

This paper was written by Michelle Valentine at the Disability Rights Commission to complement *Getting the Best Out of the Employment Experience*, guidance for Trade Union Representatives.

Is stress a disability? – A Frequently Asked Question

This is a question which perplexes many employers, Union and other workplace representatives, and people who themselves who experience stress.

What is stress?

The Health and Safety Executive defines stress as:

'The adverse reaction people have to excessive pressure or other types of demand placed on them.' - HSE

This is because it is important to distinguish between stress and pressure. Pressure is a positive motivating force at work, but it may lead to stress, and therefore become a problem, if the person under pressure does not feel that they have the resources (personal or otherwise) to cope with pressure placed upon them.

It is also important to distinguish between stress, anxiety and depression.

Depression

Depression is on a spectrum from mild to severe. Depression is common in the general and working population¹. Symptoms include low mood and lack of energy. Motivation can be affected and people may experience thoughts of life not being worth living, which in extreme cases can lead to suicidal behaviour.

Anxiety

Anxiety becomes a problem when feelings of tension and fear prevent a person from carrying out everyday tasks. In extreme cases people may suffer panic attacks or phobias. Obsessive Compulsive Disorder (OCD) is a form of anxiety where people have recurrent, intrusive thoughts, which they may feel 'forced' to act on (e.g. fears of contamination leading to repetitive hand washing).

¹ See Seymour and Grove 'Workplace Interventions for People with Common Mental Health Problems' available from http://www.bohrf.org.uk/downloads/cmh_rev.pdf

How do you decide if a member who has stress is disabled under the DDA?

When trying to decide whether a person who is experiencing stress falls within the definition of disability in the DDA, there are a number of matters that Union representatives need to take into consideration. Please note that this information should be read in conjunction with the document available from the DRC's website:

'Guidance on matters to be taken into account in determining questions relating to the definition of disability'

1. Firstly under S 1 of DDA 1995 a person is defined as having a disability "if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities". These are defined as:

- mobility;
- manual dexterity;
- physical co-ordination;
- continence;
- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand; or
- perception of the risk of physical danger.

2. Schedule 1 to the DDA as amended by the DDA 2005 now provides that people with a mental health problem no longer need to show that their particular impairment is 'clinically well-recognised in order to satisfy the definition. The term 'clinically well recognised' means that the person's mental health problem was recognised by a respected body of medical opinion, for example those conditions listed in the World Health Organisation's International Classification of Diseases (WHO ICD10). This is no longer the case BUT:

3. The person would still have to demonstrate that they fit the DDA definition of disability. So how would this be determined? Union representatives would need to consider whether:

- a. the impairment has lasted twelve months or is likely to last twelve months or more
- b. the stress is having a substantial and adverse effect on the ability to carry out normal day to day activities

So, if a person is experiencing stress, but has only done so on and off for six months, they may not satisfy the 'long-term' requirement. However, if the

substantial adverse effects of a condition are more likely than not to recur, they are treated as continuing. And if those effects are likely to recur beyond 12 months of the first occurrence they will qualify as 'long-term' under the DDA definition of disability.

It is common that most episodes of stress (but certainly not all) do not last longer than a few months and even acute episodes of depression may only last a few months, and thus it is crucial to determine whether the effects of the condition are substantial and adverse, and that they are more likely than not to recur.

If a person's mental health problem is stress related, the day to day activity affected is very likely to be the individual's memory or ability to concentrate, learn or understand, so unless it could be shown that the effect of the stress on these day to day activities was substantial and adverse, the person is unlikely to fit the definition in the DDA.

There may be one further way that people with stress may fit the DDA definition of disability, and that is if the stress can be shown to be exacerbating another pre-existing condition, such as high blood pressure*. If this was the case, you should consider that although any one of these conditions on their own may not have substantial effect, together they may do, and so a person with another condition, exacerbated by stress, may be covered by the DDA because of the cumulative effects of both conditions together.

The key thing to consider here is whether the stress is rendering the employee unable to cope with his other condition, which without the stress, he would normally be able to cope with. So, for example, someone with high blood pressure only may or may not fit the DDA definition, depending upon how severe their condition was. Some people with high blood pressure, especially in its early stages, may still be able to cope well with normal day to day activities, and so would perhaps not fit the DDA definition of disability.

However, if they were suffering stress at work (and in many cases this can be due to employer's seeming reluctant to make reasonable adjustments for people who they are not 100% sure are covered by the DDA), and if this stress makes their high blood pressure worse as well as affecting their concentration and ability to deal with colleagues and issues at work, they may come under the DDA definition.

4. It should also be borne in mind that people who have had a disability in the past, but who have since recovered are still protected by the DDA, if, at the time they had it, their condition would have been covered by the DDA. This is very important as some people who have been off work for a long time in the past with stress or a mental health problem, may have recovered, but may still experience stigma and discrimination.

* Example of other health condition amended from the original by MINDFUL EMPLOYER in agreement with Michelle Valentine.

So what should Union representatives do?

If a Union representative has a member who reports that they are stressed, there are a number of reasonable adjustments that they can suggest to the employer to help them:

- Adjustments to physical surroundings in order, for example to reduce noise levels or overcrowding.
- Allocating some of the employee's duties to another employee to reduce the workload.
- Phased hours during a return to work programme.
- Providing counseling or other forms of support such as a mentor
- Transferring the employee to another job in order, for example, to enable him to report to another supervisor, work with different colleagues or have a less demanding position.

The DRC would always encourage employers to make adjustments as early as possible, as this often means that problems do not develop to such an extent that they become difficult for the employer and the employee. Employers subject to the Disability Equality Duty should be making even more effort to tackle stress at an organisation wide level, and to develop support mechanisms and reasonable adjustment provision in a proactive way, so that when people need it, it's there, and thus they are supported to managed their condition.

Unions should also remind employers of their duty of care to their employees under Health and Safety at Work Legislation. This was highlighted by the Walker v Northumberland County Council case (see Appendix 1).

Prevention is always better than cure however, and the more that Unions can persuade employers to take a proactive and positive approach to helping employees deal with stress at work, the better things will be for everyone. There are clear benefits to employers to manage stress, which Unions could use to help persuade employers to take action:

- Work-related stress accounts for over a third of all new incidences of ill health.
- Each case of stress-related ill health leads to an average of 30.9 working days lost.
- A total of 12.8 million working days were lost to stress, depression and anxiety in 2004/5.

Unions could also encourage employers to adopt the Health and Safety's stress management standards, as a way of working towards good practice on this issue, see the HSE's website www.hse.gov.uk.

Appendix 1

Walker v Northumberland County Council [1995] IRLR 35

Stress, 'Breach of its duty of care in failing to take reasonable steps to avoid exposing the employee to a health endangering workload.'

Established the precedent that an employer can be held liable for mental injury to an employee caused by work-related stress.

Facts

the plaintiff, a social worker in charge of a team of field workers had reported his stress, arising out of a greatly increased workload handling child abuse cases, to his superiors and suggested a restructuring of services. This was refused and the plaintiff suffered a nervous breakdown. On his return to work the plaintiff was given to understand that he would have an assistant to ease his workload, but it transpired that this assistant was only intermittently available. He suffered a second breakdown and had to retire.

The Decision

The council was found to have breached its duty in respect of the second nervous breakdown, though not the first. After the first breakdown, it had notice of the particular risk facing the plaintiff and could have taken steps to reduce the stress, by reducing his workload and providing greater assistance. The court accepted that this could have caused some disruption to other services provided by the council, but this did not outweigh the obligation to protect the plaintiff against a serious risk to his health.

The decision is distinguishable, but what matters is the view that an employer can be under a duty of care to provide an employee with assistance, of uncertain scope and duration, to enable him to perform his contractual duties.

Note

Estimated cost to the employer of "Management failure" was over £400,000.

This included:

- * Damages of £175,000
- * £150,000 for the 2 week trial
- * Sick pay