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Department for Work and Pensions and Department for Health and Social Care Consultation on Health is everyone's business: proposals to reduce ill health-related job loss

Response from the Employment Lawyers Association

7 October 2019

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Introduction

The Employment Lawyer's Association ('ELA') is a non-political group of specialist in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulation.

The Legislative and Police Committee of ELA set up a working party which was co-chaired by Ivor Adair of Fox and Partners and Elizabeth Drake of the Metropolitan Police's Directorate of Legal Services to respond to this consultation paper. A list of the members of the ELA working party is at the end of this paper.

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Opening Remarks

Whereas the purpose of these proposals appear to be laudable, many ELA working group members expressed concerns that the proposed 'right to request work(place) modifications' risk introducing undesirable complexity and confusion into what is already a complex area (where the protections of the Equality Act 2010 are often engaged). This could diminish the effectiveness of our equality laws and in some cases, provoke discord in employment relations. Some other ELA working group members took the view that a straightforward process need not impose an unduly onerous burden on employers and might facilitate benefits to workers' health and encourage preventative action in appropriate circumstances.

Chapter 1: What needs to change

Q1. Do you agree that, in addition to government support, there is a role for employers to support employees with health conditions, who are not already covered by disability legislation, to support them to stay in work?
Strongly agree, agree, neither agree nor disagree, disagree, strongly disagree.

Agree

Q2. Why do you think employers might not provide support to employees with health conditions not already covered by disability legislation to help them stay in work?
Open question.

In ELA working group members' view, it is not uncommon for an employer to lack clarity on whether a worker will be protected by the Equality Act 2010 ('EqA 2010') as without an Employment Tribunal ruling on the matter, or one of the specified illnesses (such as cancer), it can be unclear whether the threshold is met. This is particularly so where the impairment is not obviously physical, such as with anxiety or depression, or neurodiverse conditions (such as attention deficit disorder, autism, dyslexia or dyspraxia). As such, many employers do not in the experience of ELA working group members approach the issue from the perspective of whether or not the individual is, or is not, protected by the EqA 2010. Employers, instead consider whether there are factors which indicate the individual may be covered by the EqA 2010.

As a result of this approach, some ELA working group members felt the existing legislative framework of reasonable adjustments and flexible working (set out in the EqA 2010 and the Employment Rights Act 1996) does encompass many employees who may not (if tested at Tribunal) fall within the scope of the legislation. However, other ELA working group members took the view that some employers wrongly focus on things the individual can still do, despite their impairment (*Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12* makes clear that the focus should be what the employee cannot do because of their impairment) and will proceed on the basis that the individual is not disabled for the purposes of the EqA 2010, even where it is suspected (or potentially known) the individual has a condition. As such an employer's approach to ill health at work can depend on the conspicuousness of the condition, its longevity and the impact upon the individual's ability to do their job.

There are also additional barriers to a proper evaluation of whether an individual is disabled or not, such as where there is a stigma to the condition (which might prevent full disclosure by the employee). There are a number of combinations of factors which ELA working group members encounter (in advising their clients) and no one scenario will be the same.

Much depends on the size of the business, ethos of the employer, sector in which they work and the type of health condition(s) the employee is experiencing. However some recurring challenges that employers can struggle with are:

i. ***Resource.***

All organisations can struggle with resourcing adequate support due to absences or adjustments. While resource constraints is a commonly acknowledged issue for smaller businesses, ELA working group members considered that it is also a significant issue for some larger organisations particularly in some sectors. For example, retailers are currently experiencing significant budgetary constraints due to declining sales and the rail industry is facing significant review/change.

Larger employers, whilst having additional resources, often have to handle multiple health-related employee issues, for example balancing a number of different types of absence, illness and impact (often within the same teams or departments).

Other employers operate in sectors where stress and anxiety are prevalent (ELA working group members have seen this particularly for employees working in social care, local authorities and teaching), leading to absence issues for a high percentage of their staff which in turn may impact the remaining workforce's health. These employers can struggle to break this cycle.

ii. ***Workplace Relationships***.

The strength of the personal relationship between the employee and their direct manager (or HR) can influence how an ill-health matter is dealt with. Internal politics and unconscious bias can also play a significant part in whether an employee is heard, and supported. Where workplace relationships are poor there can often be less of a drive for the managers to accommodate the needs of an ill employee. This can be amplified where the condition carries a stigma.

Managers can also be concerned about the implications of engaging with employees about their health issues directly, because of a range of concerns. For example, line managers can feel they are expected to be 'experts', and fear putting themselves at risk of liability or simply do not know how best to approach a difficult conversation.

iii. ***Knowledge***.

Some ELA working group members felt that employers were unaware of the benefits of facilities and organisations that may be able to assist (such as Access to Work). Where there is awareness of such assistance there are often time and cost implications for employers in obtaining the necessary guidance and knowledge to handle situations and minimise the risk for their business.

Some members commented that some employers were reticent to seek outside guidance for fear of creating a potential liability going forward (should the individual be found to be protected by the EqA 2010).

iv. ***Time/disruption***.

The time commitment required from managers (who are often themselves under pressure to meet targets) to deal with individuals with health conditions can be a factor in employers not supporting individuals to remain in work.

The value of retaining individuals who may not be considered to be reliable or productive over the medium term (while suffering ill health) may lead employers to consider dismissal as a 'quick fix' because of the feeling that resources could be better spent elsewhere, rather than providing support to keep the individual in work.

Some ELA working group members noted that employers may consider the risk that an employee who is ill (but is not considered disabled within the definition set out in the EqA 2010) may, as time progresses, become protected by the EqA 2010. Where employers are unscrupulous or under extreme budgetary pressure dismissal of an unwell employee, not protected by the EqA 2010, on grounds of capability, may be considered to be a risk worth taking.

v. ***Communication.***

Some ELA working group members have had experience of situations where individuals had been unclear regarding what they may need to support them, or are not consistent in communicating the type of support they need.

Health conditions (both physical and mental) can be extremely personal and both parties can find it awkward to hold open discussions about what the issue is and what could be done to assist the individual to stay at work / remove the disadvantages the health condition causes.

The individual may struggle to communicate openly to raise the type of measures which may assist (sometime for fear of reprisal or not wanting to be perceived to be making a "fuss"). In other cases the type of measures being requested may be inconsistent. This may be because their needs change but can also be because they may not be best placed to identify their own support needs and may change their view on their preferred approach frequently. For this reason, ELA working group members will often recommend Occupational Health ('OH') support is obtained by the line manager.

vi. ***Mental vs physical health***

ELA working group members often see a discrepancy between the level of support provided to employees with mental health conditions, in comparison to physical conditions.

There are a range of reasons for this, including the stigma attached to mental health, which creates a perception that the illness is somehow less serious or 'genuine' and may be relied upon, as a strategy. However, a further important consideration is that, with mental health as opposed to physical health there can be

additional complications. Firstly, as mental health conditions are less visible, there is more onus on the individual to disclose their condition and explain what it is about their condition that makes their job difficult. This means that, even if the mental health condition would (if tested at Tribunal) amount to a disability under the EqA 2010, the employee may not receive adequate protection as a result of the employer's lack of knowledge, unless the employer had specifically enquired (which may encourage employers not to enquire) or the employee chooses to disclose. Secondly, there is less guidance about how to support people in the workplace with mental health conditions and so employers often do not know how to help, even if they want to do so. In addition, the support required needs to be tailored to ensure it is effective for that particular individual; one size does not fit all. Therefore, the onus is again on the individual to say how they want to be supported and they may not feel confident or comfortable enough to discuss that with their employer. Finally, the medical prognosis for a physical injury can often be clearer than that for a mental illness.

Chapter two: a clear legal framework for employers

Q3. Do you agree that a new 'right *to request work(place) modifications'* on health grounds could be an effective way to help employees to receive adjustments to help them stay in work?

Yes */ No / Don't know (with reasons)*

Workers can of course already request modifications for a period whilst unwell, or may request modifications to their working pattern using the right to request flexible working. Some ELA working group members felt the proposal could help employers to monitor problems within the working environment and potentially to take preventative action in appropriate circumstances.

Some ELA working group members considered that having a legal right to request workplace modifications could increase awareness that modifications could be requested and increase the likelihood of modifications being agreed. Taking the right to request flexible working as a comparison, a basic process need not impose an unduly onerous burden on employers, and could facilitate a potentially significant benefit to workers and their health. It could also help employers to monitor problems in the working environment, and potentially to take preventative action in appropriate circumstances. However, other members felt that given the complexity of the issue and the significant existing frameworks, within which any new right to request would sit, the proposal may not be an effective way to help employees to receive adjustments to help them stay in work.

The introduction of another process for some employers may be easily absorbed but for others would likely compound the existing issues regarding budget, time and resource (as detailed in Q.2). Devising a system that works for employers of all size/resource and employees with varying health needs would likely involve a high level of complexity or such a degree of flexibility that employers would be able to avoid having to implement any real changes in the way in which they approach the issue. Introducing another process, to an already complex area, may increase the likelihood of grievances (and/or litigation) for

infringements or non-compliance thereby placing further strain on employers and employment relations.

In ELA working group members' view, it is important that guidance on how this proposed 'right to request work(place) modifications' is clear and easily accessible. However, ELA working group members are concerned that with more guidance comes the potential for employers to become further confused (or even deterred in some instances) from trying to assist employees to return/remain in the workplace (as further noted in Q.49 onwards).

In terms of considering how this right would integrate within the existing framework in the ELA working group's view there was potential for confusion by employers and employees. Further, some ELA working group members considered that a new 'right to request work(place) modifications' may detrimentally impact on persons to whom the higher levels of protection are afforded by the EqA 2010 because there are factors to indicate that an individual may be disabled (see response to Q.2). This is because the employer may shift focus from their positive duty (to make reasonable adjustments) to the worker's right to request (workplace modifications) and in doing do, the new legislation could effectively diminish workplace protection.

Q4. If the government were to implement this new right to request work(place) modifications, who should be eligible?

- ***Any employee returning to work after a period of long-term sickness absence of four or more weeks;***
- ***Any employee with a cumulative total of 4+ weeks sickness absence in a 12-month period;***
- ***Any employee returning to work after any period of sickness absence;***
- ***Any employee who is able to demonstrate a need for a work(place) modification on health grounds;***
- ***Other, please state.***

In the ELA working group's view a combination of eligibility scenarios or conditions would likely be a sensible approach, for example any employee with a cumulative total of 4+ weeks sickness absence in a 12-month rolling period and who could demonstrate a need for a work(place) modification on health grounds.

In addition, ELA working group members believe that consideration of other categories of worker should be considered (at the very least to sit in line with the protection offered under the EqA 2010 – which protects a wider population than the Employment Rights Act 1996 – see section 83(2), EqA 2010) to ensure a consistent approach is taken by employers.

Some ELA working group members considered that, given the aim of reducing sickness absence, it may be appropriate that the right be made available to any employee able to demonstrate a need for work(place) modification on health grounds in order to reduce the chance of sickness absence occurring in the first place.

There may also be a risk that by introducing trigger points that some less scrupulous employers may look to dismiss prior to an individual becoming eligible in order to avoid having to deal with requests (and without there being any likely recourse for the individual unless they could show they were in fact protected by the EqA 2010).

Q5. How long do you think an employer would need to consider and respond formally to a statutory request for a work(place) modification?
·0-4 weeks;
·5-8 weeks; or
·9-12 weeks?

In the ELA working group's view 0-4 weeks would be appropriate for an initial discussion/meeting to have taken place, albeit there would need to be some flexibility built in to allow for the scale/scope of a request, medical assessments (where required) or appropriate reviews of the proposed modifications. Delays as a result of the employee's own absence would need to be built into the process for example where they may not be available to meet (as employers should not be penalised where the delay is not theirs).

As such, a framework which sets a timeframe for an initial meeting, ability to extend where further information is required (with reasons given for any such extension), and then a long-stop date might be more practical.

Q6. Do you think that it is reasonable to expect all employers to consider requests made under a new 'right to request' work(place) modifications?
Yes / no / if no – why?

Employers vary vastly in terms of their size and resources. The appropriate support must be available to enable smaller employers, in particular, to understand the implications of any change in the law and what is required of them. Further, there is a real risk that an overcomplicated and confused regime emerges with blurred edges with regard to categorisation of an employee's request and the duties which flow from that. For example, a disabled employee would have a right under the new regime alongside the duty on their employer to make reasonable adjustments as contained in the EqA 2010. A proper evaluation of the request is important to ensure a successful resolution of the issue.

In the ELA working group's view it is worth noting that the EHRC Code advises that it is good practice for an employer to ask a disabled employee about possible adjustments and agree any proposed adjustments in advance (paragraphs 6.32 and 17.80, EHRC Code). In particular paragraph 6.32, provides:

> *"It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made."*

To provide a written response setting out their decision to the employee?
Yes / no / if no – why?

A written response would need to record the basic decision as well as the reason(s) where a request has been refused, and any alternative proposal from the employer.

Q7. Please identify what you would consider to be legitimate business reasons for an employer to refuse a new right to request for a work(place) modification made on health grounds:

- **The extent of an employer's financial or other resources**;
- **The extent of physical change required to be made by an employer to their business premises in order to accommodate a request**;
- **The extent to which it would impact on productivity**;
- **Other – please state**. **Please give further views in support of your response.**

ELA working group members consider that regard ought to be given to current law and guidance regarding whether an adjustment is reasonable (or not), where the duty arises in relation to people covered by the EqA 2010.

Some ELA working group members are concerned that the introduction of the concept of "legitimate business reasons" introduces undesirable legal complications in this area and potential confusion for employers who will be faced with two different approaches in relation to reasonable accommodations for employees with health problems.

On the one hand, there may be a legitimate business reasons for an employer to refuse a request; on the other, the employer may nevertheless have to evaluate whether a positive duty to make an adjustment is triggered under the EqA 2010 and whether, on an objective basis this can be refused. If the refusal is unreasonable the individual may have a claim under section 20 of the EqA 2010 (indirect disability discrimination claims may also arise on the same facts). *Smith v Churchill's Stairlifts plc [2006] IRLR 41,* confirms that the test of reasonableness is objective and the EHRC Code provides that,

> *"ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case"* (see paragraph 6.29).

The Disability Discrimination Act 1995, at section 18B, set out the following factors that had to be taken into account when determining whether an adjustment was reasonable. These are:

- The extent to which the adjustment would have ameliorated the disadvantage.
- The extent to which the adjustment was practicable.
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities.
- The financial and other resources available to the employer.
- The availability of external financial or other assistance.
- The nature of the employer's activities and the size of the undertaking.
- Where the adjustment would be taken in relation to a private household, the extent to which the step would disrupt that household or any of its residents.

These factors are not all set out in the EqA 2010, but they are listed in the EHRC Code as factors which might be taken into account when deciding what are reasonable steps for an employer.

In relation to the cost of any adjustment the EHRC Code states that:

> *"even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms - for example, compared with the costs of recruiting and training a new member of staff - and so may still be a reasonable adjustment to have to make"* (see paragraph 6.25).

In *Cordell v Foreign & Commonwealth Office UKEAT/0016/11*, the EAT gave guidance on how the issue of cost in reasonable adjustments cases, should be approached. The EAT held cost is "*one of the central considerations in the assessment of reasonableness*", although it must be weighed with other factors including the degree of benefit to the employee, the EHRC Code of Practice as well as other factors.

Q8. The government thinks there is a case for strengthened statutory guidance that prompts employers to demonstrate that they have taken early, sustained and proportionate action to support employees return to work. Do you agree? Yes – no – maybe – don't know

ELA working group members note that the Disability Discrimination Act 1995 contained a non-exhaustive list of potential adjustments that might be required, which were not replicated in the EqA 2010 but are included in the EHRC Code.

Paragraph 6.33 of the EHRC Code includes such examples as:

- Providing information in accessible formats. This could include producing instructions and manuals in Braille or on audio tape.
- Allocating some of a disabled person's duties to another worker. For example, a job involves occasionally going onto the open roof of a building, but the employer transfers this work away from an employee whose disability involves severe vertigo.
- Transferring a disabled worker to fill an existing vacancy. An employer should consider whether a suitable alternative post is available for an employee who becomes disabled (or whose disability worsens) where no reasonable adjustment would enable the employee to continue doing their current job.
- Altering a disabled worker's hours of working or training. This could include allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability, or permitting part-time working or different working hours to avoid the need to travel in the rush hour.
- Assigning a disabled worker to a different place of work or training, or arranging home working. For example, relocating an employee's work station to an accessible place.
- Modifying performance-related pay arrangements. For example, a disabled woman who is paid purely on her output needs frequent short additional breaks during her working day – something her employer agrees to as a reasonable adjustment. It is likely to be a reasonable adjustment for her employer to pay her at an agreed rate (for example, her average hourly rate) for these breaks.

The EHRC Code points out that it may be necessary for an employer to take a combination of steps.

Statutory guidance would be welcome, but it must fit in with what already exists in terms of guidance and literature to avoid confusion. There is of course a balance to be struck here between imposing obligations on busy employers, which could become onerous, and ensuring that they turn their minds to this issue and allow it sufficient weight.

Q10. If yes, would principle-based guidance provide employers with sufficient clarity on their obligations, or should guidance set out more specific actions for employers to take?

- **Principle-based guidance provides employers with sufficient clarity;**
- **Guidance should set out more specific actions for employers to take;**
- **Don't know;**
- **Other – please state.**

In the view of ELA working group members, guidance which is practical and useful to employers should contain both principles and specific examples and case studies, as opposed to "one size fits all" actions. The guidance should take into account employers' differing resources and expertise at dealing with the issues at hand. In ELA working group members' experience, employers are often hesitant and concerned they may act in the wrong way in relation to an employee's return to work. Some guidance which acknowledges the behavioural reality of this would therefore be valuable.

Guidance in the style of the Advisory Conciliation and Arbitration Service ('ACAS') may be a useful reference point, since this is couched in practical terms and often contains a variety of examples within different working contexts. Furthermore, it is vitally important that guidance is collected in a central place and disseminated widely and appropriately so that it reaches employers to give them the best possible chance of compliance (views on guidance are outlined further in responses to questions from chapter 4, see below).

Q11. The government seeks views from employers, legal professionals and others as to what may be the most effective ways in which an employer could demonstrate that they had taken – or sought to take – early, sustained and proportionate action to help an employee return to work. For example, this could be a note of a conversation, or a formal write-up.

In the ELA working group's view, record-keeping is important, not only to evidence the efforts made by the employer in case of legal challenge, but also to identify patterns and to prompt intervention, where appropriate, at an early stage. HSE guidance gives the following examples of situations where record-keeping could help identify situations where aspects of the particular role might be actually causing the ill-health:

- 'a number of cases of back, joint or muscle pain amongst employees who carry out a particular task;
- frequent minor but vague illness in areas where deadlines are very tight, workloads are challenging or employees have little control over their work.'

An effective way of record-keeping is to set up a case reference for each sickness absence, and log each communication with the employee under that case reference, so that everything in relation to that particular absence is in one place, and can be located easily. This is particularly helpful in cases where there are documents from multiple sources, such as occupational health, specialist doctors, GPs, as well as the employee him / herself.

The record will not of itself demonstrate sufficient action by the employer in every case: it is also key to have an appropriate person regularly review the information recorded and consider it as part of the bigger picture. This applies both within the case file for each absence, where it is important to periodically review the overall position and check that the actions being taken are still appropriate; and also within the wider working environment, to check, as in the above examples, whether any patterns emerge which could indicate causative problems inherent in a particular role or working environment. If those problems can be addressed the employer may well be able to reduce the incidence of absences relating to those problems.

Q15. All respondents: in order for employers to provide effective return to work support, what action is needed by employees? Select all that apply.

- **To have discussions with their employer to identify barriers preventing a return to work and to inform workplace support;**
- **To agree a plan with their employer to guide the return to work process;**
- **To engage with OH services; or**
- **Other – please state.**

In the view of ELA's working group, all the above suggested actions can be beneficial. In ELA working group members' view the actions needed by employees are likely to depend on the length of and reason for the absence and the circumstances of each case.

Unless there is clearly no cause for concern on either side, a discussion with the employer is likely to be appropriate, if only for both parties to update the other vis-à-vis recovery and developments during the absence, and to check whether any adjustments need to be made.

Where either the employer or (more likely) the employee anticipates that there may be a barrier preventing a return to work, an employee / employer discussion is likely to be necessary and agreeing a plan to guide the return to work process will be appropriate. ELA working group members believe that the discussion should conclude with both parties understanding (and, it is hoped, agreeing) a plan to guide the return to work process; depending on the situation, this may or may not include a need to engage with OH services. Some situations will be more obvious than others: an employee returning to work with their leg in a plaster cast will not be able to resume any driving duties, for instance, so this is likely to warrant a discussion with the employer but probably not a consultation with OH; by contrast an employee returning from having had a heart attack will likely need a more in-depth discussion about work(place) adjustments required and this may require input from the employee's medical professional and/or engagement with OH services.

The majority of information that an employer will use to decide how to provide effective return to work support will come from the employee, or a professional authorised by the

employee to release the information, so it is for the employee to notify the employer of the situation, and engage in reasonable discussion regarding reasonable and proportionate adjustments that are likely to be required upon returning to work. In ELA working group members' view it may not always be appropriate to insist that the employee engage with OH services, particularly where the employee has already provided sufficient medical information, and/or where there is a perceived view that OH will be unsympathetic or biased in favour of the employer.

While considerable guidance on how to facilitate the return to work is already available from a number of charities and government bodies, ELA working group members' view is that a structure or agenda for return to work discussions (prepared with involvement from charities and government bodies who deal with ill health) might assist both employers and employees and a pro forma could be annexed to government guidance.

Q16. All respondents: do you think the current SSP system works to prompt employers to support an employee's return to work?
Yes – no – maybe – <u>don't know</u>. Please give reasons for your answer.

In the experience of ELA working group members, the current system of SSP is unlikely to prompt employers to support an employee's return to work. Smaller employers may become frustrated by an employee's absence due to the commercial pressures put on the rest of the workforce. SSP can be seen as an additional burden they need to bear but, in itself, not a cost that prompts an employer to support an employee return. Many smaller employers are nervous about contacting employees to discuss their return to work, particularly in cases involving mental health, as they fear exacerbate an employee's condition and exposing themselves to claims. Larger employers with dedicated HR support are more likely to intervene sooner to support an employee's return to work, but ELA working group members do not believe this is influenced by SSP but by business demands and a fear that the longer an employee is absent the more difficult it may be to integrate them back into the workforce.

Q17. All respondents: what support would make it easier to provide phased returns to work during a period of sickness absence?

Whilst there is no specific legal framework for a phased return to work, there are legal frameworks in relation to the duty to make reasonable adjustments (as well as under health and safety legislation in relation to e.g. risk assessments). ELA working group members consider implementing an additional legal framework to be undesirable and a more judicial and effective approach would be to implement guidance as suggested below.

At present, employers have little formal guidance on how best to manage a phased returned to work and, similarly, employees have nothing to guide their expectations. In ELA working group members' experience it is therefore not uncommon for either employees and/or employers to believe that they must accept recommendations from medical professionals (whether from a GP or occupational health) without first assessing: (i) whether there is any legal obligation to agree to those adjustments; (ii) whether or not those adjustments are likely to be effective; and (iii) whether or not those are adjustments or amendments that the employer can indeed accommodate or offer.

With the above in mind, the provision of clear guidance on duties and responsibilities of employers, as well as worked examples, is likely to be of assistance. This should be readily available to both employees and employers and could perhaps be something that employers (and GPs/ occupational health professionals) could refer to in their discussions with employees (and, in the case of OH, their accompanying reports).

As it is not uncommon for the employment relationship to become strained or frayed in these circumstances, particularly where either side has unequal expectations of the other (whether in terms of the ability to return to work or the ability to accommodate adjustments or a phased return) guidance should seek to set out both parties' responsibilities and roles clearly and compassionately, with a view to encouraging employer and employee to work together, rather than in isolation.

The proposed adjustments to the use of SSP to enable an employee to receive part wage and part SSP during a phased returned to work would be a welcome element of such support and would mirror similar precepts relating to company sick pay as operated by a number of employers.

Q 25. All respondents: how could a rebate of SSP be designed to help employers manage sickness absence effectively and support their employees to return to work?

In the ELA working group's view, whilst a rebate could be useful in encouraging employers to adopt best practice, the operation of such a scheme would need to be straightforward and not add a further layer of complexity to what is already a complex area (particularly if HR and payroll staff are additionally required to operate SSP and wages alongside each other for the same employee).

Any rebate should not be outcome-focussed, as this would be somewhat of a blunt tool – i.e. if an employee fails to return to work, there is no rebate. Arguably, operating in this manner could place an incentive upon employers to accept employees back to work when the employee is not capable of doing so. Further, making any rebate contingent on, for example, employees subsequently being deemed "disabled" and/or leaving employment through ill-health or otherwise having a period of long-term sickness absence (e.g. over six months) could encourage employers to push employees into these categories, which would detract from the overall aim of encouraging employees back into the workforce.

Therefore, whilst it would seem sensible for any rebate to be based upon employers following "best practice", there are challenges in this approach as well. For example, how would an employer actually demonstrate that they follow "best practice"? Simply sending off the relevant sections of the company handbook would merely show what the relevant employer has written down, it would not demonstrate how the employer in fact operates its sick pay scheme. Equally, requiring a more detailed audit (whether of documentation or by way of a brief telephone interview with the relevant employee) prior to any audit being granted would equally seem to be overly onerous and add to the workload for the Department for Work and Pensions.

Some ELA working group members consider that one approach is to say that all businesses under a certain revenue size and/or employee threshold would be entitled to an automatic

rebate of a percentage of SSP but that additionally, in certain circumstances (for example in relation to employees who subsequently resign due to ill-health or, at the other end of the spectrum, who return to work on a phased return whilst receiving statutory sick pay), the employer will qualify for a partial rebate of SSP for a period of up to, say, three months (the time period being limited so as not to encourage employers to keep employees on a phased return for longer than is absolutely necessary).

Chapter three: occupational health market reform

Q27. In your view, would targeted subsidies or vouchers be effective in supporting SMEs and the self-employed to overcome the barriers they face in accessing OH?

ELA working group members consider that subsidies via grant applications by SMEs/self-employed people will work better than vouchers in light of the administration that is usually involved in such a scheme.

Q29. In your view, would potentially giving the smallest SMEs or self-employed people the largest subsidy per employee be the fairest way of ensuring OH is affordable for all?

According to parliament statistics there were 5.7 million SMEs in the UK in 2018, which was over 99% of all businesses and that micro-businesses (with 0-9 employees), accounted for 96% of all businesses in 2018.

In ELA working group members' view, the number of employees is therefore not a fair measurement for OH subsidies. As in other areas of government assistance, targeted financial assistance should not be based on size but instead turnover and/or net profit (as some businesses have a very small profit margin, which would mean that they warrant a subsidy more than an employer/self-employed people who make more money).

Q30. All respondents: what type of support should be prioritised by any potential, targeted OH subsidy for SMEs and/or self-employed people?

ELA working group members consider that OH assessments and advice; training, instruction or capacity building (for example for managers and leads); and OH recommended treatments should be included in any potential, targeted OH subsidy.

ELA working group members consider spending monies on a campaign to raise awareness of the following would be appropriate:

- the existence of OH;
- how OH can help businesses;
- the costs of OH (both in using properly and failing to use OH) and available subsidies;
- the importance of providing space, time and a framework for managers and leads in dealing with absence management; and

- the importance to an unwell individual in communications being handled correctly leading to their improved health and well-being, which is ultimately a benefit to their employer.

Q31. Please give reasons and details of any other categories of support you think should be included.

ELA working group members also consider that the following categories of support should be included:

- training for owners/managers as to sickness absence/disability generally and how to handle this from the outset;
- training for leaders and managers in relation to difficult conversations and reintegration; and
- signposting of e.g. physiotherapy, CBT, alternative medication etc.

Q32. How could the government ensure that the OH services purchased using a subsidy are of sufficient quality?

ELA working group members considered that the introduction of a government approved kitemark scheme would be in indication of sufficient quality.

Q35. As an OH provider, expert or interested party, what are your views on private OH providers' involvement in the training of the clinical workforce?

ELA members are interested parties on behalf of our clients.

Some ELA working group members consider that employers and employees would benefit significantly if GPs were to provide information on fit notes such as which work tasks an employee is fit, and not fit, to undertake. ELA working group members appreciate that a lack of resources do not permit this, at present, and OH therefore needs to fill this gap. ELA working group members consider that OH could be made available at GPs surgeries to cover this lack of resource and provide GPs with support.

Q37. As an OH provider, expert or interested party, what changes to the training and development of the OH workforce could support the delivery of quality and cost-effective services?

ELA working group members are interested parties and have limited knowledge of the current arrangements for training and development of the OH workforce. However, resources such as: a universal checklist for the referrer to complete for the assessor in respect of general issues and a tailored questionnaire which can be completed by the manager/owner of the employer with online resources to assist them to do so, may be useful tools to be developed.

Q41. What approaches do you think would be most effective in terms of increasing access to OH services for self-employed people and small employers through the market? Please order in terms of priority:

While ELA working group members can see that the following approaches are all important, we feel their priority should be:

- Use of tech to support OH service provision.
- New service models.
- New ways of buying.

The government may also want to consider:

- Campaigns to "get ready" for the legislation;
- A government OH website;
- Utilising different forms of communication, such as videos, PowerPoint presentations ready to be tailored by SMEs and others, interactive tests etc. like those which were created by the ICO for the implementation of the GDPR; and
- A list of approved OH providers which can be searched by location (using the kitemark).

Q43. As an OH provider, expert or interested party, what more could be done to increase the pace of innovation in the market?

In the ELA working group's view the following are all required:

- co-funding;
- access to finance;
- help with innovation or evaluation;
- commercial advice;

In addition, the government could consider:

- Involving an innovation leader/entrepreneur like someone from "Dragon's Den" or "The Apprentice" to roll out the practical side of the legislative changes based on their experiences/vision;
- Involving certain mental health charities;
- Kitemark Courses;
- Subsidies for OH post-graduate training courses (like teachers);
- Campaigns to "get ready" for the legislation;
- A user-friendly government OH website like the ACAS site with e.g. video content as well as booklets and pro forma information which can be downloaded;
- Utilising different forms of communication, such as videos, PowerPoint presentations ready to be tailored by SMEs and others, interactive tests etc. like those which were created by the ICO for the implementation of the GDPR; and;
- A list of approved/kitemarked OH providers according to area.

Q45. As an employer, what indicators of quality and compliance arrangements would help you choose an OH provider?

Quality marks/kitemarks (provided they are universal i.e. government approved).

Q47. All respondents: how could work outcomes be measured in a robust way?

In the ELA working group's view the only real way to gauge work outcomes would be to require employees, employers/self-employed and OH to provide feedback following OH referrals.

Chapter four: advice and support for employers

Q49. Do you need more information, advice and guidance?

In the ELA working group's view there are already some excellent existing sources of information, advice and guidance, however, the volume of information can be bewildering and the information varies in terms of its quality and user-friendliness. ELA working group members consider that there is a lack of awareness about where the best sources of advice and guidance can be found.

ELA working group members consider that the identification and consolidation of 'core' guidance (from government, the Equality and Human Rights Commission ('EHRC'), the Health and Safety Executive ('HSE') and ACAS) on one website would assist in supporting employers wanting to understand more about managing health in the workplace. A single 'starting point' would aid consistency of understanding and interpretation of legal obligations and assist anyone seeking information, guidance and support. Some ELA working group members also considered that periodic communication exercises and a list of accredited medical specialists could be listed on a core website to give users confidence they are accessing reputable sources of expertise.

Further, some ELA working group members considered that the use of a recognised accreditation ('kite mark') for key third party experts such as Occupational Health Advisers (such accreditation to be overseen by the existing regulatory bodies such as The Faculty of Occupational Medicine) would assist. This would assist organisations and individuals seeking support can be confident that those with the relevant kite mark will have a core level of experience and expertise.

Q50. If so, what content is missing?

As outlined in ELA's response to question 49 there are already some excellent existing sources of information. However, ELA working group members consider that information is lacking in the following areas:

Occupational health and health insurance

ELA working group members consider that it remains difficult for employers who do not already have access to OH guidance and support to know where to source such guidance. In addition, it can be difficult for employers to establish the quality of the guidance they are being provided.

One suggestion could therefore be for a core portal to include information about and web links to the relevant accreditation bodies (such as The Faculty of Occupational Medicine),

and high level guidance about the recognised accreditation bodies and what qualifications an expert Occupational Health Advisor should be expected to have.

Best practice and case studies
Existing guidance such as the Equality Act Code of Practice includes case studies to illustrate the key legal issues in a common sense, practical way. Translating legal and other guidance into 'front line', operational examples can be an effective way of encouraging compliance and good practice. One approach could be to include examples from emerging case law and specialist disability organisations on a core portal.

Local providers of services and advice
ELA working group members consider that employers can find it difficult to establish which organisations are reputable when seeking local 'go to' sources of guidance online. As previously indicated the use of some form of benchmarking/kite mark system and/or a list of providers on a core portal/website would likely assist employers.

Mental health and disability risk assessments guidance and templates
In some of the ELA working group members' experience, employers are familiar with the need to assess hazards in the workplace but little emphasis or attention is given to the risks to mental health. The Holmes-Rahe Stress inventory can also be a useful resource for employers and employees alike to help spot those employees who are at risk of diminishing mental health. In the ELA working group members' view, introducing a template risk assessment that encourages and promotes positive discussions around mental health with all employees would help spot and prevent those at risk and give employers a framework to follow to help ensure work is a positive influence on mental health.

Q51. What would you recommend as the best source of such new advice and information?

ELA working group members consider that the best source of new advice would be the main government portal (GOV.UK). This would be the logical choice and it would be of benefit to avoid 'reinventing the wheel' by promoting any other source.

Q52. As an employer, where do you go for buying advice and support when purchasing, or considering purchasing, OH services?

X Internet search;
X Professional/personal contact;
X Legal sources;
X HR person (in-house or external);

Q53. As an employer, what additional information would you find useful when purchasing, or considering purchasing, OH services?

X Online questionnaire to help you identify what type of services you could benefit from;
X Toolkit that could include information on OH referral and assessment process;
X Basic online information on the process of buying OH services;
X Provider database;
X Comparison website;

EMPLOYMENT
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Appendix

List of members of the working party

Ivor Adair, Fox and Partners: co-chair
Elizabeth Drake, Metropolitan Police's Directorate of Legal Services: co-chair
Eleanor Diamond, Fox and Partners
Jodie Hill, Thrivelaw.
Greg Jones, Greene & Greene
Mark Landon, Weightmans
Fiona Macdonald, Keystone
Liz Parkin, Ashurst LLP
David Regan, Squire Patton Boggs (UK) LLP
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