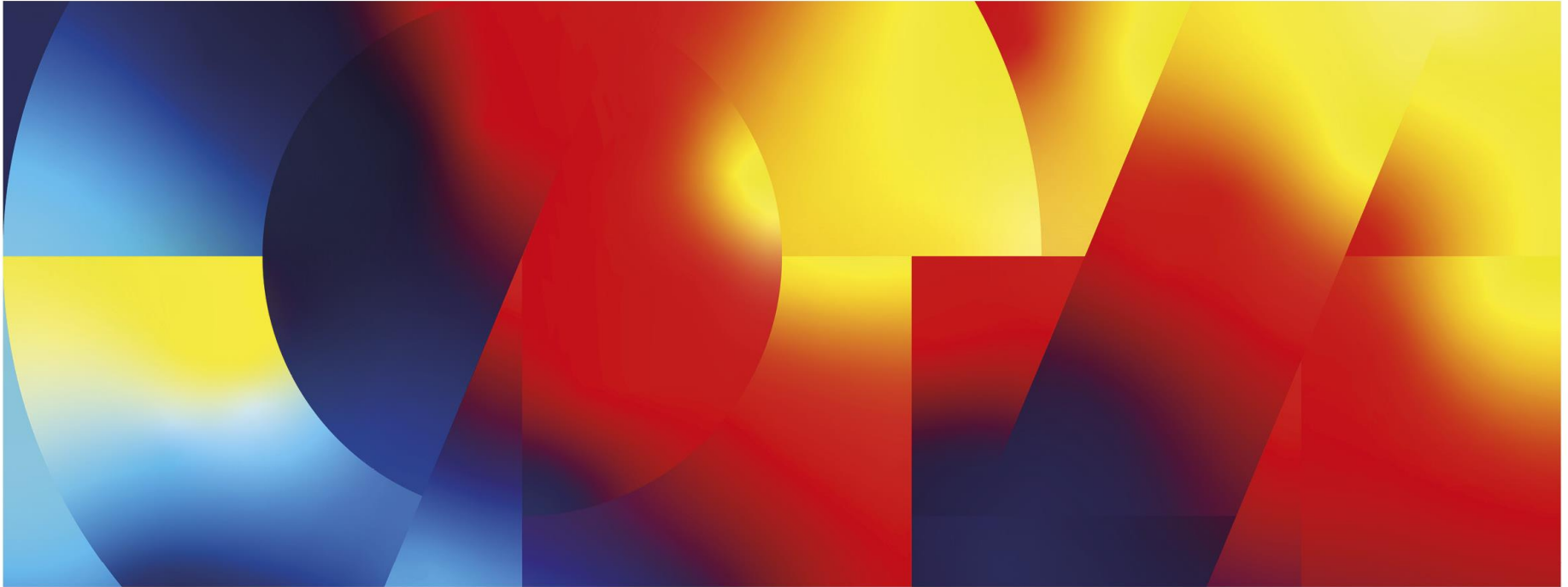


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Managing Hidden Disabilities in the Workplace



1. What is a hidden disability?
2. The question of knowledge.
3. The duty to make reasonable adjustments
4. Lessons learned.

Statistics

- In the UK alone, 1 in 5 people have a disability.
- 80% of those have a hidden/non visible disability.

Hidden Disabilities – Examples

- ADHD
- Autism
- Asperger's Syndrome
- Bipolar disorder, schizophrenia
- Chron's Disease
- Chronic pain
- Chronic Fatigue Syndrome
- Depression or other mental health conditions
- Dyslexia, Dyspraxia
- Diabetes
- Epilepsy
- Menopause

What is the definition of a disability under the Equality Act 2010

A physical or mental impairment

Which has an adverse effect on the ability to carry out normal day to day activities

Section 6 Equality
Act 2010

The effect is substantial

The effect is long term (i.e. more than 12 months or is likely to last more than 12 months)

The Question of Knowledge – what's knowledge got to do with it?

- An employer can't be liable for discrimination unless it knew or should have known about the employee's disability (**ACTUAL** or **CONSTRUCTIVE KNOWLEDGE**)
- Assessed at the time of the allegation of discrimination.



The Question of Knowledge – what's knowledge got to do with it?

- **Direct Discrimination** – treats someone less favourably than others
- **Discrimination arising from disability** – treats someone unfavourably because of something arising in consequence of their disability.
- **Indirect Discrimination** – Employer applies a provision, criterion or practice which puts people with the individual's disability to a particular disadvantage when compared to others and it puts the individual at that disadvantage
- **Failure to make reasonable adjustments** – duty for an employer to make reasonable adjustments where the disabled person is placed at a substantial disadvantage by an employer's provision, criterion or practice
- **Harassment** – where a person engages in unwanted conduct related to disability and the conduct has the purpose or effect of violating the individual's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual.

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The Question of Knowledge

Is there a difference in the amount of knowledge an employer needs to have – YES!

Direct Discrimination: actual or constructive knowledge of disability

Reasonable Adjustments: actual or constructive knowledge of disability **and** that the disability is likely to disadvantage the individual substantially.

The Question of Knowledge – what is knowledge?

1. Good practice to deal with each of the 4 questions that make up the definition. **HOWEVER**
2. There may be occasions when it is permissible to focus on the question of whether there is knowledge (or ought reasonably to be knowledge) of a substantial adverse effect on day to day activities without having to establish the precise nature of the impairment before doing so. Cases where there are difficult medical questions around diagnosis.

The Question of Knowledge

EHRC CODE

“an employer must do all they can reasonably be expected to do to find out if a worker has a disability”.

- treat employees with dignity and respect their privacy.
- Ensure that personal information is dealt with confidentially

The Question of Knowledge – Imputed knowledge

The EHRC Employment Code makes it clear that if an employer's agent or employee knows that someone has a disability, the employer will have **IMPUTED** knowledge.

This includes:

- Occupational health adviser
- HR officer
- Line manager
- Colleague
- EXCEPTION: if OH is an independent even if instructed by the employer.

The Question of Knowledge – using Occupational Health advisers

KEY POINT likely to occur if medical advice says someone is not disabled

- **REMEMBER** it is you, the employer who is responsible for making the judgment as to whether someone is disabled, and not Occupational Health or other medical adviser.
- **Think of it like this** You undertaking an investigation into someone's health. The medical evidence you gather is part of that investigation but not the whole.
- **E.g.** other pieces of evidence may be; return to work interviews, descriptions of behaviours, correspondence from GPs, asking further questions of OH.

The Question of Knowledge – using Occupational Health advisers

Gallop v Newport City Council [2013] EWCA Civ 1583

- Claim for failure to make reasonable adjustments
- Question: did the Council have actual or constructive knowledge of an employee's disability after OH had advised that Mr Gallop was not disabled.
- Facts:
 - Mr G told the Council he was suffering from stress. Symptoms = lack of sleep and appetite, headaches and nausea.
 - OH advised he had stress related symptoms but not clinical depression.
 - Mr G signed off sick from work with stress related illness on a number of occasions over a few years.
 - OH did not consider he had a depressive illness.
 - Mr G raised a grievance. Council failed in their duty of care. GP had diagnosed him with depression.

The Question of Knowledge – using Occupational Health advisers

Continued

- OH continued to assess Mr G and found he remained ill.
- His GP said that they doubted he could return to his current job.
- OH did not consider he was disabled under the DDA.
- Mr G cleared to return to work but dismissed following bullying allegations.
- Brought a claim for unfair dismissal, direct discrimination and failure to make reasonable adjustments.
- Council accepted he had a mental impairment but denied that he was disabled at the relevant time and therefore that they had a duty to make reasonable adjustments. They relied on OH advice.
- ET and EAT both accepted that the Council did not have the requisite knowledge given OH advice.

The Question of Knowledge – using Occupational Health advisers

Continued

- Court of Appeal unanimously upheld Mr G's appeal. Remitted case back to the ET.
 - Task for the ET is to decide whether the Council had actual or constructive knowledge of the facts concerning Mr G's disability.
 - ET did not engage that question. It was an error to consider that the Council could deny knowledge by just relying on OH advice.

The Question of Knowledge – Employee doesn't co-operate or conceals disability

- **Scenario: Employee tells OH information from which OH could advise that the employee has a disability but asks OH to keep it confidential. Does the Employer have imputed knowledge?**
- Answer: arguably, no.
 - Hartman v South Essex Mental health Community Care NHS Trust and others [2005] IRLR 293.
 - Court of Appeal held that if an employee discloses confidential information about their health to their employer's OH provider, the employer should only be deemed to have knowledge of the information provided to it by the OH provider.

The Question of Knowledge – Employee doesn't co-operate or conceals disability

A LTD v Z UKEAT/0273/18

Question: was the ET wrong to say that the employer had constructive knowledge of disability?

- Since 2008 Z suffered from stress, depression, low mood and schizophrenia.
- She was employed by A between 2016 and 2017. She did not disclose her diagnosis.
- She explained her sickness absence from previous employer as knee surgery, back and neck injuries and minor issues.
- She ticked the health questionnaire to say she did not have a disability which might require adjustments
- During her employment with A she had 85 days unscheduled absence. 52 were sick leave.
- She attributed absence to physical issues. Did not mention mental health conditions which were the actual reason.

The Question of Knowledge – Employee doesn't co-operate or conceals disability

Continued

- 12 February 2017, Z signed off with low mood saying due to problems with her son she was feeling incredibly depressed.
- She was hospitalised for psychiatric care between 1 and 16 March 2017 but did not tell A.
- She was dismissed on her return to work because she was unreliable.
- She claimed disability discrimination.
- ET decided that A had constructive knowledge of Z's disability. i.e. ought reasonably to have known
- The evidence was the GP certificates (13 Feb and 27 March 2017) and hospital certificate (1 March 2017) showing significant deterioration in her mental health.
- Incumbent on A to have made enquiries into her mental wellbeing. Failure to do so did not protect them.

The Question of Knowledge – Employee doesn't co-operate or conceals disability

Continued

- **EAT** decision
- ET should have asked itself these questions:
 - What more might A have reasonably been expected to have done in terms of process
 - What might A have been reasonably expected to know following that process.
- ET had found that Z would have continued to suppress information about her mental health.
- Z would not have gone to OH
- Z would have insisted that she could work normally.
- A would not have had constructive knowledge.

The Question of Knowledge – Practical Tips

- Ask OH/medical advisers specific questions focussing on the effect of the individual's possible disability.
E.g.
 - Does the individual have a physical or mental impairment and what is it?
 - Does that impairment have a substantial and long-term adverse effect and if yes, what is that effect/are those effects?
 - Does the impairment affect their ability to carry out normal day to day activities? If yes, describe how
- Talk to the individual – what do they think has caused their absence?
- Do they have concerns that their health is impacting on their day to day activities and/or their work?
- Do they think any effect is going to be short term or long term?
- Has anything similar happened before?
- It's a balancing act – between the need to make enquiries and respecting privacy and dignity.

Reasonable Adjustments

The Equality Act 2010 places a duty on employers to make reasonable adjustments for disabled job applicants and employees, where the employee/job applicant would be placed at a substantial disadvantage if the adjustment was not made.

The duty to make reasonable adjustments is unique to the protected characteristic of disability. Where the duty arises, the employer must effectively treat the disabled person more favourably than others in an attempt to reduce or remove that individual's disadvantage.

- What is a reasonable adjustment?
- This isn't necessarily the right question to ask.
- Each case has to be considered individually depending on a number of circumstances
- The correct question to ask is when does the reasonable adjustment duty arise and then to consider whether any reasonable adjustments can be made.

Reasonable adjustments – what does the law say?

- Section 20 of the EqA 2010 imposes a duty on employers to make reasonable adjustments to help disabled job applicants, employees and former employees in certain circumstances.
- The duty can arise where a disabled person is placed at a substantial disadvantage by:
 - An employer's provision, criterion or practice (PCP).
 - A physical feature of the employer's premises.
 - An employer's failure to provide an auxiliary aid.
- However, an employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

Reasonable adjustments – what does the law say?

- It is for an employment tribunal to objectively determine whether a particular adjustment would have been reasonable to make in the circumstances. It will take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.
- The legislation protects:
 - disabled job applicants,
 - employees
 - former employees

- Where a **provision, criterion or practice** applied by the employer puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. Here, the employer must take such steps as it is reasonable to take to avoid the disadvantage (section 20(3)).

What is a PCP?

The phrase 'PCP' is not defined in legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions.

The PCP must be work related – however, be cautious with this. Increasingly as more people work from home or have hybrid working arrangements this is going to be very difficult establish in certain cases.

PCP – sickness absence trigger points

- In recent years there have been a number of high profile cases dealing with this issue and whether the employer should have relaxed its trigger points for taking formal action against a disabled employee suffering with long-term sickness absence.
- The cases are fact sensitive and it would be wrong to apply a blanket policy of giving all disabled employees the same level of flexibility in trying to mitigate against them being caught by such a policy.
- The adjustments that might be required to the trigger point system is likely to be very different depending on the employee and their needs. Therefore you could have a number of bespoke arrangements in place.
- In certain circumstances, there might actually not be any duty at all to make any changes to the policy for a disabled employee.

PCP – sickness absence trigger points

- It is a misconception that in all cases involving a disabled employee, who has triggered the points under the sickness absence policy, must have the points adjusted so that they're given a significant degree of leeway so they're not caught under the formal steps of the policy.
- In reality, most of the times, there is probably going to be some adjustment required, but not always.
- The duty to make reasonable adjustments relates to what steps the employer takes or does not take, not what steps the employer considers. However, an employer should ideally consult regularly with an employee on long-term sick leave.
- A number of cases have held that an employer was under no duty to make adjustments (such as implementing a phased return to work or a change in duties) because there was no return to work date on the horizon.
- There is no absolute rule that a return date must be specified for the duty to arise. However, employees will find it very hard to establish any breach of duty where there is not yet any prognosis of a possible return to work, even with adjustments being made.

- It is important that any decision/agreement on trigger points is properly documented with the rationale being set out.
- Employee turn-over and inability to retain knowledge of agreements with employees can lead to problems in the future.
- It is important to remember that while on the face of it, the need for a reasonable adjustments in relation to sickness absences might well have gone because of improved attendance levels for a significant period of time, if the employee starts to become unwell again – then the reasonable adjustment hasn't necessarily been removed because of the previous good attendance levels.
- Therefore historic adjustments should be reviewed and properly documented.

Physical feature of employer's premises

- Where a physical feature of the employer's premises puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. Again, the employer must take such steps as are reasonable to avoid the disadvantage (section 20(4)).

The phrase "physical feature" is defined by section 20(10) as:

- A feature arising from the design or construction of a building.
- A feature of an approach to, exit from or access to a building.
- A fixture or fitting, furniture, furnishings, materials, equipment or other chattels, in or on premises.
- Any other physical element or quality.

- Where a disabled person would, but for the employer's provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled. Here, the employer must take such steps as are reasonable to provide the auxiliary aid (section 20(5)).

- "An auxiliary aid is something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software. Auxiliary aids include auxiliary services; for example, provision of a sign language interpreter or a support worker for a disabled worker."

Potential adjustments

- Alternative role (not entirely new role but depending on the circumstances could be considered)
- Change to hours or days of work
- Alteration of duties
- Additional support in relation to certain duties
- A piece of equipment to assist the employee
- The alteration of certain policies

Is it reasonable?

An Employment Tribunal will take into account:

- The extent to which the adjustment would have ameliorated the disadvantage.
- The extent to which the adjustment was practicable.
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities.
- The financial and other resources available to the employer.
- The availability of external financial or other assistance.
- The nature of the employer's activities and the size of the undertaking.
- Will the adjustment work?

Do other employees have to agree?

- Employment Tribunals are meant to consider the wider impact of any adjustments and what it will mean for other employees.

LESSONS LEARNED

- C was a Band 7 clinical pharmacist in a hospital. Employed since 2010.
- Issues raised around her performance in 2011
- C was being disciplined for misconduct – drug errors/ behavioural issues/ challenging instructions
- R had sought medical advice from OH and experts. C's behaviour appeared outside the “norm”.
- C misdiagnosed as having OPD.
- NCAS involved.
- Disciplinary panel put C put on a retraining programme.
- Her line manager also included a behavioural impact and assessment programme
- C failing retraining programme and was exhibiting signs of stress
- C put on involuntary paid leave because of stress

- Disciplinary process culminated in a final dismissal hearing
- At the hearing C's union representative provided a report which diagnosed C as having Asperger syndrome.
- Internal process was halted whilst information was obtained on reasonable adjustments. Transferred into attendance policy.
- Letter obtained setting out adjustments.
- Reviewed by line manager together with C's union rep and C.
- Ultimately C was dismissed as R determined that the adjustments were not reasonable and would not remove the substantial disadvantage
- C brought claim for unfair dismissal, discrimination arising from, direct discrimination and indirect discrimination. C claim was successful
- C claimed she was disabled by reason of having Asperger's Syndrome.

X v East Cheshire NHS Trust - Knowledge

- Trust accepted that X was disabled by way of Asperger's Syndrome
- Argued that they did not have actual or constructive knowledge of Asperger's until the Union Rep presented diagnosis.
- Facts.
- Early days her line manager had raised concerns about her lack of understanding of verbal and non verbal communication
- OH report said no medical issues
- 28 January 2015, NCAS letter suggested a consideration of Asperger's in an assessment
- OH referred communication difficulties
- 2 April 2015 - medical diagnosis of Obsessive Personality Disorder
- 8 April 2015 – C's sister's letter set out behaviour that led her to think she had Asperger's Syndrome

X v East Cheshire NHS Trust - Knowledge

- OH said she was disabled based on diagnosis of OPD
- C agreed with the diagnosis
- Various emails/letters referring to C being “different”.
- 2 October 2015 – OH report which state that C had personality traits which caused her difficulty with functioning in social environments and concluded she was disabled because of difficulties with interpersonal functions.
- **ET’s finding:**
- From this date, the Trust had knowledge that C was disabled by reason of a mental impairment which related to her interpersonal skills.
- Doesn’t matter that she was not diagnosed until later

X v East Cheshire NHS Trust Arising from Claim (s. 15) – put on involuntary paid leave

- C stressed because she was criticised for behaviours linked to her disability e.g. not following her dress code, the use of personal email, and being late.
- She made 2 drug errors following breach of the dress code.
- Stress arose in consequence of her disability
- Involuntary paid authorised leave is unfavourable treatment
- Patient safety is a legitimate aim but it was not a proportionate means.
- Mistakes she was making were not sufficiently serious to warrant suspension

X v East Cheshire NHS Trust – failure to make reasonable adjustments

- Imposition of the behaviour, impact and action agreement as a condition of avoiding dismissal was a PCP
- Trust had knowledge of disability at this time
- Trust had knowledge that C had difficulties with interpersonal functions.
- Knew that this agreement would place her at a disadvantage compared to someone without her disability.
- C likely to be criticised for her behaviours which would cause stress
- Likely to adversely effect her ability to complete the retraining programme
- Likely to be called back before the disciplinary panel and possible out come of dismissal
- **ET decided:** reasonable adjustment would be not to impose the agreement at the same time as the retraining programme or at least until she became more confident in her work

X v East Cheshire NHS Trust Arising from claim/failure to make reasonable adjustments: the dismissal

- R accepted the dismissal arose in consequence of the disability
- The question was; could the Trust objectively justify their treatment of C. i.e. was dismissal a proportionate means of achieving a legitimate aim?
- Trust relied on patient safety as their legitimate aim
- **ET did not agree with the Trust**
- R had not gone far enough in their assessment of what difficulties were caused by C's disability and what adjustments could alleviate the disadvantages. Should have asked for guidance from the National Autistic Society as recommended by OH.
- C's line manager was not qualified to make decision about what someone with Asperger's could and couldn't do. They hadn't asked questions about the recommended adjustments.
- R applied too high a standard i.e. the adjustments must be guaranteed to succeed. If adjustments had a prospect of enabling C to work safely they should have been made. Consider dismissal if adjustments fail.

Questions and answers

Thank you

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