Watershed

Confidential

How can you create an inclusive business?

27th and 28th March 2023

Ground rules

- Participation. You are your own best resource. Each of you brings a wealth of experience to this session
- Agree to disagree. Everyone should feel free to express themselves. Frank discussions are healthy
- Respect. Respect each other, yourself and the topic
- Ask questions. There are no stupid questions

Programme

09.45 – 10.15	How should your business tackle microaggressions and unconscious bias?	Ian McGlashan
10.15 – 10.45	How can you support your employees' mental health?	Jo Hale
10.45 – 11.15	When does banter become harassment?	Ian McGlashan
	Break	
11.30 – 12.00	How can you lawfully balance flexible working requests with the needs of your business?	Lindsey Murray
12.00 – 12.30	How must you protect your business from discrimination claims?	Ian McGlashan

How should your business tackle microaggressions and unconscious bias?

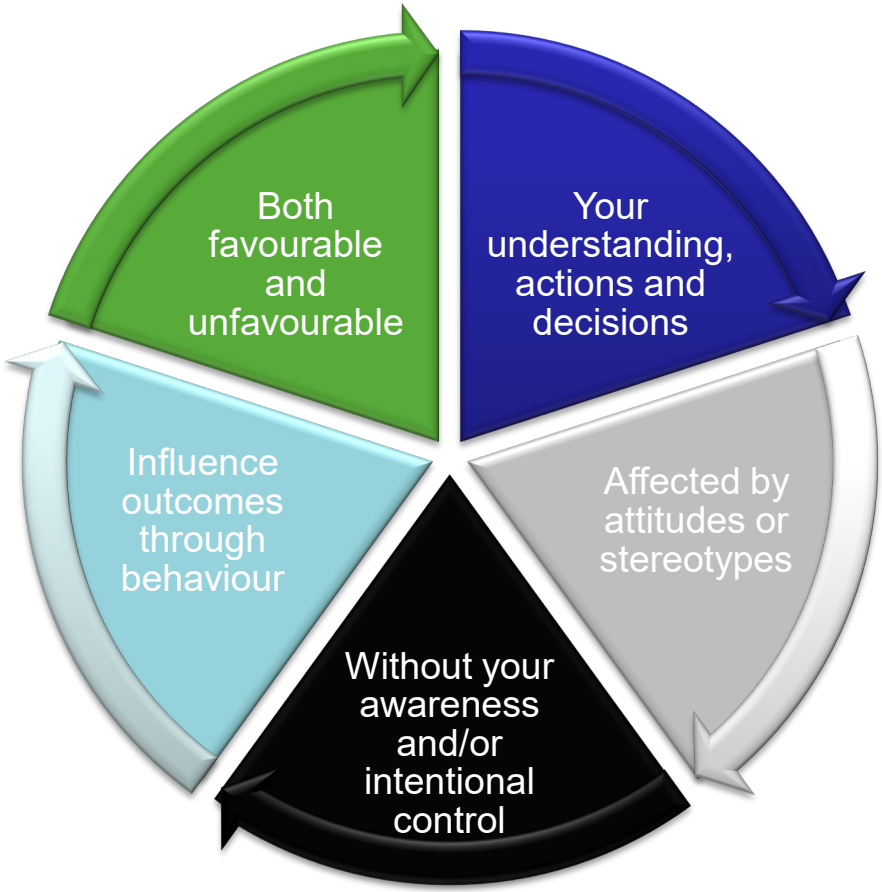
Ian McGlashan

Microaggressions and unconscious bias

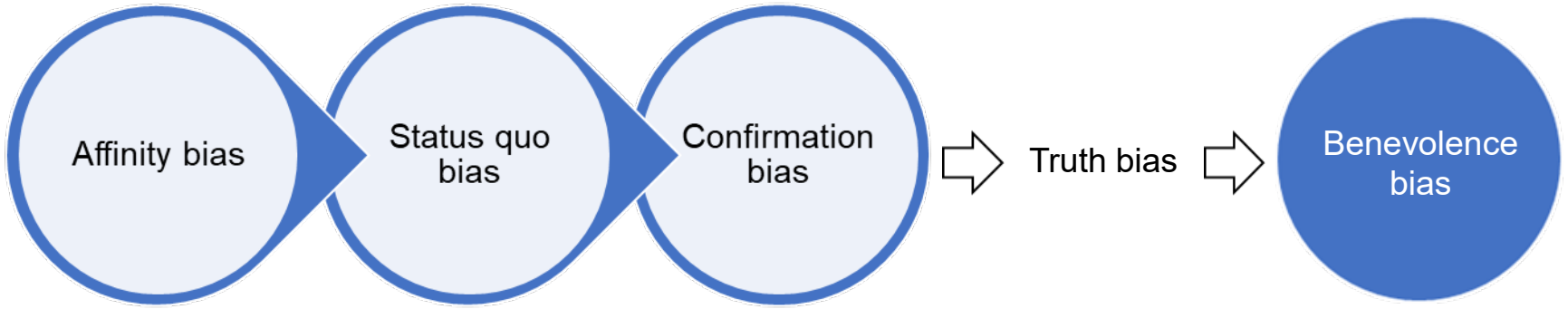
At the end of this session, you will:

- Identify microaggressions and unconscious bias
- Understand how to manage bias
- Understand how to embed positive practices

What is unconscious bias?



Different types of unconscious bias



Did you know that?

… within the first seven seconds of interacting with a stranger, you make an average of 11 judgements about that person. You then subconsciously continue to gather data to justify and maintain these judgements

Microaggression and unconscious bias

Microaggressions are the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to someone based solely upon their group membership

These are usually formed because of unconscious biases

Unconscious biases are social stereotypes about certain groups of people that individuals form outside their own conscious awareness

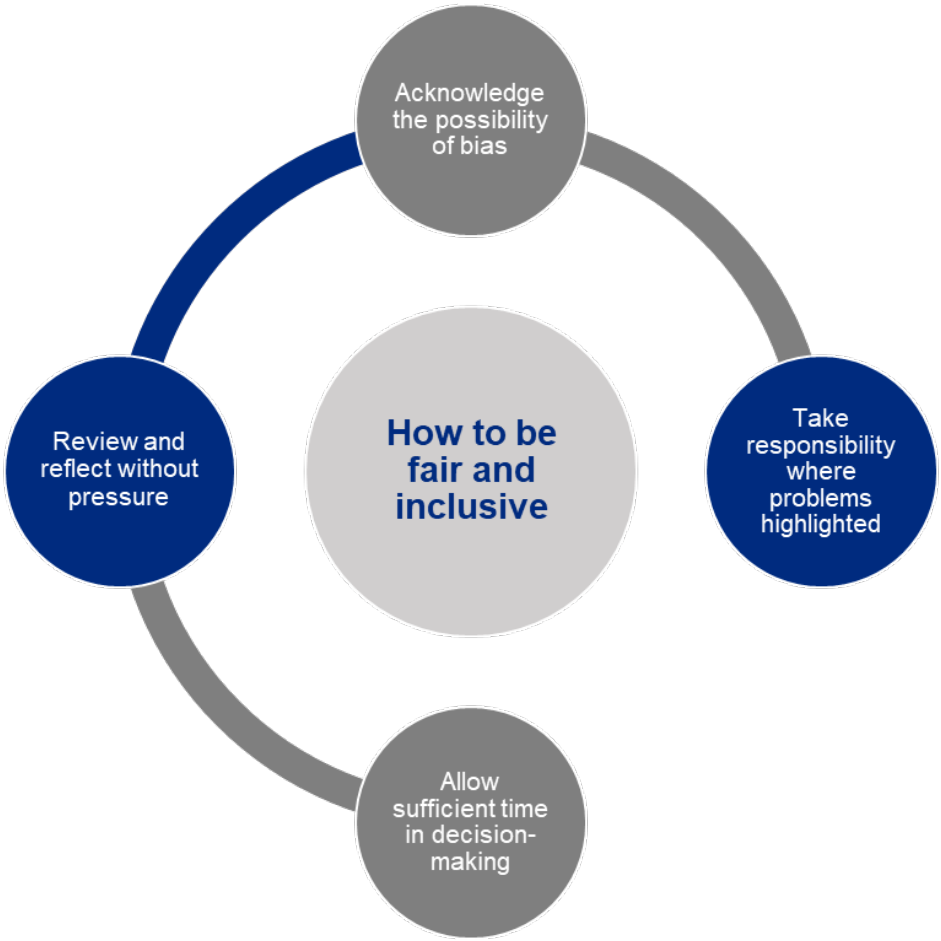
Everyone holds unconscious beliefs about various social and identity groups

Possible microaggressions

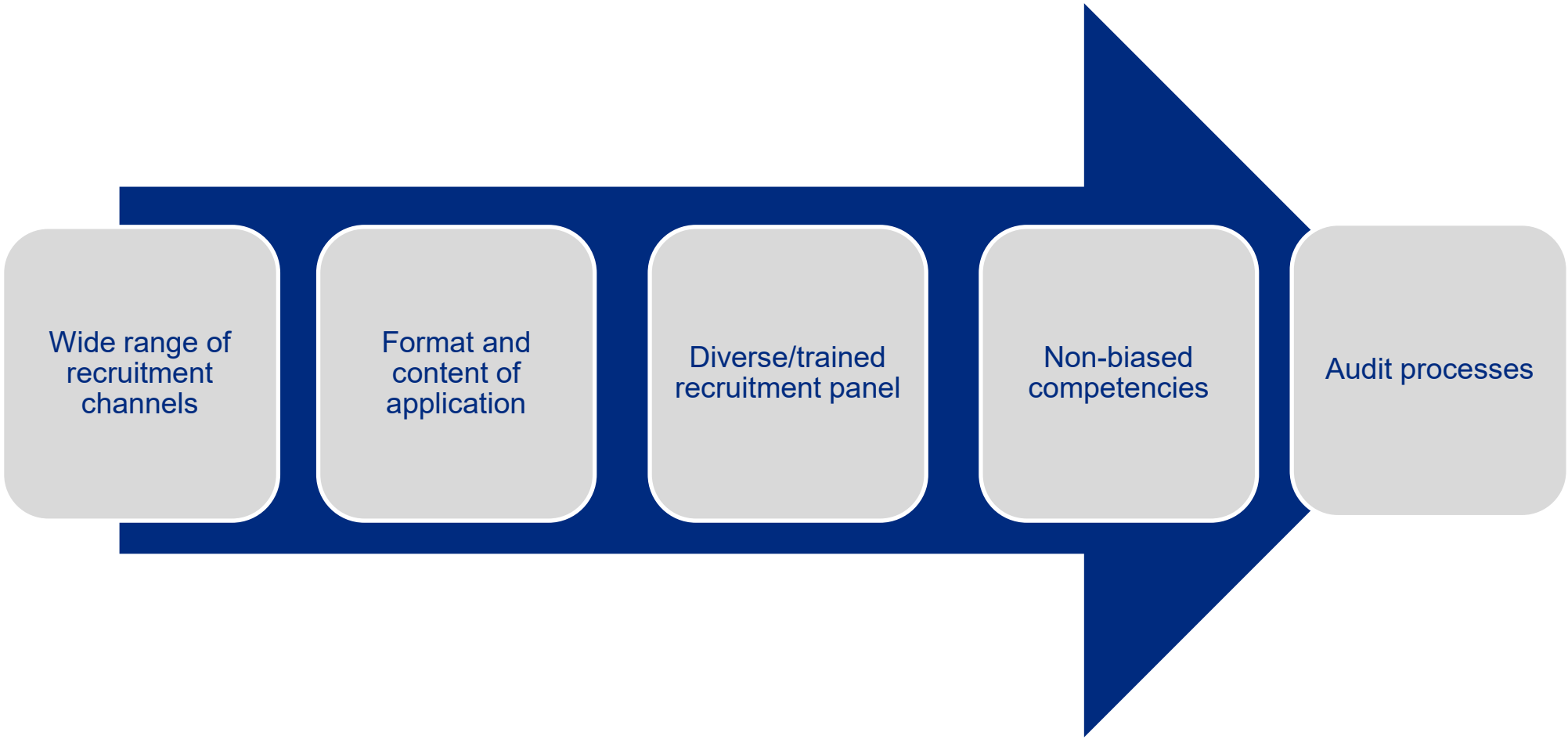
Microaggressions are often communicated through language, so it is very important to pay attention to how we talk. They can also be very subtle. It is often hard to know if you are using microaggressive language or even whether you are on the receiving end.

Some examples of possible microaggressions:

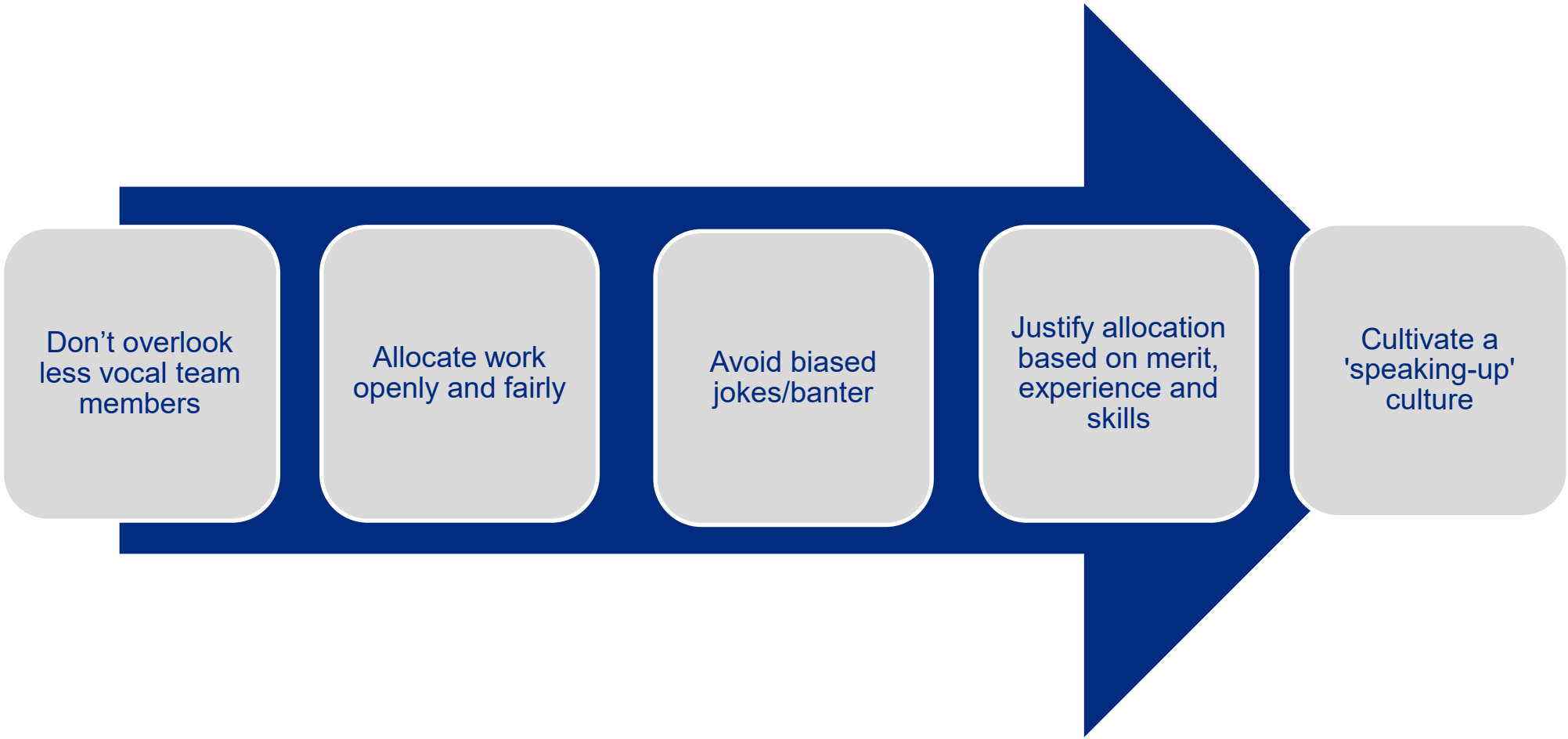
Techniques for managing bias



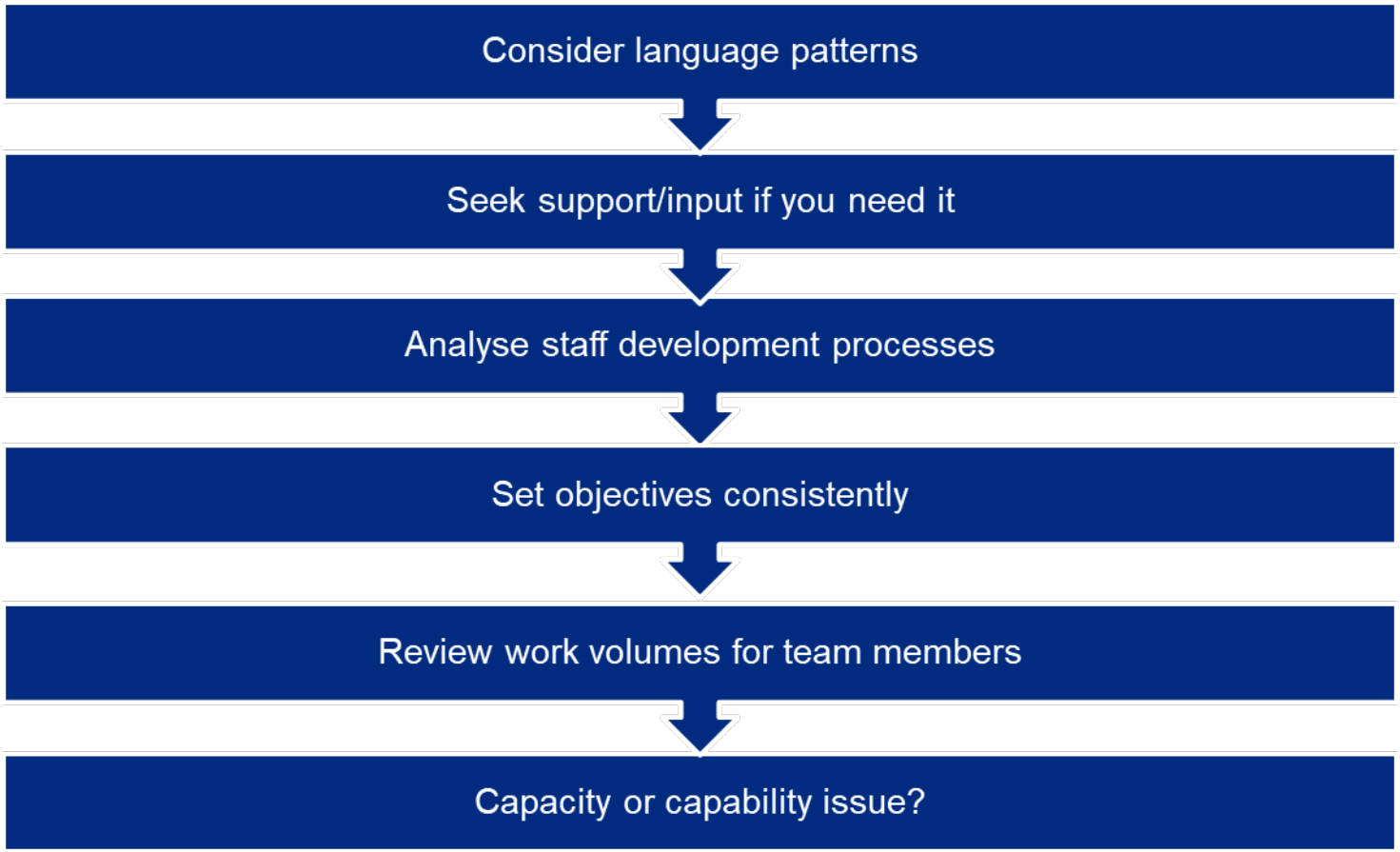
Recruitment



Team meetings and work allocation



Appraisals and staff development



How can you support your employees' mental health?

Jo Hale

How can you support your employees' mental health?

Some statistics

One in four people in the UK will have a mental health problem at some point. While mental health problems are common, most are mild, tend to be short-term and are normally successfully treated, with medication, by a GP.

The latest release from the Office of National Statistics (ONS) about absence in 2021 states that an estimated 149.3 million working days were lost because of sickness or injury in the UK in 2021, equivalent to 4.6 days per worker.

And the main reasons for sickness absence have been minor illnesses and musculoskeletal problems.

This has changed recently because of the impact of the coronavirus (Covid-19) pandemic. In 2021, 'Other' conditions (which includes Covid-19) were the most common reasons for sickness absence, accounting for 26.9% of occurrences. This was followed by minor illnesses, at 21.9%, musculoskeletal problems, at 13.4%, and mental health conditions, at 9.8%.

The Stevenson/Farmer Review commissioned by Theresa May in 2017 showed 300,000 people with a long term mental health problem lose their jobs each year.

Understanding stress and mental health

- Stress is a reaction or a response and will not normally amount to an illness itself, it may result in or be a trigger for illness. The effects of stress may manifest themselves in both mental conditions, such as anxiety and depression, and physical health problems such as heart disease

- It is healthy for staff to have challenges to meet and, while challenges produce pressure, pressure can have a beneficial effect in improving performance and job satisfaction. Too much pressure can, however, result in stress and be harmful to health

The Health and Safety Executive (HSE) defines stress as the 'the adverse reaction people have to excessive pressures or other types of demand placed on them' at work

The World Health Organisation (WHO), definition of work-related stress is 'the response people may have when presented with work demands and pressures that are not matched to their knowledge and abilities and which challenge their ability to cope'

Understanding stress and mental health (2)

The Acas guide on promoting positive mental health at work defines mental health as 'our emotional, psychological and social wellbeing; it affects how we think, feel and act and how we cope with the normal pressures of everyday life'

The WHO defines good mental health as:

'A state of wellbeing in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully and is able to make a contribution to his or her community'

In October 2017, the Department for Work and Pensions, in co-ordination with the Department of Health, published Thriving at work: the Stevenson/Farmer review of mental health and employers (Stevenson/Farmer Review). It suggested that 'the correct way to view mental health is that we all have it and we fluctuate between thriving, struggling and being ill and possibly off work'

The important steps to supporting employee's mental health

Talk at an early stage

- In routine one to ones, before any problem arises by including a regular item enquiring about health and well being – how are you?
  - ➤ Encourage open and honest dialogue
  - ➤ Make employees feel safe
- Ad hoc when you see that an employee is having difficulties
- In either situation can adjustments be made in the short term, medium term, longer term?

Spot the signs

- Appearing tired, anxious or withdrawn
- Difference in personal appearance and hygiene
- 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 (for example getting angry or upset)

It can be harder to spot these signs if employees are working from home. The sooner an employer becomes aware of a mental health problem, the sooner they can provide help and support.

Take steps quickly

Make sure the working environment is safe

- Remember you have a duty of care to your employees
- Conduct a risk assessment
- Access internal services:
  - Mental health first aider
  - Mental health champion
  - Health and safety officer
  - Employee assistance programme
  - Counselling
  - Health checks
  - Nutritional advice
  - Wellbeing apps
- What external services might be helpful:
  - GP
  - Occupational Health
  - NHS Every Mind Matters
  - MIND – Wellness Action Plans

Encourage people to explore coping strategies

Coping strategies

- For example noting signs of a possible relapse and taking pre-emptive action, such as
  - Taking a break
  - Walking away from the situation
  - Getting some fresh air
  - Asking for help
  - Asking for a day off
  - Cutting down on work
  - Being careful about drinking alcohol
  - Taking exercise and
  - Finding time to relax

Advance statements

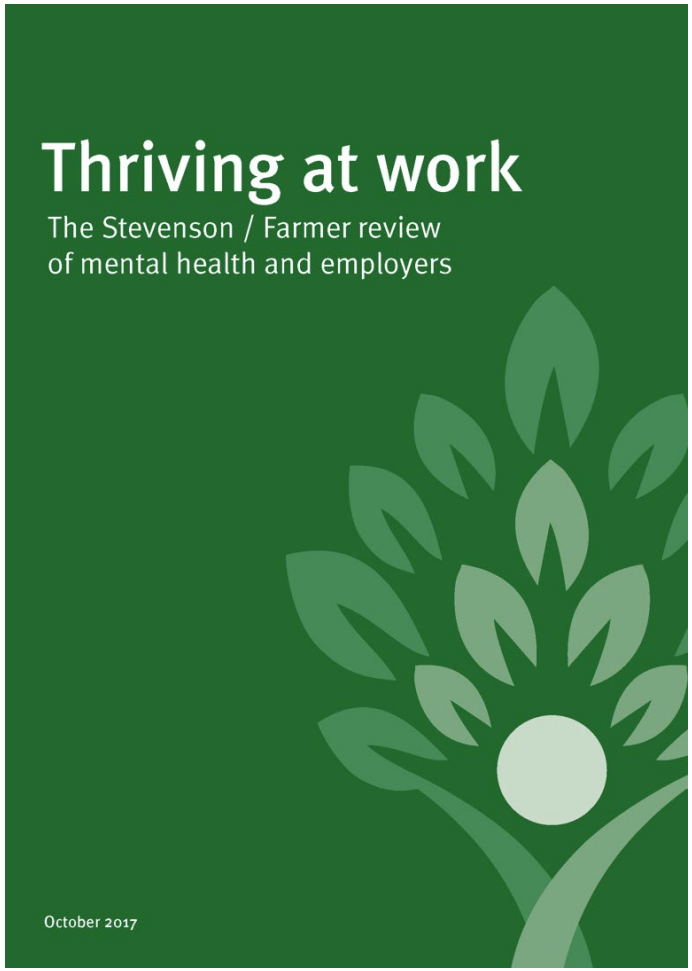
Some people find it useful to draw up an 'advance statement' which explains how they want to be treated if they become unwell. The statement can cover practical arrangements such as details of the people who need to be contacted or provided with information

It could include:

- signs that indicate the person is becoming unwell
- who to contact (perhaps a close relative, care coordinator or GP)
- what sort of support is helpful and what is not

If an employee draws up an agreement with you, you should put the statement into practice to maintain trust

Thriving at work – The Stevenson/Farmer review of mental heath and employers



Encourage	Encourage open conversations about mental health and support available when an employee is struggling
Provide	Provide employees with good working conditions and ensure they have a healthy work life balance and opportunities for development
Promote	Promote effective people management through line managers and supervisors
Produce, implement and communicate	Produce, implement and communicate a mental heath at work plan
Develop	Develop mental health awareness among employees
Monitor	Routinely monitor employee mental health and wellbeing

When does banter become harassment?

Ian McGlashan

When does banter become harassment?

At the end of this session, you will:

- Understand the statutory definition of harassment
- Appreciate the risks to your business
- Understand when banter becomes harassment

When does banter become harassment?

Harassment is unwanted conduct that has the **purpose** or **effect** of:

- violating an individual's dignity or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual, regardless of the intention

Consider

- the complainant's perception
- the other circumstances of the case
- whether it is reasonable for the conduct to have that effect

Legal remedy

If a claim of discrimination related to a protected characteristic succeeds, an employee may be awarded compensation for injury to feelings and loss of earnings. Remember:

there is no limit on compensation	no length of service is required	the tribunal may make recommendations	judgments may be published

An employee with sufficient service may resign and claim that they have been constructively unfairly dismissed

They may complain to the police

Employers' liability for harassment

An employer is liable for harassment perpetrated during the course of employment

An employer is liable despite the harassment being done without its approval

Individual employees may be liable if personally responsible for the harassment

Liability may be avoided where an employer can demonstrate that it took all reasonable steps to prevent the harassment

When is banter unlawful discrimination?

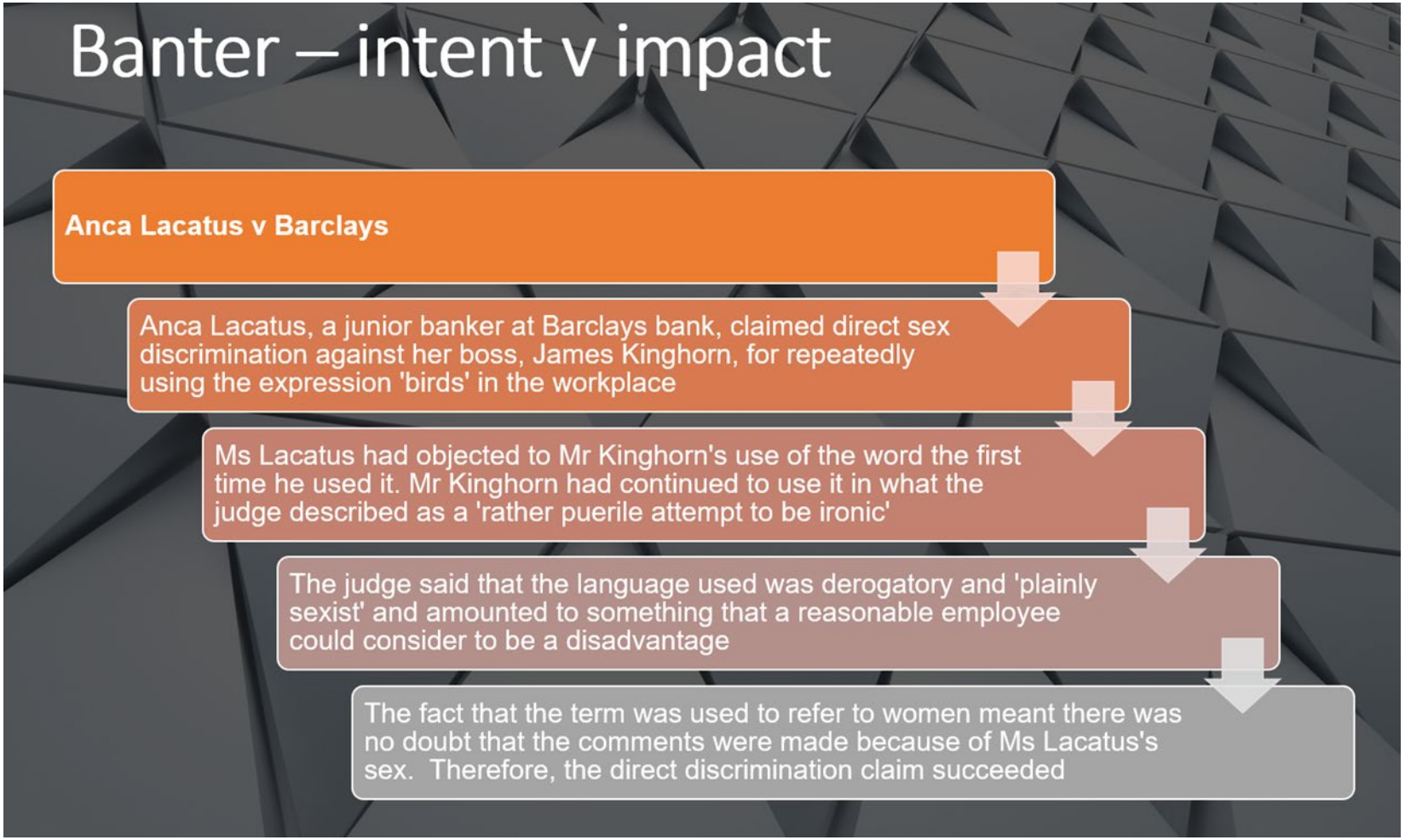
- Harassment can happen
  - Where conduct is related to the worker's own protected characteristic
  - Where conduct relates to someone else's protected characteristic
  - Where a worker is wrongly perceived to have a protected characteristic
  - Where conduct related to a protected characteristic is not directed at the particular worker

Can you complain about banter if you have joined in?

Can you complain about banter if you've joined in? (2)

- The waitresses had financial constraints and, as migrant workers, they had no certainty of obtaining work elsewhere
- They also had the comfort of the assistant manager acting as a 'buffer' between them and Moss. When she left, they all left within three months
- The claimants had initiated conversations with Moss about his life to distract him from asking questions about their own sex lives
- Whether conduct is unwanted will depend on the facts. Where a claimant has suffered continued harassment without objection (for example, for fear of aggravating the situation), this will not necessarily mean that the conduct was not unwanted

Intent v impact



Banter explored

A report ranked the most frequent topics of banter:

Age 71%

Gender 52%

Personality 52%

Behaviours 45%

Appearance 45%

Sport 40%

Break

Break

How can you lawfully balance flexible working requests with the needs of your business?

Lindsey Murray

Flexible working requests and your business needs

- Who has the right?
- What is the right?
- Why you should consider it properly?
- What happens if you don't?

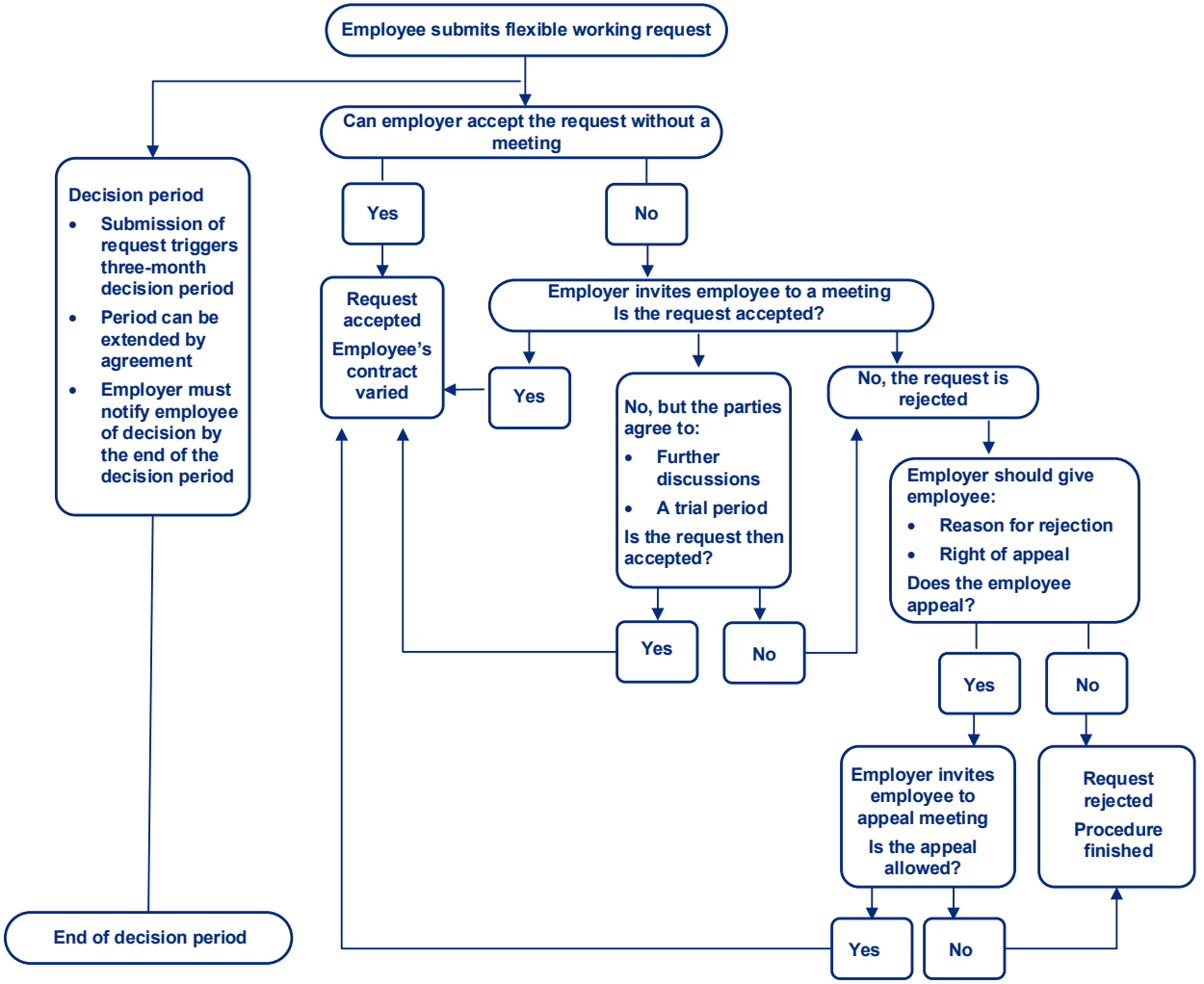
Who has the right?

- Since 30th June 2014 any eligible employee can make a request
- Any employee with 26 weeks' continuous service is eligible
- Agency workers after parental leave
- One request in 12 months
- Acas statutory code and guidance

What is the right?

- Right to request, not the right, to work flexibly
- Legislative procedure:
  - The request must be in writing stating it is an application under statute
  - What will change and from when
  - It must tell the employer how it might deal with the effects of the request
  - The employer has three months to make a decision (except if extension agreed in writing)

What is the process?



What changes can be requested?

- Increase in hours as well as decrease
- Temporary change
- Changes to start and finish times
- Term time only
- Flexitime
- Compressed hours
- Place of work to include home

What should I consider?

- Discuss as soon as possible
- Allow a companion
- Establish the reason for the request
- Make a decision using facts not personal opinion
- Consider protected characteristics
- Look at other options
- Research the effects and collate evidence
- Have a trial period
- Explain any reduction in salary, bonus or pension entitlement

How can I refuse?

- Only for one or more of eight reasons;
  - The burden of additional costs
  - A detrimental effect on the ability to meet customer demand
  - An inability to reorganise work among the existing staff
  - Inability to recruit additional staff members
  - A detrimental impact on quality
  - A detrimental impact on performance
  - Insufficiency of work during the periods the employee proposes to work
  - Planned structural changes

What is the risk?

- An award of eight weeks' pay and you can be ordered to reconsider where you:
  - failed to approach the request in a reasonable manner
  - failed to notify of the decision within three months
  - failed to use one of the eight reasons
  - based your decision on incorrect facts
  - wrongly treated the application as withdrawn

What is the risk?

- Discrimination
  - Sex
  - Disability
  - Race
  - Age
- Constructive dismissal
- Automatic unfair dismissal
- Detriment

Reform

- Day one right
- Two requests are allowed in 12 months
- The employer has two months to respond not three
- Consultation is required before rejection

- There is no need to tell the employer how it might deal with the effects of a request
- There is no date for implementation of this change

How can you protect your business from discrimination claims?

Ian McGlashan

How must you protect your business from discrimination claims?

Where an employee has committed an act of discrimination, harassment or victimisation against a colleague, the employer will not necessarily be liable. It might have a defence

Section 109(4) of the EqA 2010 states:

'In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A-

(a) from doing that thing, or

(b) from doing anything of that description.'

So, the employer will avoid liability if it can show that it took all reasonable steps to prevent its employee committing a particular discriminatory act or committing that type of discriminatory act

'Stale' training is no defence

Allay v Gehlen (EAT)

Mr Gehlen complained that a colleague regularly made racist comments towards him including:

- Asking him why he was in the country
- Suggesting that he 'go and work in a corner shop'
- Noting that he drives a Mercedes 'like all Indians'

A Customer Service Manager knew of the comments, but he failed to act

Allay relied on the reasonable steps defence because it had trained the colleague and manager on equality and diversity

'Stale' training is no defence (2)

The tribunal upheld the claim and rejected the defence because the training had been several years earlier and was 'clearly stale'. The employer needed to refresh it.

The Employment Appeal Tribunal agreed because:

Brief and superficial training is unlikely to prevent harassment

Forcefully presented training is more effective and will last longer

If managers become aware of harassment despite training, it may serve as notification that the training may require refreshing

'Stale' training is no defence (3)

What should you do :

Support a policy with robust, proactive training to increase the chance of a successful reasonable steps defence

Regularly monitor the effectiveness of equality training and refresh it if people have ignored what they learned

Include examples in training of what constitutes harassment based on the protected characteristics in the Equality Act 2010

Ensure that training includes unconscious bias and micro aggressions

EDI training is key to the reasonable steps of defence

V v Sheffield Teaching Hospital NHS Trust (ET)

V was transitioning from male to female, so the employer took several steps including:

Warning staff not to ask V about transitioning	Informing staff that V would be using a cubicle in the women's changing room	The Head of EDI devising and delivering bespoke trans and gender identity diversity training to every member of staff

EDI training (2)

EDI training is key

Despite the employer's actions, V complained of transphobic abuse. The key allegations were that:

- A note was posted on to V's locker that said 'Get out you tranny freak'
- V overheard two colleagues using transphobic slurs
- Another message on V's locker read 'GET OUT TRANNY' written on a sanitary disposal bag

EDI training (3)

EDI training is key

Despite accepting that the incidents took place, the tribunal concluded that the employer had made out its reasonable steps defence because it:

established a culture in which employees were aware of and understood the organisation's values

applied and enforced policies on acceptable behaviour at work and equal opportunities

operated an EDI strategy, with an EDI board, coaching and mentoring

provided EDI training every three years

designed specific, bespoke trans and gender diversity training

delivered its training to every member of the outset of V's employment

EDI training (4)

What should you do?	
	Foster a diverse, equitable and inclusive culture through effectively delivering EDI training
	Monitor EDI training to ensure that it reflects current terminology, case law and workplace trends
	Schedule EDI training for existing employees and as part of the on-boarding process for new recruits

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