

# **Menopause and disability discrimination: a tale of caution when addressing the performance of an employee suffering from menopausal symptoms.**

In the recent case of *Lynskey v Direct Line Insurance Ltd*, the Employment Tribunal decided that poor appraisal ratings, a written warning and ceasing enhanced sick pay were all discrimination arising from Ms Lynskey's disability of menopause.

## **What happened in this case?**

Ms Lynskey began working for Direct Line as a motor sales consultant in 2016. In 2019, she began to experience menopausal symptoms, which included mood swings, poor concentration and memory loss. In March 2020, she was diagnosed with a hormone imbalance and depression and was prescribed antidepressants by her GP. Before the onset of these symptoms, Ms Lynskey had been model employee, well-liked and had received good performance ratings.

In June 2020, Ms Lynskey had a difficult phone call with a customer and concerns were raised about her conduct during this call. She went off sick with work-related stress for a period of two weeks and, during this period, she was offered a

different role in the telematics team. As the new role did not involve direct sales, it was thought to be less stressful and more suitable for Ms Lynskey. She willingly agreed to the new role, and things started off well. She also came off her antidepressants. However, two customer complaints were received, alleging that Ms Lynskey had been rude during calls. She received coaching but was also told that this should not happen again and, if it did, it could result in disciplinary action.

During Ms Lynskey's annual appraisal in 2020, she was graded as "needing improvement" for the first time. As a direct consequence of this rating, she did not receive a pay rise. There was no direct mention of her menopausal symptoms, but her manager noted that it seemed she was "*struggling to retain information*".

There were further difficult calls and in April 2021 her manager decided to sit in on some of her calls. Her manager then sought advice from HR who, without knowing about her menopausal symptoms, recommended disciplinary action be taken. During the disciplinary meeting, Ms Lynskey raised her menopausal symptoms as a mitigating factor, however, this was not accepted by Direct Line. As a result, Ms Lynskey received a 12-month written warning, together with a "success plan" (i.e. a performance improvement plan). Her mental health deteriorated following the written warning, but she continued to try to work.

In July 2021, Ms Lynskey went off sick due to stress at home. An Occupational Health report was obtained, which recommended that Ms Lynskey have a phased return to work and stated that it was "likely" that she was disabled under the Equality Act 2010. In addition, it was suggested that her

targets be removed until her symptoms improved. During this period, Ms Lynskey received enhanced sick pay. She was entitled to receive this benefit for up to 26 weeks, however, Direct Line chose to withdraw it after only 13 weeks.

Upset by the outcome of the disciplinary and the decision to remove her enhanced sick pay, Ms Lynskey challenged these decisions by raising a grievance in November 2021. Her enhanced sick pay was reinstated, but the disciplinary warning was not reversed. She remained off sick. In May 2022, Ms Lynskey resigned as result of the above treatment and brought claims in the Employment Tribunal for constructive unfair dismissal, disability, age and sex discrimination.

### **What was decided?**

Given the length of time that had passed between the events complained about and Ms Lynskey's resignation, the Tribunal rejected the claim of constructive dismissal. It also rejected the sex and age discrimination claims but found that there had been disability discrimination.

The Tribunal agreed that Ms Lynskey's menopausal symptoms amounted to a disability under the Equality Act 2010 as her symptoms had a significant impact on her day-to-day activities and her ability to perform at work. In particular, it concluded that Ms Lynskey was treated unfavourably because of something arising out of her disability in three instances, namely the appraisal rating, the written warning and the decision to withdraw the enhanced sick pay (even though this was eventually reversed).

### *Appraisal rating*

As regards the appraisal rating, it was found that the rating did not take into account the fact that Ms Lynskey was performing at the best of her ability in light of her symptoms. The Tribunal was also critical of the link between the appraisal rating and Ms Lynskey's pay award. It noted that *"need for improvement is inherently unfavourable if the person, through disability, cannot, in fact, improve, or meet the required standards"*. Whilst Direct Line identified high quality customer service as a legitimate aim, it failed to provide any evidence showing how linking pay awards to appraisal ratings achieved this aim. The Tribunal took into account Ms Lynskey's previously good appraisal ratings and the fact that she had informed Direct Line that she was struggling as a result of her menopausal symptoms.

### *Written warning*

Turning to the written warning, the Tribunal applied the same analysis as above and explained that the disciplinary process and written warning were unfavourable treatment because of something arising in consequence of Ms Lynskey's disability. In addition to the substantive unfairness, both the disciplinary investigation and meeting had been conducted by Ms Lynskey's manager, falling foul of the Acas Code on Disciplinary and Grievance Procedures, and ignoring Direct Line's internal policies which stated that managers ought not to be involved. The manager also failed to consider Ms Lynskey's symptoms as mitigating factors when deciding on the appropriate sanction.

### *Withdrawal of enhanced sick pay*

The Tribunal also concluded that the decision to withdraw Ms Lynskey's enhanced sick pay after 13 weeks was unfavourable treatment. This decision was made by her manager because it was considered that she was not doing enough to return to work and withdrawing sick pay would force a return. This was despite the medical evidence available, and Ms Lynskey regularly engaging with her GP and occupational health.

Finally, the Tribunal decided that Direct Line ought to have referred Ms Lynskey to occupational health at the onset of her symptoms to ensure that she was supported and that reasonable adjustments were made at an early stage. Further, they had failed to make adjustments to the telematics role that would have helped her manage her symptoms.

The Employment Tribunal awarded Ms Lynskey compensation in the amount of £64,645. This included compensation for loss of earnings as well as an award for injury to feelings due to the impact of the loss of her job. Unusually, an aggravated damages award was made due to Direct Line's failure to concede Ms Lynskey's disability status earlier on in the Tribunal process – it was only during the final hearing that Direct Line conceded that it knew, or ought to have known, about her disability.

### **What does this mean for employers?**

Employers are under a duty to make reasonable adjustments for disabled employees and to ensure that such employees are not subjected to unfavourable or less favourable treatment. This extends to all aspects of work, including performance. This case is a sobering reminder that it can be challenging to deal with performance issues which intersect with disability.

If performance issues arise where an employee is struggling with menopausal symptoms or other symptoms which could amount to a disability, it is important to seek early legal advice to avoid any pitfalls. Remember to engage your occupational health services early on if appropriate and consider and implement the recommendations made in any occupational health report.

This decision also highlights the need for continued awareness around the menopause. Frequent training for managers is vital to ensure they are equipped to handle such matters and also to ensure that employees who are suffering with symptoms are treated fairly and supported.

[Lynskey v Direct Line Insurance Ltd](#)

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues arising out of this decision please contact Blair Wassman**

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