

# MENTAL HEALTH AT WORK

## Employment Law Roundtable

We hosted an Employment Law roundtable on mental health at work at our offices in London. The participants were senior human resource practitioners from a range of businesses and sectors. The event was co-hosted by Seddons Solicitors and chaired by [Helen Crossland](#), a Partner and Head of Employment Law at Seddons, who shared her professional expertise.

We decided to discuss this topic as the practitioners from Seddons had seen a noticeable increase in the number of mental health related cases from their clients in the last few years. We collectively believe that this increase is a positive sign of heightened awareness around mental health, representing an effort to remove the stigma and put mental health on the same platform as physical health.

The aim of this roundtable was to share insights and knowledge around dealing with physical and mental health at work.

Specifically the conversation covered:

- Statistics on mental health at work
- How to manage mental health issues at work
- Occupational Health referrals
- The Equality Act 2010
- Reasonable adjustments

This white paper aims to capture and distil the key points which emerged from the roundtable discussion.

# SOME STATISTICS ON MENTAL HEALTH AT WORK

## Key statistics

- Workplace absences caused by mental and physical health issues are declining in the UK. We used to have the highest number of sickness absence in Western Europe and are now ranked third. The average days of employee absence in the UK used to be 7.2 days a year, which in the last decade has now dropped to 4.3.
- Mental health is now the main reason for long term sickness absence (i.e. four weeks or more).
- The three main reasons cited for mental health absence are: workload, problems with (line) management, and non-work-related issues.
- 30% of businesses report a significant increase in these issues in the last three years.
- It is widely considered that one in four employees will have a mental health issue at some time during their working career. That said, Accenture puts that figure at 85%, with 93% for millennials.
- Women are twice as likely as men to suffer from mental health issues.
- Only 15% of employees said they would report the issue to HR, 39% would go to their line manager first, and 61% would rather confide in a close work colleague.
- Only 1 in 5 organisations offer mental health training to managers and only 6% have a mental health policy.
- 93% of people who take short-term absences for mental health reasons choose to say that it's for something else, such as a migraine or common cold.

It was noted that according to these statistics, HR are likely to be the last to know about mental health issues. Everyone in the room agreed that that they too had seen a growth in the number of mental health incidences in the last three years, agreeing that "people are talking about it more, people in their mid to late 20s are the most affected, and managers are coming into HR saying they don't know what to do and asking how to deal with it."

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# HOW TO MANAGE MENTAL HEALTH ISSUES AT WORK

## Organisational approaches to managing mental health issues

While some organisations are content to “buy their way out of trouble” others want to take a much more holistic approach to managing mental health issues. This might include things like promoting healthy living and subsidised gym memberships, although much more is required for a really structured programme.

One of the measures gathering momentum is the use of mental health first aiders and mental health champions: go-to people within organisations who people can turn to when they have an issue.

Numerous training courses are available, offered by organisations such as St Johns Ambulance. Incorporating this offering into an organisation is a positive for all employees, and serves as a good protection mechanism for organisations to demonstrate that mental health is being taken seriously. It also supports managers who often don't feel equipped to deal with these issues. It means that there are people in the organisation they can call on.

## Selecting mental health first aiders

There was a consensus in the room on how the right people need to be chosen for this type of training: they must be individuals who people can absolutely trust. This provoked a short discussion on who in the organisation should be a mental health first aider. One view was that, because of confidentiality, it should only sit within HR. Another was that people who have had experiences with their own mental health, and who have been well supported in working through it, have the most passion and are ideal, especially given that, as noted above, 61% of people would rather speak to a colleague than HR. Everyone seemed to agree that all mental health first aiders should not be in the senior leadership team as this might be intimidating.

The conclusion was that the first step should be for HR to establish a safe channel of communication for people. It was also helpful if employees have regular sit downs /supervision meetings with their line managers, so there is an open platform where issues can be raised. In addition, processes should be devised so that people can approach mental health first aiders in a discrete way. It was concluded that mental health first aiders don't have to be in HR, that instead it needs to sit with someone who has been trained correctly, because poor mental health is not a HR issue, it's an issue for everyone.

## The role of flexible working

Flexible working is another broadly recognised tool which reduces mental health absences. It's widely accepted that mental health issues can present themselves in quite episodic and fluctuating ways and people with less rigid and constrained hours have more flexibility and freedom with which to manage their own condition. That said, from a legal point of view, individuals may unfortunately sometimes use mental health as a means to take advantage, and this is something many organisations, including Seddons who advise them, see more and more often when going through disciplinary and other formal processes.

Tribunals now have greater expectations upon organisations, they expect there to be mental health measures in place, and strong support for them.

Organisations need to demonstrate a supportive and sincere process for handling mental health issues, including in emails and other communications. The notion of credibility is as important as ever, organisations should do what they have said they will do, when they said they would do it. Helen from Seddons commented saying, "If you can demonstrate a supportive, consistent approach it will help with tribunals," and that implementing flexible working hours can have a positive result on mental health and help people manage any issues they have as part of a normal working life.

## Declarations: Asking the question

We talked about the merits of asking new employees about mental health conditions upfront. From a legal perspective, you can't ask any health questions before an offer has been made. However, once it's made you can discuss things, as long as you don't take any discriminatory action subsequently.

It was found in our discussion that employees can be both really honest but also dishonest when asked to fill in medical questionnaires during the on-boarding process. The legal advice was that most employers ask for a pre-employment health declaration. However, too much dependence should never be placed on these, as some employees don't know themselves that they have a disability, or their condition could become a disability later on. Things can change over weeks or months when it comes to disability or illness.

Nevertheless asking for a declaration shows that, as an employer, you are open to supporting any issues. Equally it can count against an employer if they don't ask at any point about an employee's health. In addition, a good option is to have the health declaration form always available to employees throughout their employment so they can update it at any time along with other personal information.

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# OCCUPATIONAL HEALTH REFERRALS

Overall, absence rates have fallen in the UK, largely because managers have a greater responsibility to be on top of issues such as mental and physical wellbeing, and to make sure absences are well managed.

They are also familiar with, and are using Occupational Health referrals more often. The room described these referrals as “a bit of a novelty a few years ago, but now are much more common.”

Occupational health is a specialist branch of medicine that focuses on the physical and mental well being of employees in the workplace. The goal of occupational health is to stop work-related illness and injury by: encouraging safe working practices, ergonomics (studying how you work and how you could work better), monitoring the health of the workforce and supporting the management of sickness absence.

## How to use OHRs

Seddons gave some pointers on the use of OHRs:

- Attach questions with the referral. Sometimes the reports produced by an Occupational Health Physician are less than helpful, so it can be beneficial to send closed questions to practitioners.
- Ask questions like ‘can you guarantee that this person will be able to come back to full time work in the next four to six weeks?’ These types of questions really assist the OH practitioner to come down on one side of the fence or the other.
- Don’t be afraid to send back a bad report.
- If the report is not very clear and not very useful, you should be asking them to give you stronger guidance.
- If you are dealing with a more troublesome employee, ensure you get a direct appointment and a more definitive report. Majority of OHRs are done over the phone, in these cases this should be avoided.
- Don’t get fixated on OHRs reports as they are not infallible. Instances have been recorded whereby an individual was given a clean bill of health, only to suffer a break down or serious episode weeks later.

## Tackling stigma

There’s still a stigma around mental health; it was described around the table as “a cultural conflict”. “We’re all being told to treat mental health in the same way as physical health, but in reality, if I saw a colleague walking with a limp I wouldn’t think twice about saying something, but if I think

someone is showing signs of clinical depression, I’d feel quite nervous about saying anything in case I offend them or if I was wrong.” People with mental health issues often feel the stigma themselves.

It was discussed around the room how people shy away from expressing signs of mental illness to avoid being labelled as that person. They place mental health in a separate box themselves, making it harder for managers to reach out and help. That said, one participant spoke about a colleague with severe mental health issues who was very open about their history and then received adequate support from their employer. Everyone around the table agreed that openly discussing mental health created a better

environment for everyone involved. The hope is that with more openness, the stigma will lessen over time. One professional described an open plan session they had attended on mental health awareness whereby a senior member of the group spoke freely about their own personal journey with mental health which helped air out issues around the room and spark up meaningful conversation.

# THE EQUALITY ACT

The Equality Act became law in October, 2010, replacing previous legislation (such as the Race Relations Act 1976 and the Disability Discrimination Act 1995) to ensure consistency in what employers and employees need to do to make their workplaces a fair environment and comply with the law.

According to the Equality Act, disability is a physical or mental impairment which can lead to a substantial and long-term negative effect on someone's ability to do their normal day to day activities. Long-term means it's lasted or is likely to last 12 months or more.

It's also important to remember that two distinct conditions combined can lead to disability. These can be two unrelated conditions which taken on their own do not meet the 12 month threshold, but combined they do.

What is classified as a disability when looking at mental health?

- Stress isn't generally a disability but it can lead to conditions which are, such as anxiety and clinical depression. It's useful to note that there is a difference between a low mood as a result of anxiety and clinical depression, which is a disability, and depression from adverse life events which will generally not be a disability.

- Other disabilities include: dyslexia, dyspraxia, eating disorders, anorexia, bulimia, OCD, PTSD, bipolar, the various forms of schizophrenia, autism and ADHD.

Where individuals have a disability, organisations need to be really careful. The ultra-safe route will always be to get a OHR for the employee. If an employee refuses to attend an assessment then it becomes a different issue. There are two options when this occurs; the first is asking the question of how can we manage this person if they are going to be unmanageable? Next is to look and see what is included in the employee contract, it's normal for employment contracts to include a clause saying that employers can refer employees for medical assessment for any reason so if they refuse it could be a disciplinary matter.

## Some Other Substantial Reasons for dismissal (SOSR)

The SOSR route, which is often forgotten, is one of the five potentially fair reasons for dismissal, the others being conduct, capability, redundancy, and illegality. In order to understand whether SOSR is appropriate, it is worth exploring some cases of unfair dismissal.

The first example was a teacher who brought claims of unfair dismissal and disability discrimination after being dismissed for showing a class of 15-year-olds an 18-rated film. The teacher successfully argued that battling with cystic fibrosis (a disability) caused stress which led him to make a gross error of judgement. If the SOSR route had been chosen however over the disciplinary procedure used, the employer could very well have been more successful in arguing that notwithstanding the accepted disability, the medical condition was unmanageable and presented an untenable risk to the employer.

In another example, an employee's unfair dismissal claim was upheld despite the fact that he had sent a very aggressive email to a colleague and it being accepted he was extremely difficult to manage. The tribunal accepted that stress suffered by the employee resulting from a disability (clinical depression) had caused him to send the email.

The judge heavily criticised the employer's evident lack of sympathy and support, having seen a series of unsympathetic and hostile emails. In this case the organisation could have gone down the SOSR and argued that the reason it had to part ways with the employee was because he was causing a significant disruption to the business: taking up too much management time and resources and causing noteworthy disruption to colleagues. Helen noted that in her profession she has tried and tested this route and come out successfully, claiming that it is the far safer route to go down when dealing with these issues and where there is an accepted and known disability.

If an organisation is willing to make a cash settlement with an individual, a settlement offer can be offered as an alternative option. It is best approached by the simple act of commencing a SOSR or other formal process before, or simultaneous to the offer being made. When employees get legal advice; they'll likely be advised that the correct procedure is being followed by the employer, that it is for a fair reason and that they should accept an offered settlement rather than risk leaving with nothing.

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## The Equality Act and sick pay

In order to make workplaces a fair environment for employees and employers the Equality Act is always in 'change mode'. More recent proposed changes to the Act have been related to sick pay - taking into account the episodic, fluctuating and distinctive nature of mental health conditions – suggesting statutory sick pay could be given for half days as well as full days. This is something organisations can do themselves as part of a holistic approach to employee wellbeing, and in the offering of occupational sick pay, as it can help people take shorter spells of time off if needed and reduce the risk of absence becoming long term.

The question was then asked about the dangers of setting a precedent of paying more than statutory sick pay – the group around the table suggested this type of benefit should be available to longstanding employees, opposed to those who have just joined an organisation. It was concluded that consistency is key but that nonetheless it could be reasonable to pay one individual more than another if a rationale for doing so can be recorded and justified.

# REASONABLE ADJUSTMENTS

To conclude this discussion all participants around the table also went through a quick overview of reasonable and proportionate adjustments.

It was concluded that adjustments should be proportionate; it's not about having to keep people in employment if a person has a disability no matter the cost, and organisations need to be aware that they are allowed to be pragmatic. Commercial decisions need to be based on what's right for the organisation, and if supporting an employee is infringing upon business survival, then there comes a point where an organisation can no longer afford to do so.

A reasonable adjustment could easily be a change in workload, as the amount of work individuals have is a big reason for absence.

Employers could look at ways of temporarily or permanently reducing workload to give people a breather. It's helpful to have things like employee assistance programmes and confidential helplines along with any other measures mentioned above to promote mental health in the workplace.

Understanding and utilising these issues and their correct measures all form part of setting yourselves up as employers who can handle and are open to talking about mental health issues, resulting in an organisation which is more likely to have healthy employees with lower absence rates.

If you would like to register your interest in our next Employment Law Roundtable event, or to provide any feedback, please email: [marketing@markssattin.com](mailto:marketing@markssattin.com)

