

## Mental health in the workplace

*Partner Matthew Howse, head of the London Employment practice at global law firm Morgan Lewis, and associate Sarah Stock examine the regulatory impact of mental health issues in the workplace*



In the wake of last month's shocking crash of a Germanwings flight in France, some are questioning what, if anything, the airline or indeed any other employer should, or could, have done to prevent employees with mental health concerns impacting the working environment. Such questions touch on important issues about what an employer is permitted to address in pre and post-employment medical screenings concerning an employee's mental health.

The main piece of legislation governing workplace health and safety is the Health and Safety at Work Act 1974 which imposes a general duty on employers to ensure so far as is reasonably practicable, the health, safety and welfare at work of all their employees. The Management of Health and Safety at Work Regulations 1999 also require employers to make an assessment of

workplace health and safety risks for their employees, and for third parties. The Health and Safety Executive (the “HSE”) which regulates workplace health and safety expects organisations to carry out suitable and sufficient risk assessments which should include assessing the stress levels of its employees.

Employers should implement measures such as management training, monitoring the workload of employees, and implementing staff surveys and risk assessments, and ensuring that workplace appraisals appropriately cover the health and safety of employees. Where there is a risk to the health and safety of an employee, an employer should offer free occupational health assessments from a reputable occupational health provider, and monitor the employees’ health at regular intervals.

This Autumn also sees a new Fit for Work initiative come into effect; whereby employers can refer employees to an occupational health therapist when they have been absent for four weeks, in order to facilitate an employee’s return to work.

There is also a duty under the Protection from Harassment Act 1997 on an employer not to harass or bully its employees. Employers can also be held liable for harassment committed by an employee towards another employee in the course of employment. An employer may be held liable for harassment under this act, if an employee has experienced anxiety or distress as a result of oppressive or unacceptable behaviour amounting to harassment.

There are also more specific obligations, under the Equality Act 2010, where the mental health of an employee is deemed to be a disability which is determined by a complex legal test and further medical evidence. If an employee has a disability, the employer will be under an obligation to make reasonable adjustments. This can involve moving employees to an alternative position, implementing management training, monitoring the workloads of employees, implementing stress and anti-bullying policies, anonymous counselling service or employee assistance helpline, risk assessments, and ensuring that the appraisal system correctly covers any potential mental health issues. Employers are prohibited from asking for information about a prospective employee’s mental health prior to offering them a job, however, an employer could ask for this information after making the job offer and prior to the employee commencing the role in order to make the necessary adjustments. It is also unlawful for an employer to treat a disabled person less favourably for a reason relating to their disability, or to implement a certain

practice which indirectly discriminates against a disabled employee, unless this practice can be objectively justified.

In addition to statutory duties under health and safety legislation, employers are also under a common law duty to take reasonable care for the health and safety of employees in the workplace. An employee may have a personal injury claim if they can prove that an employer has breached its duty of care, which caused injury to the employee, and the injury of that type was reasonable foreseeable.

As data controllers under the Data Protection Act 1998 (“DPA”), employers are obligated to process data in relation to an employee’s mental health (which is sensitive personal data) in accordance with the DPA. However, if an employer has concerns about an employee’s mental health, they should prioritise their obligation to protect the health and safety of their employees and should contact a medical adviser, or occupational health adviser and consult with the individual about any concerns.

To conclude, employers have general and specific legal responsibilities to safeguard the health and safety of its employees. There are a wide range of claims that may be available to an employee suffering from mental health issues, which may include a personal injury, protection from harassment, disability discrimination or harassment, unfair dismissal or constructive unfair dismissal claims.

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