See Me
End mental health discrimination

See Me in Work

Protection from Discrimination

A Guide for Employers and Employees

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1. How the Equality Act 2010 protects people from discrimination

The Equality Act 2010 ("the Act") brought together and replaced previous equality legislation. It provides protection for individuals, and ways for people to take legal action when they think they have experienced unlawful discrimination. The legislation identifies which groups have "protected characteristics", describes what unlawful discrimination is, and what kind of things are permitted to enhance equality in certain circumstances.

The Act also places General duties on some public bodies "to advance equality", requiring them to use their powers and resources to pro-actively consider how to prevent discrimination and enhance equality. Scottish regulations back up the general duty with specific duties on certain listed Scottish authorities, with Westminster dealing with British bodies including those that cover Scotland. (This means that bodies operating in Scotland may be working to different specific duties depending on whether they are a Scottish body or part of a British body.)

The Equality Act 2006 set up the Equality and Human Rights Commission (EHRC) which provides guidance, and enforces the legal requirements in the 2010 Act.

2. Who is protected by the law?

The Equality Act 2010 sets out nine groups or people with characteristics that are protected under the Equality Act and describes who is included in the different "protected characteristics" groups.
For example, race includes colour, nationality, and ethnic and national origin as well as race.
Disability has a particular legal definition. (You may be more familiar with these characteristics as "equality strands" or "equality groups").

Many of the groups include everyone – for example, everyone will have an age or fall into an age group. Some characteristics are more specific – for example, pregnancy or maternity applies only to pregnant women or to women for a specific period after the end of a pregnancy.

- Protected Characteristics

Age	Age or age group.
Disability	Where someone has a physical or mental impairment that has a substantial, long-term, adverse effect on their ability to carry out normal day to day activities. (There is more detailed discussion of this legal description at section 7).
Gender Reassignment	Where someone is proposing to undergo, is undergoing or has undergone the process of transitioning from birth sex to their preferred gender; it does not refer to medical processes.
Marriage and Civil Partnership	People who are married (whether same or opposite-sex), or in civil partnerships. (Single people do not have legal protection from discrimination in this category).
Pregnancy or Maternity	Covers a woman's whole pregnancy and a period of time after the birth (or stillbirth), and in relation to work, up till the end of maternity leave.
Race	"Race" includes colour, nationality and ethnic or national origin.
Religion or Belief	Religion or lack of a religion. Belief refers to a system of philosophical beliefs or lack of these.
Sex	Reference to a man or a woman.
Sexual Orientation	A person's orientation towards persons of the same sex, the opposite sex and either sex.

Examples:

Someone refuses to serve you in a shop because they think you are disabled. This would be unlawful discrimination. If you are disabled, it is direct discrimination.
If you are not disabled, it is still discrimination because of the perception that you are disabled.

During an interview you mention that you care for a disabled child. You are not given the job. When you ask for reasons, the employer explains it is because they think you will need extra time off for these caring duties. This would be unlawful direct discrimination because of association with someone who has a disability.

Broadly speaking, you cannot be discriminated against because of your protected characteristics. In some cases, the protection extends to being perceived to have a characteristic (even if you don't actually have it).

Protection can also extend to being discriminated against because you are associated with someone who has the characteristic.

These are quite complex areas and are not covered in detail here, but it is important to know that the protection can be quite wide. People with mental health problems may fall within the definition of disability, detailed in the table on page 3.

3. What is unlawful discrimination?

Unlawful discrimination happens when a person is treated, because of a protected characteristic, in a way that disadvantages them. Discrimination can be conscious or unconscious (e.g. indirect discrimination may not be deliberate).

Discrimination usually cannot be justified and there are many different types of discrimination.

These include:-

- **Indirect discrimination**
- **Direct discrimination**
- **Instructing someone to discriminate**
- **Victimisation**
- **Discrimination 'arising from disability'**
- **Harassment**
- **Not considering or making reasonable adjustments for someone with a disability (where you have a duty to do so).**

Indirect discrimination

Where a policy or practice has a worse impact on a group with a protected characteristic and on an individual from that group, and it cannot be "objectively justified".

You have long-term depression and anxiety, and you are on new medication which is making you weepy and unable to concentrate. This means you need to leave your desk frequently and you are not always able to speak to someone for permission. Your manager points out that you are going against company policy.

Although the policy may be reasonable for most people, in comparison, it disadvantages you (and others with a similar disability) because of your mental health disability, and unless your employer can show it is proportionate, and for a legitimate reason, (and be objectively justified) this might be unlawful indirect discrimination.

Your employer would also have to consider making adjustments to the policy for you.

Objective justification is justification that is not about being disabled.

Direct discrimination

Treating someone less favourably because of a protected characteristic and this disadvantages them.

If you are not offered a job because you have a mental health problem that is a disability, this is direct discrimination because of your disability.

Instructing someone to discriminate

If you tell your staff not to hire someone with a mental health problem, this is likely to be unlawful discrimination because of disability.

Victimisation

Where someone uses their legal right to be protected from discrimination, or assists someone else to do this, and they are treated in a way that disadvantages them as a result.

A colleague asks you to accompany them to a grievance interview. They have complained that they were harassed by a manager. After you do this, you discover you are being allocated unfairly to early starts by this manager.

If there isn't a legitimate explanation, this may be victimisation because you assisted someone to use their rights to be protected from discrimination.

Discrimination “arising from disability”

You are protected from being discriminated against because of something connected to your disability and there is no objective justification.

Unlike direct discrimination, you do not have to show that you are being treated worse than someone else. There is no need to have someone to compare yourself to.

You also do not have to show that other people with a disability would have been disproportionately disadvantaged compared with people without the disability (as you would with indirect discrimination).

You only have to show that you are disadvantaged because of something connected to your disability, and that the person discriminating against you knew you had a disability or ought to have done.

You have changed your medication to deal with depression that has been a feature of your life for several months. This makes you very tired and sleepy and some mornings it is difficult to get into work on time.

Although it would normally be reasonable to expect you to be on time, disciplining you in this case might amount to discrimination arising from disability.

In this case, it may be possible for the employer to make a reasonable adjustment such as changing your starting time, or allowing you to be late for a period of time.

Harassment

Behaviour related to a protected characteristic that is unwanted by the person receiving it, and the behaviour has the purpose or result of violating their dignity or creating a degrading, humiliating, hostile, intimidating or offensive environment.
Sexual harassment is unwanted conduct that is of a sexual nature and/or related to sex or gender reassignment.

You have recently returned to work after a period on sick leave where you were dealing with aspects of your bi-polar condition.

Your colleagues are generally supportive but a couple of them are teasing you about how it feels to have bad spells, and every so often you spot them making gestures to each other that seem to be about your mental health. This is upsetting you and you feel humiliated and uncomfortable.

This could be harassment because of your mental health.

Not considering or making reasonable adjustments for someone with a disability
(where you have a duty to do so)

One of your staff members has been off ill. The company operates a trigger system for sickness absence and this absence takes the employee over the trigger. However, the last sickness note shows that the employee has been off with stress and depression, and you know that this has been an ongoing issue for the last year. If you proceed because of the trigger without considering reasonable adjustments, this may be unlawful.

Note: Reasonable adjustments could include how you apply the policy, for example, applying the trigger rigidly. They could also include ways of supporting the employee during the process – for example, allowing them to be accompanied during meetings to discuss their absence and reasonable adjustments, and not just during disciplinary meetings.

The legislation applies to employers, and providers of services, goods and facilities – for example, shops, agencies and care providers. The protection goes beyond employees and extends to workers such as agency workers and contract workers, but not to volunteers. Employees are covered from the first day of employment and no minimum period of service is required. You are also covered when you apply for a job.

Employers may be liable for the actions of their employees in the course of their business unless they can show they took all reasonably practical steps to prevent it. This is called "vicarious liability".

A candidate discloses a disability to an individual occupational health service (OHS) provider employed by the company. The OHS provider asks health-related questions once a job offer has been made, and decides that the person should not be offered the job because of their disability. They do not consider reasonable adjustments. The company withdraws the job offer.

The applicant can take legal action both because the job offer was withdrawn because of disability, and because reasonable adjustments were not considered or made by the OHS provider who was acting in the course of their business. The company may be able to defend themselves if they can show that they took steps that should have prevented discrimination, for example - the OHS provider had been given instructions about asking questions that relate to the job requirements, and training to do this.

4. What kind of action is "permitted" to enhance equality?

You can take action to enhance equality in certain circumstances.

This includes positive action (which is about taking actions that seek to meet needs or overcome or minimise disadvantage experienced by people who share a protected characteristic).

If you know a particular group is under-represented in your workforce, and that advertising in a particular publication is more likely to reach that group, using that publication in addition to your usual advertising methods is likely to be positive action.

Assisting people to be better prepared for the recruitment process could also be positive action so, for example, making arrangements to mentor people with mental health problems so they are better able to deal with interviews could be positive action. These steps put people in a position to compete equally.

However, in most circumstances, it would be unlawful to discriminate in favour of someone because they were from an under-represented group as that would be positive discrimination.

You have a mentoring scheme and promise participants a job at the end of the scheme. This is likely to be unlawful.

(Positive action might include letting them know about jobs as they come up so they can compete against others as part of the normal recruitment process).

5. Am I permitted to favour someone in an under-represented group?

There are three situations when you can favour someone in an under-represented group:

(i) Where two candidates have been assessed, through your recruitment process, as being absolutely equal for a job. You could then select the one who came from a group that was under-represented in your organisation. As this is a complex area, it would be wise to take advice before using this provision.

.....

Having a policy of interviewing all disabled people who meet your minimum selection criteria when others may have to reach a higher threshold.

(This is often called the "guaranteed interview scheme" which offers an interview to someone who is disabled, and meets all of the essential (i.e. necessary) criteria.)

Note: you could not apply this provision to any of the other protected characteristics.

(ii) As people who are not disabled are not protected compared with people who are disabled, it is lawful to treat a person with a disability more favourably than someone who does not have that disability.

(iii) Where it is necessary for the job that someone has particular protected characteristics, this is covered specifically as an "occupational requirement".

A care-worker will be providing specialist support to people with experience of mental health problems. One of the requirements is that the post-holder has lived experience of mental health problems. This is an "occupational requirement" provided that the role cannot be carried out by people already in post.

Employers should get advice before using provisions to enhance equality so they know what they have to take into account.

6. Are there any other provisions?

The Act also prohibits employers from making unnecessary pre-employment checks so that people with physical or mental disabilities are not disadvantaged.
(This is covered in more detail later/separately.)

The Act also prohibits discrimination in relation to contractual pay and benefits between men and women so it is unlawful to pay different rates to men and women doing:

- Like work
- Work rated as equivalent in a job evaluation study
- Work that is proved to be of equal value

7. How is Disability Defined?

In the Act, disability has a special definition (which may be different from the definition used in other legislation, or by different organisations for their own purposes such as parking permits).

In the Act, a person has a disability if he or she has a physical or mental impairment that has a substantial, long-term, adverse effect on their ability to carry out normal day to day activities.

This usually means the physical or mental health problems are more than trivial and last (or lasted) more than a year. There does not need to be a diagnosed condition.

Some conditions are automatically considered to be disabilities (e.g. cancer, HIV, multiple sclerosis, some progressive conditions and terminal conditions).

Certain conditions are exempt from being considered as disabilities (e.g. alcohol or drug addiction, kleptomania, wearing spectacles). Whilst the condition itself is not a disability, the impact of the condition may meet the definition and therefore be a disability.

Someone may have an alcohol addiction. The addiction itself is not a disability. As a result of their addiction, they may have problems with concentration, memory, balance etc which are more than trivial, affect day to day activities and are long-lasting. This could be a disability.

Note that this is about how normal day to day activities are affected. These may be different from work activities.

In deciding if someone has a disability, the effects of medication are disregarded so that if, for example, someone is taking medication that means they have fewer episodes of anxiety, the impact would be assessed as if they were not on any medication.

Disability is determined by the impact on someone and how they fit the definition – not by whether or not they have been diagnosed with a condition, or whether or not they are on medication. This means, for example, that if two people experience depression, one might fit the description and thus have a disability and be protected by the Act, and another might not.

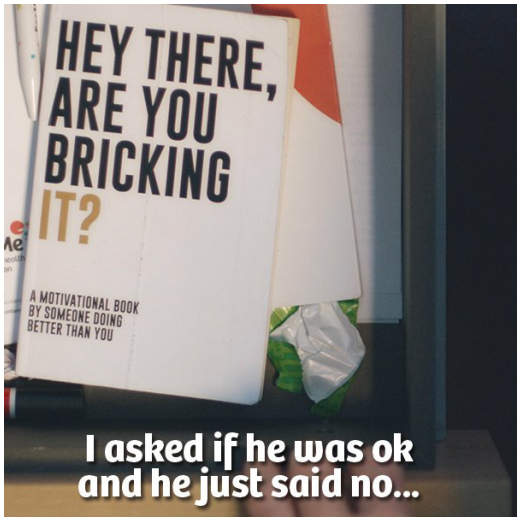
One employee has had a recent close bereavement. They have been diagnosed with depression, and have been off work for three weeks. They have been given medication on a short-term basis. They return to work and are still experiencing problems with sleep, concentration, memory, and feeling weepy. However, the condition is associated with their bereavement and has not lasted (and is unlikely to last) 12 months or more. This would not be a disability.

As an employer, you are required to make reasonable adjustments for someone with a disability. However, in the examples above, the issues are similar in terms of what is happening to the employee in the workplace, and the impact on their ability to do their work and their need for support through the immediate circumstances. You would be likely to offer support to both employees, and make adjustments that support them and their colleagues so that both can get through this period, become well and be able to attend work fully fit.

Another employee has also had a recent close bereavement. Like the first employee, they are experiencing depression and are having problems with sleep, concentration, memory and feeling weepy. They have had depression in the past, and have taken time off work at different points in the past two years. Their depression has lasted more than 12 months but they had stopped taking medication because their symptoms had reduced and have not felt the need to take more at this time.

The effect of the depression was substantial on their ability to do day to day things even though they are not currently taking prescribed medication. It is likely they would be considered to have a disability.

8. Should I Disclose a Mental Health Problem?



A job applicant or employee is not obliged to disclose if they have a mental health problem or a disability. Obviously, disclosure of problems is one way of ensuring that reasonable adjustments can be considered and made at an early stage, with the involvement of the person - so employees should consider disclosing mental health problems. An employee is more likely to disclose when they know that talking about mental health and disability will not disadvantage them in the workplace.

9. What are Reasonable Adjustments?

The Equality Act says that employers have a "duty to make reasonable adjustments". Over time it has become clear that this applies where the employer knows, or it is reasonable for them to know, that a mentally or physically disabled person is at a substantial (more than trivial) disadvantage compared to people who are not disabled. This means taking reasonable steps to remove that disadvantage without any cost to the employee.

Employers should note that the duty to make reasonable adjustments does not depend on disclosure. If it is reasonable for you to know that an employee has a disability, the duty comes into force. Of course, it is easier to take appropriate action if the employee discloses to you, but you can still explore the situation.

Reasonable adjustments relate to the person with the disability. They do not apply to carers of disabled people who do not themselves have a disability. However, it might make good business sense to assist a carer to give effective service by making adjustments.

An employee has been caring for someone with a progressive and degenerative condition, and this person now requires more daytime care. The employee is working with health and social care to get support for the individual. The employee is feeling anxious and stressed and is concerned about trying to manage their work as well as their caring responsibilities.

Possible reasonable adjustments might include letting the employee bring forward annual leave to take paid time off, having a period of unpaid leave, or being permitted to work from home for a fixed period of time. All of these will help cover the gap until social care support has been set up. The particular adjustment will depend both on the circumstances of the employer and the employee which can only properly be established in discussion.

One of your employees has recently started taking a half-day off every week in addition to their usual leave. You take them to one side and discover that they care for an older person with a disability who has recently had changes in medication which mean regular clinic appointments.

You cannot discriminate against your employee because that would be unlawful discrimination because of association with someone with a disability. However, their absence is having an impact on the workplace. It might be reasonable to discuss if the employee can arrange appointments in a way that lets them leave a little earlier without having to take a half-day off work. Such a solution might mean that it works better for them and you, and they don't have to disclose to their colleagues what is happening.

An employee's behaviour has changed recently. They are coming in late, and their concentration and focus seems to be affected. They have had episodes like this in the past, and you know that in the last year they had a short period off work with stress. It would be reasonable to consider that there could be a recurrence of problems – though you cannot make that assumption – and it might be reasonable for you to know that there could be a disability.

You may need to explore this sensitively – perhaps just asking if everything is okay, or if there's anything going on they would like to talk about. You could even suggest that if there's a temporary problem, perhaps you could discuss any arrangements that might help for a while such as changing their start time. Any such discussions should be held confidentially and in private.

10. What about the cost of reasonable adjustments?

Reasonable adjustments may be inexpensive. They can often involve simple changes to work-practices, physical aids or temporary changes to assist an employee at particular periods. They are frequently far less expensive than the cost of recruiting a new employee including the costs of training and waiting for full productivity.

"The most important goal is that people coping with mental health problems will be better understood and supported in the workplace."

Adjustments may be required at any stage of the work-cycle – from recruitment, to being at work, attending work, being off work, returning to work, being supported in the work environment or with learning and development, promotion, when the organisation is making changes or considering redundancies, dismissal or when an employee is leaving, preparation for retirement, being given suitable references after leaving work.

The important thing is that you must not discriminate against someone with a disability, and the purpose of reasonable adjustments is to overcome disadvantage created by the arrangements already in place.

"Encouraging employees to disclose their symptoms will help them to stay well and in work."

Where there is a cost to making reasonable adjustments, this must not be passed on to the employee. Some help with costs may be available from Access to Work, contact details can be found on page 32.

11. What kinds of reasonable adjustments can be made?

What is reasonable for one employee and employer may not be reasonable for another. You must consider the individual and their needs, and what is reasonable in the circumstances. For example, a small employer may have a lower threshold about the time off that a disabled employee can take off work, or the needs of the business may mean that work hours cannot be easily adjusted.

"Line managers should respond to the mental health issues of their staff in an informed, sympathetic and non-judgemental manner."

On the other hand, a larger employer may be expected to make a range of adjustments before it is considered unreasonable to do more. Someone with a degenerative condition may require a range of reasonable adjustments over the course of their employment.

"Staff should be granted regular breaks during their work hours and have access to quiet spaces as well as social and relaxation areas."

Some conditions require different reasonable adjustments to cope with particular phases. For example, someone with depression may require adjustments to working hours when they are experiencing particular symptoms and impacts. At other times, they may be able to work normal hours, but find it helpful to be able to take time out from the shop-floor so they can avoid excessive stress building up.

Reasonable adjustments may be required at any point in the employment cycle. The examples below are categorised but some of the examples could be useful at other stages – for example, having quiet space to take time out may be appropriate in recruitment, during employment, and when someone is coming back to work in a phased return.

At Recruitment Stage

- Assistance with completing forms or CVs, or offering an alternative way of providing the information such as a telephone conversation or recording for someone who has difficulty with filling in forms.

- Offering a quiet space for a candidate to sit in before an interview so they are not affected by a noisy background.

- Adjusting times for practical tests at interview for someone who has a mental health problem that affects their concentration.

- Making arrangements so that preparation for practical tests can be done in advance of the interview as far as possible rather than under stressful conditions just before the interview. (The practical test would still be under conditions that showed the employee's own work).

- Changing the way skills are assessed if the method selected is unsuitable for a disabled candidate (e.g. the ability to analyse and discuss information can be tested through a paper-based exercise and questions where someone has difficulty making a presentation, and the job doesn't require the person to be able to make presentations).

When someone is unwell or experiencing particular problems

- Allowing someone to work part-time or have a phased return to work on reduced hours with reduced pay (or no loss of pay) for a period of time.

- Adjusting policy provisions such as triggers for sickness absence, or being able to bring forward leave.

- Ignoring disability-related absence in whole or in part when assessing the amount of sick leave.

- Allowing a companion to attend interviews to take notes where the employee is experiencing difficulty with concentration and memory.

During employment

- Providing a work "buddy" or mentor for support.
- Changing work-hours or providing flexible working to assist e.g. someone with temporary circumstances that are contributing to stress, or whose sleep is being disrupted by medication.
- Creating a quiet (break-out) space for someone with particular conditions that are made worse by noise or who needs to take rest-breaks from work or from computers; allow more frequent breaks; finding different ways of noise reduction- e.g. use of noise-reduction headphones.
- Assisting with appropriate equipment e.g. light-box, or support to work from home for a period e.g. answering machine or laptop.
- Changing the way someone communicates to let them reflect and take their own time e.g. email instead of phone or face-to-face or taking voice-mail messages rather than answering calls.
- Providing access to a counselling service or occupational health support.
- Allocating some of the employee's duties to other colleagues.
- Redeployment to another role (without the need for competitive interview), including to a higher graded post where there is no role at an equivalent grade.
- Disability leave provisions so that an employee with a disability can take leave with pay for disability related reasons e.g. assessment, rehabilitation, flare-ups of conditions, treatment, time off while reasonable adjustments are made to the workplace; adjusting to becoming disabled, episodes of stress related to caring for someone with a disability; where a disability means some extra recovery time is needed (e.g. where someone with asthma gets a cold).
- Allowing time off for clinical treatment to assist recovery – whether this is with a clinician or some form of prescribed self-help.
- Retraining or refresher training.
- Enabling an additional companion to attend to support an individual going through grievance or disciplinary procedures to reduce stress.

12. What practical steps can employers make when considering and making reasonable adjustments?

Employers should:

- Encourage disclosure and create a culture that encourages disclosure and discussion of mental health problems.
- Create and promote policies that support well-being and take account of mental health and disability leave.
- Ensure employees and managers are aware of good mental health and signs of mental health problems.
- Train managers to have sensitive conversations with employees, particularly when employees disclose mental health problems or when managers think an employee may be experiencing mental health problems.
- Train managers to be able to discuss reasonable adjustments with employees.
- Encourage managers to consider what employees can do as well as the areas where some support may be helpful.

- Consider the needs of the individual employee and the following questions – preferably with the employee:

  i. What are the barriers?

  ii. What steps might reduce these barriers and enable the employee to do their job in full or in part? Are these about how the job is done, about the workplace or working arrangements, or about additional support?

  iii. Can the job be adjusted or some of the duties re-allocated?

  iv. For what time period will the adjustment be required?

  v. If the employee can't continue in their current job, is there another post they could take up – even if it is a higher graded post?

  vi. Will they need training or additional support?

- Consider confidentiality –
  - What does the employee feel about others knowing?
  - How will you keep at a minimum the people who need to know?
  - How will you ensure people know enough about changes in arrangements without disclosing personal information about the employee?

- Set up a regular informal conversation; This may be enough to provide reassurance and explore how things are changing so that reasonable adjustments can be adjusted. (Employees may feel uncomfortable about approaching their employer to ask for further adjustments.)

- Consider that not supporting an employee may mean having to recruit a replacement.
  - What are the costs of recruitment and training compared with the cost of making the adjustments?

13. Talking about mental health problems and reasonable adjustments

Many people with mental health problems don't want to disclose their experience. This may be for a range of reasons – for example, they are coping fine and don't need to disclose them, they experience problems from time to time and manage it well when they do occur, they have had poor experiences in the past when they disclosed a problem – perhaps experiencing stigma or discrimination, or being given no support or even being unfairly dismissed from a job. Someone may even be experiencing stress or anxiety and not label it as a mental health problem or disability – although the law might recognise them as being disabled. Others may not realise how their problem is affecting them and their colleagues, and may not welcome being asked about their mental health. Uncertainty about personal or work circumstances may be making things worse.

It is important to be sensitive if, because of changes in behaviour or performance at work, you are wondering if a colleague or someone you manage is experiencing mental health problems such as stress, anxiety or depression.

It is not for you to diagnose these or any other mental health conditions.

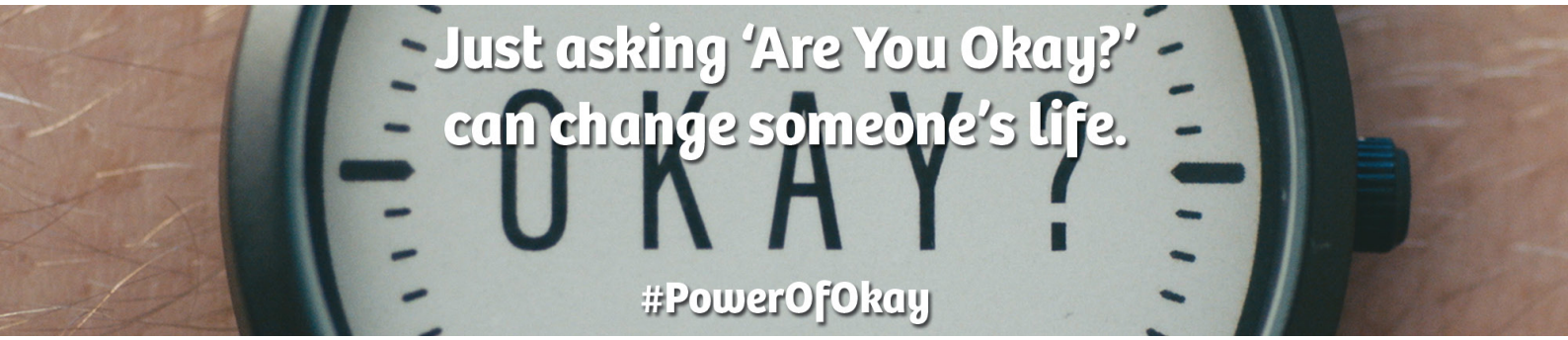
What can you do?

- ✔ Be aware of common signs of stress and anxiety e.g. lack of energy, poor concentration, poor memory, timekeeping getting worse, moody behaviour.

- ✔ Ask your staff member, in private, if everything is okay. Be prepared to ask again if you think they may not feel comfortable about disclosing at this time.

- ✔ Be sensitive about pushing for information. They may still be coming to terms with their circumstances.

- ✔ Be patient and understanding. However, if their behaviour is causing problems at work you may have to say something about this. Be gentle. E.g. I've noticed that your timekeeping is a bit erratic and it means other staff are having to cover for you in the mornings. Is everything ok?"



- Be supportive. "Is there anything I can do?" Ask if it might help to put some time aside to have a chat. If there isn't anywhere suitable in the workplace to do this, you could make it even more informal and suggest having a chat over a coffee.

- Let them talk. They may just need to release some pressure and be reassured that they will be given the space to deal with things. Listen carefully. There may be more to the story than they are able to disclose at present.

- Ask if there's anything that might help them at work. Offer some suggestions depending on what the behaviour is so, for example, if the issue is poor timekeeping, you could ask if it would help to have a temporary adjustment to their start time. Adjustments don't need to follow formal processes. And they could be made for anyone experiencing difficulties – not just for people covered by the Equality Act.

- Ensure they know you will keep your discussion confidential.

- Ask if you could put some time aside to discuss ways in which you could make adjustments that might make it easier for them and their colleagues. Develop a work-plan which you can review together to make sure you monitor progress and any changes to the adjustments.

- Make sure they know there is an open door if they want to come and discuss anything with you.

- Watch out in case their behaviour seems to be getting worse. This might mean you have to speak to them more formally – but this can still be done supportively. Talking to them when things aren't so bad may make it easier to talk when they do need support.

14. What should I know about Pre-Employment Health Checks?

It is generally unlawful for an employer to ask about a job applicant's health, absences from work or disability before offering them employment. This means that blanket questionnaires should not be used in the application process, and that such questions should be avoided during interviews, even where an applicant discloses a mental health problem.

Asking a candidate on the application form if they are taking medication would normally be unlawful unless there is a good reason for the employer needing to know this.

There are limited circumstances where questions about health and work absence may be permitted before a job offer is made.

These include:-

- Determining whether or not a candidate can carry out a function essential to the job role.
- Making reasonable adjustments during the recruitment process.
- Taking positive action.
- Recording information for equality monitoring purposes (which is kept separate and confidential and is not made available to people involved in recruitment decisions).
- Determining if a candidate is disabled where this is a "genuine requirement" for the job.

Where there are aspects intrinsic to a job, such as ability to cope with mental pressure, these should be explicit in job criteria so all candidates can be assessed. Candidates who have or have had mental health problem are not excluded as reasonable adjustments may be possible. It would probably be unlawful to ask only those candidates who had disclosed or appeared to have a mental health problem, or other disability.

Once a candidate is successful and the job has been offered to them, then it may be appropriate to carry out pre-employment health and absence checks before finalising the job offer. Where there is an open culture and confidentiality about sensitive information, people will not be fearful about disclosing such personal information and should be honest. However, employers should appreciate that fear or previous experience of stigma and discrimination in being offered a job or losing a job because of their mental health problem may mean applicants take a risk at this stage.

At any stage, where pre-employment questions are asked about health, absence or disability, the information must not be used to discriminate against someone with a disability. If this happened, the individual could complain to an employment tribunal about discrimination.

15. Where can I get more information?

i. Equality and Human Rights Commission (EHRC)

Whilst the EHRC cannot provide advice to individuals, its website contains advice and guidance on rights, responsibilities and good practice, based on equality law and human rights. More information and publications on managing disability and health in the workplace for both employers and employees are available here: *www.equalityhumanrights.com*

ii. Equality Advisory and Support Service (EASS)

EASS is a telephone service aimed at individuals across Great Britain who need more expert advice and support on discrimination than advice agencies and other local organisations can provide.

www.equalityadvisoryservice.com/

iii. Acas – The Independent Advisory, Conciliation and Arbitration Service

Acas aims to improve organisations and working life through better employment relations. It provides impartial advice, training, information and a range of problem resolution services.

www.acas.org.uk

Telephone: 08457 47 47 47 (Monday to Friday: 08:00 to 20:00; Saturday: 09:00 to13:00)

iv. Access to Work

Access to Work can help disabled people or their employers if their condition or disability affects the ease by which they can carry out their job or gain employment. It gives advice and support with extra costs which may arise because of certain needs.

www.direct.gov.uk/en/disabledpeople/employmentsupport/workschemesandprogrammes

Telephone: 0800 444 205

Textphone: 0800 444 206

Opening hours:

Monday to Friday 09:00 to 20:00

Saturday 10:00 to 14:00

Closed on Sundays and Bank Holidays

v. Citizens Advice Scotland

Citizens Advice Scotland is the umbrella organisation for Citizens Advice Bureaux in Scotland. They do not offer advice directly but can provide information on Scottish bureaux.

www.cas.org.uk

vi. Employment Tribunals

Employment Tribunals are legal courts. If you think you have been discriminated against, you can apply to employment tribunals about your claim. There are various rules about applying to a tribunal.

www.employmentribunals.service.gov.uk

vii. Scottish Association for Mental Health (SAMH)

SAMH is a national charity providing a range of information and support for people experiencing mental health problems. This includes employability services to help people get the knowledge, skills and strategies to get back into and/or sustain employment.

www.samh.org.uk

viii. Scottish Centre for Healthy Working Lives

The Scottish Centre for Healthy Working lives supports employers to create a safer, healthier and more motivated workforce.

www.healthyworkinglives.com

There is also a free advice-line on a range of workplace health issues.
Telephone: 0800 019 2211
It is open from:
Monday to Thursday 9am to 5pm
Friday 9am to 4.30 pm.