

DISABILITY DISCRIMINATION

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Introduction

I am writing this article following the dismissal of an individual suffering from a disability and the process an employer should follow before dismissal.

Having worked as an HR professional for over 20 years, there isn't much I haven't witnessed or handled in the world of HR.

Last week was Mental Health Awareness week and it still amazes me how many employers still do not understand the impact of mental health on some people.

Having known and worked with a particular individual for 5 years, I can only describe this person as dedicated, loyal, hardworking, passionate and devoted to their job. This individual divulged to me some years ago that they suffered horrific abuse as a child. I was astonished at their determination and strength to overcome the abuse and make a successful career in an industry they are passionate about and where they can contribute towards improving the lives and safety of others.

However, last year an incident triggered the events of their childhood and all those memories which had been suppressed for so many years erupted. Having sought and self-funded counselling, they started to address the past with a view to unburdening all the hurt and trauma and to get their life back on track.

They were subsequently diagnosed with PTSD. Two months ago following the advice of their counsellor and GP, they were signed off from work where, I should add, their service was under 2 years.

Definition of disability under the Equality Act 2010 (Gov.UK)

'You're disabled under the Equality Act 2010 if you have a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do normal daily activities.

Your condition is 'long term' if it lasts, or is likely to last, 12 months.

'Normal day-to-day activity' is defined as something you do regularly in a normal day. This includes things like using a computer, working set times or interacting with people.'

PTSD can be classed as a disability and therefore the employee could be protected under the Equality Act.

What did the Employer do?

Dismissed them via email in Mental Health Awareness Week!

No welfare support, little communication, no meetings, no medical report, no referral to occupational health.

OK, so Employers have the ability to let staff go without following a process if they've been with the company for under two years. The only requirement is that the employer pays their notice period unless dismissal is for gross misconduct, plus any accrued and unused leave. Saying that, employers should be aware though that all staff are protected from discrimination, at every stage of the employment journey.

What should the employer have done?

Sought advice

As well as discussing it with the employee themselves, the employer may wish to consider seeking expert advice on the extent of someone's capabilities, prognosis and a return to work, and on what might be done to change the working arrangements. This could be through an Occupational Health specialist or GP.

Reasonable adjustments

- A phased return to work if someone has been off for a long while.
- Part-time or flexible hours if someone is finding full-time working difficult.
- Reassigning some elements of their job to another member of staff or transferring them to another role in the organisation

How would a tribunal decide?

An Employment Tribunal would refer to the following questions when considering whether an employee has been unfairly dismissed:

- When considering all circumstances of the case, would a reasonable employer have waited longer before dismissing the employee?
- Were the employee views taken into account about the likelihood of a return to work?
- Has the employer sought proper medical advice to obtain a prognosis on the employee's condition?

With regards to ill health, the likely duration of the illness is an important consideration. This would be the case, for example, if medical advice suggested an employee would be able to return to work within a certain definitive time period. If the employee were dismissed during this period then it's possible it would be unfair.

If after a reasonable period of time the employee is unable to say when they are likely to be able to return to work, that would weigh heavily in favour of an employer. As an employer you not expected to wait indefinitely for an employee to return to work.

If dismissal is a strong likelihood, the employer should consider alternative work, if available, prior to dismissing the employee. There is no requirement to create work or jobs if none exist, but the employer should take reasonable steps to find alternative employment as part of the dismissal process.

Summary

I know some employee's 'do play the game' and it can be very frustrating for employers. However, in this instance, it is extremely disappointing that the employer in question failed to follow the above recommended guidelines or consider the consequences of their actions on the employee, who is obviously in an extremely vulnerable state. Also to dismiss via email during Mental Health Awareness week, in my view, just adds insult to injury.

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