



WORLD  
MENTAL  
HEALTH DAY  
October 10

Brachers Bitesize

# Mental Wellbeing

Tuesday 10 October 2023

## Presented by:

Lauren Sellwood, Solicitor – Employment, Brachers LLP

Ruth Epps, HR Consultant – Kent HR

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Presenters



---

**Lauren Sellwood**

Solicitor, Employment

[LaurenSellwood@Brachers.co.uk](mailto:LaurenSellwood@Brachers.co.uk)



---

**Ruth Epps**

HR Consultant, Kent HR

[RuthEpps@KenthR.co.uk](mailto:RuthEpps@KenthR.co.uk)

# Today's session

- 01** Legal requirements of an employer
- 02** Tips and ideas to support good mental health in the workplace
- 03** What to consider if an employee is suffering with poor mental health
- 04** What claims an employer could face if they get it wrong



# Statistics and Impact

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Statistics

- One in six people of the working age population of Britain experience symptoms associated with poor mental health.
- 46% of employees say they've worked in recent months despite not feeling physically or mentally well enough to perform their duties.
- One third of employees expect or would like more support for their mental health and wellbeing from their employers.
- Mental ill health costs UK employers approximately £56 billion each year.
- For every £1 spent by employers on mental health interventions, employers could get back £5.30 in reduced absence, presenteeism, and staff turnover.
- 81% of workplaces have increased their focus on employee mental health, however, 36% of companies take a more reactive approach, rather than being proactive.

# Impact

- Poor mental health leading to sickness absence can have several negative impacts on a business including:
  - Extra cost
  - Reduction in customer satisfaction
  - Having to find, train and pay for temporary cover
  - Loss of morale and / or motivation from other employees
  - Reduced productivity
  - Increased sickness absence across the workforce
- We cannot always avoid poor mental health, but there are things that can be done to help manage it.



# Duties of the Employer

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Employer Duties

- Implied and common law duty of care.
- Implied duty of trust and confidence.
- Implied duty of fidelity.
- Legal duty in relation to health and safety law (Health and Safety at Work Act 1974) and associated regulations.



# Duty of Care

- Employer to do all they reasonably can to protect employee's health, safety and wellbeing.
- No logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty - *Walker v Northumberland County Council 1995*.
- Comply with a duty of care by:
  - Providing a safe working environment
  - Carrying out risk assessments and taking action
  - Taking steps to protect employees from bullying and discrimination
  - Taking steps to prevent work-related stress

# Duty of Trust and Confidence

- Mutual duty of:
  - Behaving in a way so employer and employee can trust each other
  - Treating each other with respect
  - Not behaving in an entirely unreasonable way
- Example of breach could be refusing an employee's reasonable request for support whilst they are suffering with poor mental health.

# Bereavement

- Right to time off if a dependant dies, for example a husband, wife, civil partners or a parent.
- The amount of time off must be 'reasonable' and there is no legal right for that time to be paid.
- Right to 2 weeks off if a child is stillborn after 24 weeks of pregnancy or dies under the age of 18. This is called parental bereavement leave and is also known as 'Jack's Law'.
- Parental bereavement leave is a day one right.
- Entitlement to 2 weeks' statutory parental bereavement pay (subject to conditions).



Personality changed?



Agitated?



Withdrawn?



Poor self-care?



Hopeless?

# Signs of Poor Mental Health

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Signs of Poor Mental Health

- Not always obvious and important not to make assumptions.
- Some signs of poor mental health could include:
  - Appearing tired, anxious or withdrawn
  - Increase in sickness absence or being late to work
  - Changes in the standard of their work or focus on tasks
  - Being less interested in tasks they previously enjoyed
  - Changes in usual behaviour, mood or how the person behaves with the people they work with



# Supporting Good Mental Health

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Culture and Awareness

- Promoting an open culture and awareness of mental health.
- Allow employees to feel comfortable to 'bring their whole self to work', flaws and all.
- Suggestions to help change a workplace culture:
  - Publicise commitment to promoting positive mental health
  - Ensure all managers and team leaders lead by example
  - Talk to staff or use a survey to find out what the business is doing well and what needs to improve

# Training

- Training should include:
  - Information about mental wellbeing
  - How to identify early warning signs
  - Any Resources
  - Awareness of the stigma associated with poor mental wellbeing
  - Ongoing monitoring in the workplace
  - How to have a conversation about mental wellbeing with an employee
- Responsibilities:
  - HR
  - Senior Leaders
  - Line Managers
  - Employees



# Mental Health First Aiders

We expect companies to have first aiders to assist with physical issues, why not make mental health first aiders a standard too?

## **ARE THERE TO:**

- Recognise those that may be experiencing poor mental health
- Provide first level support and early intervention
- Signpost colleagues to appropriate places for support
- Listening whilst showing respect and support
- Work towards reducing stigma around mental health in the workplace
- Escalate where appropriate

## **ARE NOT THERE TO:**

- Diagnose conditions
- Act as a counsellor or therapist
- Replacement for proper treatment of mental health issues

# Financial Wellbeing and EAP

- Financial wellbeing
  - CIPD (2021) shows a lack of attention to employee's financial wellbeing in most organisations
  - 47% of UK employees worry about money
  - 2/3 of those who are struggling financially report at least one sign of poor mental health
  - Retirement Plan providers as a source of advice
- EAPs
  - Gallup shows that ROI is quite high - an employer of 200 people, for example, investing £1,500 can expect a ROI of up to £10,065
  - EAP as part of an insurance policy - 6% of UK organisations have this
  - Average usage of 12% in 2022 which is an increase from 11.7% in 2021

Make sure schemes are communicated to employees regularly.

# Occupational Health

- Occupational Health reports can help ensure that employers are doing all they can to prevent further decline in someone's mental health.
  - Not just for those off work
  - Support the individual in seeking further assistance
  - Advise of anything that could cause absence issues
  - Advise the company of any adjustments to consider
  - The length that may be required for those adjustments
  - If they may be covered under the Equality Act 2010
- A company cannot force an individual to have an occupational health appointment.

# Occupational Sick Pay

- Companies can choose to offer occupational sick pay which is over and above SSP.
- CIPDs Spring 2021 Labour Market Outlook showed 59% of employers agreeing that there is a business case for providing OSP to staff and just 11% disagreeing.
- Contrasting the result of government research in 2019 showing that only 28% of employers provide OSP.
- PWC show that 57% of people say finances are the top cause of stress in their lives.
- Research showed that in 2023 23% of workers who would receive either SSP or no pay would struggle to pay bills or buy food within one week.
- Presenteeism – Almost half of workers state they have gone into work while feeling ill.

# Policies

- No legal requirement
- Policies give clarity in terms of expectation and support available.
- Sickness absence policy could provide clarity on:
  - How to report sickness absence
  - What evidence an employee needs to provide
  - Entitlement to any occupational sick pay (if offered)
  - Process for managing both short-term and long-term sickness absence and the trigger point



# When an Employee is Unwell

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists

# Statements of Fitness for Work

- Statements of Fitness for Work (also known as 'fit notes') are used as evidence of an employee's fitness for work.
- An employee can be assessed as not fit to work or may be fit to work taking account of advice.
- Fit notes can be issued by doctors, nurses, occupational therapists, pharmacists and physiotherapists.
- Healthcare professionals do not usually issue fit notes during the first 7 calendar days as employees can self-certify.
- Fit notes cannot sign an employee back to work. However, employee's can return to work before the expiry of a period covered by a fit note if they feel ready. Ensure you take steps to ensure this is appropriate.

# Statutory Sick Pay

- To be eligible for SSP a person must:
  - be classed as an employee and have done some work for the employer
  - earn an average of at least £123 per week
  - have been ill for at least 4 days in a row
- SSP can be paid for up to 28 weeks of the year.
- An employee will not qualify for SSP if they have received the maximum 28 weeks in a year or are getting statutory maternity pay.
- The standard rate of SSP increased on 6 April 2023 to £109.40 per week.
- Anyone eligible for SSP must not be paid less than the standard rate.



# Communication

- Important to agree:
  - How you will stay in touch
  - How often the contact will be
  - How you will contact each other, for example by email, phone or face to face meetings
- Continued contact can help:
  - The employee stay informed
  - The employer stay informed so they can plan ahead
  - The employer assess what support might be needed
- Employee should not be overwhelmed.

# Claim form

You must complete all questions marked with an '\*\*'

| Official Use Only |  |               |  |
|-------------------|--|---------------|--|
| Tribunal office   |  |               |  |
| Case number       |  | Date received |  |

## 1 Your details

1.1 Title  Mr  Mrs  Miss  Ms

1.2\* First name (or names)

1.3\* Surname or family name

1.4 Date of birth  /  /  Are you?  Male  Female

# Potential Claims

# What Type of Claim?

- The type of claim an employee might bring will depend on:
  - Whether the employer caused/was responsible for the sickness
  - Whether the employee is classed as disabled under the Equality Act 2010
  - Whether the employer ultimately decides to dismiss the employee by reason of their incapacity or conduct in relation to their sickness absence.
- No standalone legal claim for breach of duty of care or breach of trust and confidence.
- Could amount to breach of contract or constructive dismissal (in the case of very serious breaches).

# Personal Injury

- If the employer caused/was responsible for the sickness, the employer could be liable under:
  - The tort of negligence
  - Health and safety legislation
  - Failure to provide a suitable working environment
  - The implied duty not to act without reasonable and proper cause and in a manner calculated or likely to destroy the relationship of trust and confidence
  - Discrimination and harassment

# Disability Discrimination

- An employee may be protected by disability discrimination law under the Equality Act 2010.
- Disability is one of nine 'protected characteristics'.
- Someone with poor mental health can be considered disabled if:
  - It has a 'substantial adverse effect' on their life
  - It lasts, or is expected to last, at least 12 months
  - It affects their ability to do their normal day-to-day activities
- Poor mental health can be considered a disability even if an employee does not have symptoms all of the time.
- It is not always clear whether an employee is disabled so it may be necessary or prudent to obtain a medical report.

# Disability Discrimination (continued)

- Direct discrimination - treating an employee less favourably because of disability.
- Discrimination arising from disability – treating an employee unfavourably because of something arising out of their disability, unless that treatment is a proportionate means of achieving a legitimate aim.
- Indirect discrimination - applying a provision, criterion or practice (PCP) that puts an employee (and other persons with the same disability) at a particular disadvantage, unless that PCP is a proportionate means of achieving a legitimate aim.
- Failure to make reasonable adjustments where these would help overcome a substantial disadvantage. This duty is unique to the protected characteristic of disability.

# Disability Discrimination (continued)

- Victimisation - dismissing or subjecting an employee to detriment because they have done a 'protected act' such as complaining about discrimination or supporting another employee in their complaint.
- Harassment - unwanted conduct related to disability, which has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- There is no minimum qualifying period for discrimination claims and no upper limit on compensation.

# Reasonable Adjustments

- Work with an employee to make the right adjustments, even if you don't think their mental ill health amounts to a disability.
- Small changes can make a difference, such as:
  - More rest breaks
  - Support with prioritising workload
- In theory, the scope of possible reasonable adjustments is almost limitless.
- The Equality and Human Rights Commission (EHRC) has an Employment Statutory Code of Practice which contains a non-exhaustive list of examples (<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>).



# Unfair Dismissal

- Qualifying employees (those with 2 years continuous service) have the right not to be unfairly dismissed.
- There are five potentially fair reasons to dismiss. For sickness absence purposes, the relevant reasons are capability, conduct and some other substantial reasons (SOSR).
- Capability (section 98(2)(a) Employment Rights Act 1996).
- Conduct (section 98(2)(b) Employment Rights Act 1996).
- SOSR (section 98(1)(b) Employment Rights Act 1996).

# Unfair Dismissal (continued)

- An employer must act reasonably when dismissing an employee and follow a fair process. The leading case on fairness in ill-health dismissals is *East Lindsey District Council v Daubney*.
- Factors to consider:
  - Nature of the employee's illness
  - Prospects of the employee returning to work and the likelihood of recurrence of the illness
  - Need for the employer to have someone doing the work
  - Effect of the absence on the rest of the workforce
  - Extent to which the employee was made aware of the position
  - Employee's length of service



WORLD  
MENTAL  
HEALTH DAY  
October 10

Thank You

**Brachers**  
With you all the way

**KentHR**  
Human Resources Specialists