take reasonable steps to prevent health deteriorating in the workplace
- Seek appropriate medical advice and objectively assess it
- Note why management processes need to be invoked and act proportionately in implementing them
- Make reasonable adjustments if a health condition is a disability and document the parameters
- Handle medical information sensitively and confidentially

WHAT'S ON THE HORIZON?



From the Second Queen's Speech of 2019

- Key provisions of proposed Employment Bill:
 - a single enforcement body
 - extending redundancy protection to prevent pregnancy and maternity discrimination
 - extended leave for neonatal care
 - one week's leave for unpaid carers
 - making flexible working the default
- National disability strategy

Right to parental bereavement leave / pay – the Act





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