

The hidden disability: when mental health affects employee wellbeing

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Last week's [World Mental Health Day](#), acts as a good reminder for employers to revisit their policy and culture to see if they match up to best practice

The taboo of talking about mental health has started to shift, following several high-profile campaigns, but many employers are keeping quiet and avoiding conversations with staff, even though they have legal responsibilities and it's been shown to improve the bottom line.

According to the [Health & Safety Executive](#), over 11 million working days are lost each year, because of stress in the workplace. Research among workers by [MIND](#), the mental health charity, found that a continuing culture of fear and silence around the topic was adding up to a big cost to employers, with over 20% reporting they had called in sick to avoid workplace stress, and 30% saying they did not feel they would be able to speak openly with their line manager about the issue.

Such figures highlight the need for companies to have strategies focused on mental health as part of employee wellbeing, to tackle stress-related absence and to avoid potential complaints or even litigation from staff.

Employers have a legal duty to protect employees from stress at work by undertaking a risk assessment and acting on it. And where an employee is suffering from a mental health condition which has a long-term effect on day to day activity, this may be classed as a disability, requiring the employer to take positive action under the [Equality Act 2010](#). The Equality Act makes it unlawful for an employer to treat a disabled person less favourably because of their disability, without a justifiable reason.

Employment lawyer Karen Cole:

"Best practice is for employers to have clearly stated policies that are reflected in the company's culture, so that

a manager who notices a change in personality, evidence of low mood or periods of increased absence, will feel equipped to enquire if any workplace support is needed. It needs to happen in a supportive environment where the employee feels comfortable in opening up and asking for help, if needed.

It's important to avoid an atmosphere where an employee feels that raising the issue of mental health may affect their future prospects, or that they will feel stigmatised by asking for help. Unwillingness to talk can make for a difficult position for employers."

Such difficulties have been highlighted in disability discrimination claims which have reached the Court of Appeal. One [case](#) involved a former employee of Newport City Council, who had been off work on three separate occasions for stress-related illness and depression. Finally, the Council asked an occupational health advisor for an opinion on whether the employee was fit for work. The opinion given was that he was not a candidate for ill-health retirement and that he was not disabled for discrimination purposes. When he was subsequently dismissed following allegations of bullying, he brought a claim of disability discrimination. The Council said that it relied upon the opinion of an occupational health expert, but the Court of Appeal said that an employer must make a factual judgement and cannot "simply rubber stamp the adviser's opinion".

This need to look more carefully was reflected in another [case](#), involving an employee who had been resistant to discussing her health issues and would not allow contact with her GP. Here the Court of Appeal found in favour of her employer, Liberata UK Ltd, because the company did all it could "reasonably be expected to have done" – it did not rely solely upon occupational health advice but reviewed it in the light of its own experience and

impressions of the employee and undertook its own further investigations.

Karen added:

“In creating and maintaining a culture of wellbeing, an employer should start from a perspective of how best to provide everyone with responsible support and protection from unfair or discriminatory treatment and should reflect that in processes and practice. If anyone has issues that impact on how they may perform a particular function – whether related to physical or mental health - then it’s important to look at how to introduce reasonable adjustments to enable them to fulfil the role.”

If you have any queries regarding mental health in the workplace, call [Karen Cole](#) today!

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

