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EMPLOYMENT LAW

Disabilities in the workplace
BDBF lunchtime webinar: 11 October 2023

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Speakers



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What are we going to cover?

- What is disability in law?
- When does an employer have knowledge of an employee's disability?
- What obligations do employers have to disabled staff?
- When should employers seek occupational health advice?
- How to navigate sickness absence where an employee has a disability.
- What are “reasonable adjustments” and when do they have to be made?

Legal definition of disability (1)

Section 6(1) Equality Act 2010 (the EqA):

*“A person (P) has a disability if P has:
a physical or mental impairment;
and the impairment has a:
substantial and
long term adverse effect
on P’s ability to carry out normal
day-to-day activities.”*

Legal definition of disability (2)

Deemed disabilities	Excluded conditions
<ul style="list-style-type: none">▪ Blindness, severe sight impairment and partial sightedness (excl. colour blindness)▪ Severe disfigurements (e.g. scars, birthmarks, limb or postural deformation or diseases of the skin), excl. unremoved tattoos/piercings▪ Cancer▪ HIV▪ Multiple sclerosis	<ul style="list-style-type: none">▪ Addiction to alcohol, nicotine or any other substance (unless the addiction arose as a result of medically prescribed drugs or other medical treatment)▪ Tendency to set fires▪ Tendency to steal▪ Tendency to physical or sexual abuse of other persons▪ Exhibitionism▪ Voyeurism▪ Tattoos and body piercings▪ Hay fever

Disability discrimination claims

- Direct discrimination (s. 13 EqA)
- Indirect discrimination (s. 19 EqA)
- Harassment (s. 26 EqA)
- Victimisation (s. 27 EqA)
- Discrimination arising from disability (s. 15 EqA)
- Failure to make reasonable adjustments (s. 20 – 21 EqA)

Knowledge of disability

Actual

- The employer knows that the person is disabled

Imputed

- The employer's employee or agent knows that the person is disabled
- This knowledge will usually be attributed to the employer

Constructive

- The employer does not have either actual or imputed knowledge of the disability, but it ought to have known

When might an employer be fixed with constructive knowledge?



Warning signs



Sickness absence



Occupational health advice



Impact of employee's actions

Case study - knowledge

- Margarita is an employee of a marketing firm, Company X. Before this, she worked for the London Fire Brigade and, during this time, was diagnosed with Post Traumatic Stress Disorder (PTSD). Her PTSD meets the legal definition of a disability.
- Margarita has not disclosed her PTSD to the Company, or anybody within the business. However, the Company is aware that Margarita used to work for the London Fire Brigade.
- The Company ask for access to Margarita's medical records. She refuses.
- Co-workers notice that Margarita has been increasingly nervous, tense and is easily startled.
- Margarita takes a number of short-term sickness absences for different reasons.

Does the Company have knowledge of Margarita's disability?

Sickness absence

For the purposes of SSP, incapacity for work is defined as:

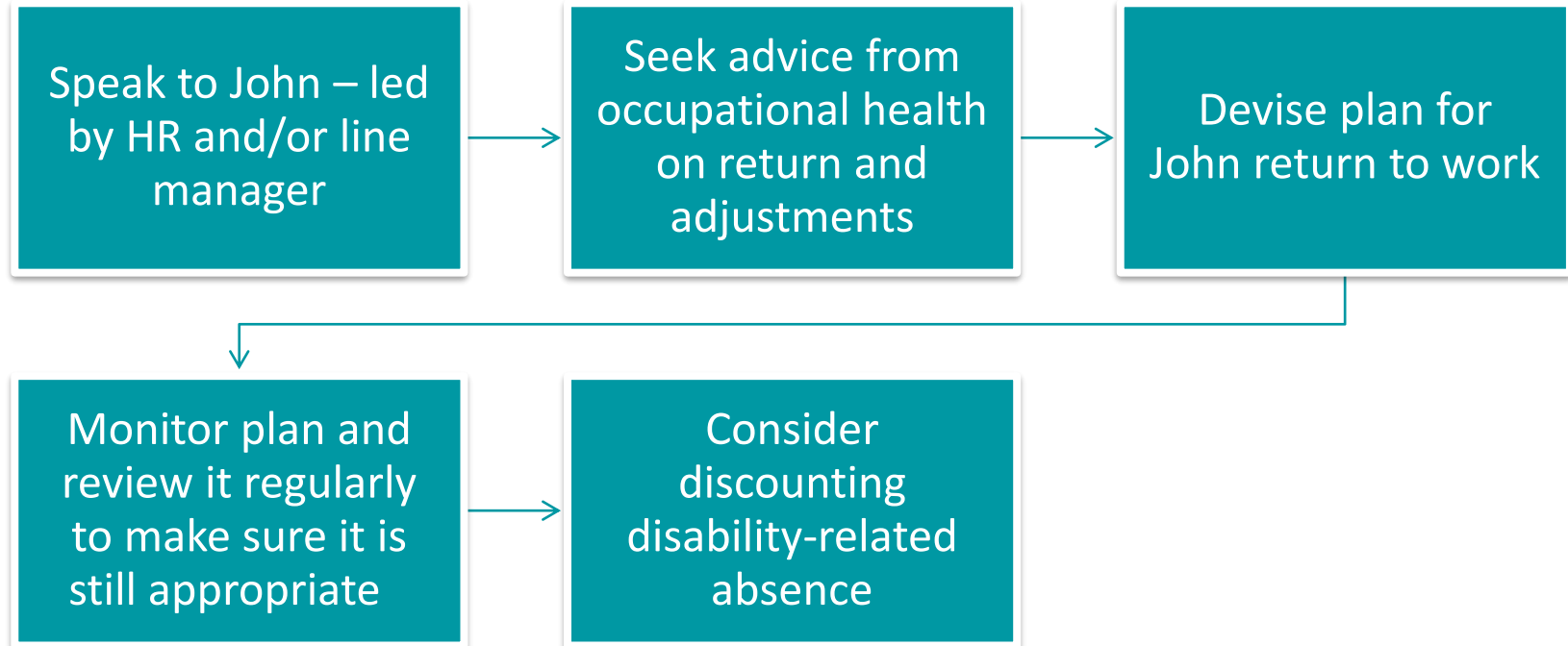
“A day on which the employee concerned is, or is deemed in accordance with regulations to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract.”

Case study - sickness absence

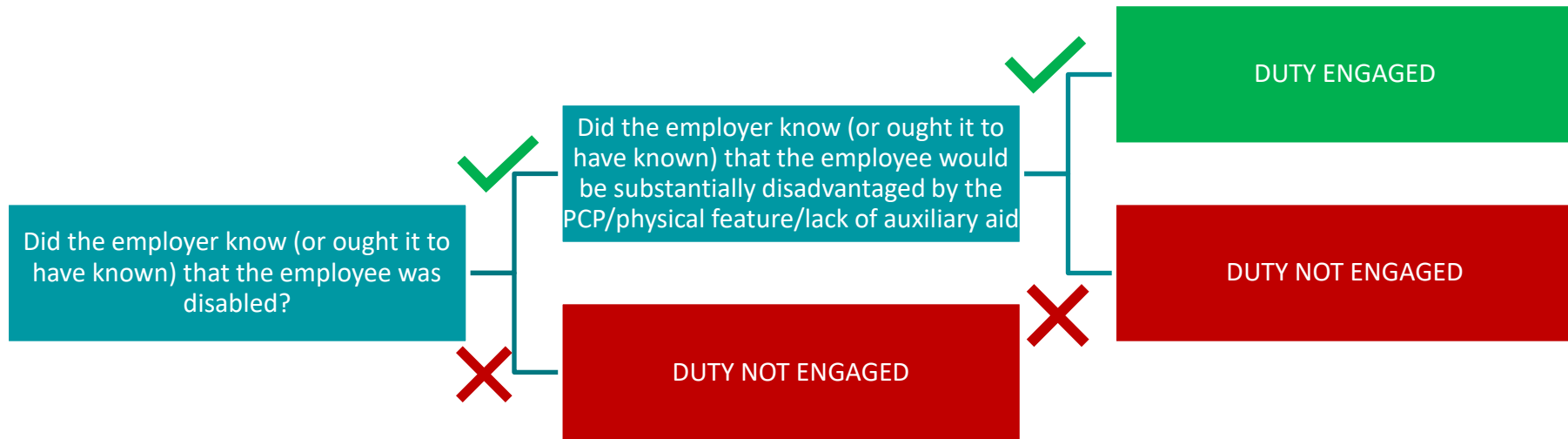
- John has been employed by you for 5 years.
- He has epilepsy and you have known about this for the entirety of his employment. John manages his condition through lifestyle and medication.
- Historically, he has not had to have many sick days. However, a month ago he had a major seizure and has been off work since then.
- John says he is now ready to come back to work full-time but will need some time off to attend medical appointments and may need more sick days as he adjusts to his new medication.

How do you handle this situation? Would you handle it differently if the reason given for John's absence was "stress"?

Case study – suggested strategy



When is the duty to make reasonable adjustments engaged?



Possible reasonable adjustments

Adjust trigger points in internal processes such as capability or disciplinary procedures

Adjust the way internal processes are run to allow the employee to participate effectively

Provide special disability leave

Manage and monitor heavy workloads

Closer supervision and support from the employee's line manager

Offer flexible working arrangements

Make adjustments to the physical workspace

Purchase goods or services to support disabled worker

Create a supportive and understanding culture

Modify testing or assessment arrangements

Job redesign or redeployment

Case study - reasonable adjustments

- Ryan is planning to apply for a job at an opticians, Company Z. Ryan is disabled by reason of his dyspraxia.
- Company Z requires all prospective job applicants to create an account to their online portal and, once an account is made, complete an online job application.
- Ryan writes to the Company stating that, because of his dyspraxia, he is unable to create an account and, therefore, cannot complete the application.
- The Company sends three follow-up emails to Ryan. The first two ask for more information about his disability, the third includes a link that would allow Ryan to submit a video job application directly to the Company.
- Ryan does not respond to any of the emails, and the Company makes no further inquiries.
- Ryan brings a claim alleging that the Company has failed to make reasonable adjustments in relation to his disability.

Has a duty to make reasonable adjustments arisen?

Tips for employers

Get to know your workforce so you can spot changes to behaviour

Gather information – conversations with employee and line manager, medical/OH reports

OH – give specific instructions and push back if initial report is inadequate

Keep the situation under review

Don't be afraid to make adjustments – it is not necessarily a concession of disability

Test is reasonableness, not perfection

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Questions



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