



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Season 2

Episode 7 – Addiction at work, with Charlotte Reid and Eleena Misra KC

Ellie: Before we start today's episode, we wanted to give our listeners a quick content warning. We will be discussing themes around addiction in a workplace context, including gambling, alcohol and drug dependency, which some listeners might find distressing. With that in mind, we would advise listener discretion as to whether you feel comfortable listening to this episode.

Hi, and welcome to The Work Couch podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC, and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today.

We hope by the end of the podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. And to make sure you don't miss any of our fortnightly episodes, please do hit the like and follow button and share with a colleague.

The topic of addiction undoubtedly carries with it a social stigma. It's something that is often hidden. It comes in many forms and is rarely spoken about openly, but we probably all know at least someone who is or has been affected by addiction. And we know it can be incredibly difficult to manage the situation where you have a colleague at work who is struggling with addiction. So, this week we're going to look at addiction at work and the key questions to ask when considering how to approach someone who has an addiction or dependency and the action you should take, including whether to treat it as a wellbeing issue or a misconduct issue. And we'll also examine how disability discrimination, as well as the duty to make reasonable adjustments, can come into play in the case of an addiction. And with me to navigate this challenging but hugely important topic, I'm delighted to welcome back Charlotte Reid, senior associate in RPC's Employment, Engagement and Equality team, and Eleena Misra, KC of Old Square Chambers. Hi both, thanks so much for coming back to speak on The Work Couch.

Charlotte: Hi Ellie.

Ellie: Charlotte, I know this is a subject that's particularly close to your heart, and it's also something you advise clients on, but it isn't a subject that we hear being discussed that often in the context of employment law.

Charlotte: Thanks, Ellie. And you're absolutely right. Addiction is something that, as you said, is often hidden. It sort of often lurks in the shadows. We may get glimpses every now and then, but it's generally kept as a sort of inverted commas "shameful secret". It's something people find uncomfortable and often extremely embarrassing to talk about, even with those closest to them. So, in a workplace context, we can probably ramp those feelings up by a thousand.

You also said it's something we've all been touched by in one form or another, if not directly ourselves, then in respect of those with whom we're closely connected. I think people are becoming more aware of addiction and dependency issues, and there is help out there, but I'm never really sure how many workplaces are kind of moving with the times and embracing those really difficult conversations.

From my work, I've noticed that in a workplace context, there's generally sort of lack of curiosity. In other words, the employer's often not asking themselves why someone is doing what they're doing or how they've come to be in this place of dependency. What more usually happens is people go straight to labelling a person and dealing with certain issues as misconduct and ensuring people are moved on as the case may be rather than looking at the issues in the round.

Ellie: So, you mentioned the reasons why. What do you often see as that root cause of addiction? What examples are there that employers should be alive to when thinking about why someone might have an addiction?

Charlotte: Gosh, I mean, the why is just so tricky and every case will be different. There are a whole host of potential underlying reasons and causes for a person's dependency. Sometimes there's a biological cause with, as we all know, some families being more predisposed. A really common cause of addiction is mental illness, for example, depression or bipolar disorder, which we'll just briefly touch on later.

Another, perhaps lesser understood, cause of addiction is certain neurodivergent conditions, some of which can lead to impulsive behaviour, including addictive tendencies. There are also various stress factors that can lead to addiction. For example, a person's caring responsibilities, maybe a relationship breakdown, the cost of living. I think there was some research done recently by GambleAware, which found that one in four women aged between 18 to 49 who gamble expect to gamble more due to the cost-of-living crisis with one in 10 reportedly already having turned to gambling in an attempt to supplement household income. So those are really quite startling figures to behold. And it may also be a way of coping with a particularly traumatic event in a person's life including previous domestic or sexual abuse or where a person's been bullied at work. There will of course be you know, many other causes that I haven't mentioned, but I just wanted to highlight how complex a situation can be, if you take the time to understand why someone might have the struggles they are currently having. And finally, I think this is one really important thing to bear in mind. Sometimes dependency and addiction issues may have been brought on by work pressures.

Ellie: Absolutely, so a whole host of potential reasons why someone has an addiction. So, let's look at the law now, specifically disability discrimination. Many of our listeners will be thinking, hang on, addiction isn't a protected characteristic under the Equality Act 2010.

Charlotte: Yes, and they would be absolutely right. And in fact, we know certain conditions and dependencies are expressly excluded as disabilities. Put very simplistically then, there is currently no protection for employees who experience discrimination, ie less favourable treatment by their employer because of their addiction or dependency. But that is very much not the end of the legal story. So, if we wind the analysis back slightly, s.6 of the Equality Act defines disability as being a physical or mental impairment that has a substantial and long term, ie 12 months or more, adverse effect on a person's ability to carry out normal day-to-day activities. The Equality Act 2010 (Disability) Regulations 2010, just to get really boring, paragraph 3.1, specifically excludes addiction to alcohol, nicotine or any other substance from the definition of disabilities. However, it's important to note that paragraph 2.1 of those same regulations states that exclusion does not apply to addiction that was originally the result of medically prescribed drugs or other medical treatment. And likewise, there are going to be very blurred lines where the addiction or dependency itself is the result of a disability. So, in other words, where it arises from a disability that perhaps would in of itself benefit from the protections of the Equality Act. So, to put it in shorter form, there's a real intersection between dependency and potentially disabilities.

Ellie: So, Eleena, if I can bring you in now, it sounds as though even if on the face of it, someone's addiction isn't covered, there may well be more legal aspects to this.

Eleena: Yes, that's absolutely right. There are a myriad of examples where the situation will be far from clear-cut or straightforward. So, for example, where a person's alcohol dependency actually stems from a serious depression, the depression may well fulfil the definition of disability. The alcohol dependency is potentially a symptom of that disability or something arising in consequence of the disability.

To take another example, a person might be addicted to gambling. It's ascertained that they have severe and complex neurodivergences, including ADHD. The ADHD again, might be a disability. The gambling addiction is not, but again, it could be a symptom of the disability or arise in consequence of the disability.

You may have someone who has been prescribed high strength pain killers to manage pain related to a disability, which leads to addiction or addiction disorders. Yet another example of how the lines can very easily be blurred. I guess the point here is that addictions in their various forms, more often than not, cannot be viewed in isolation. Usually as individuals, we like to categorize and put things into neat boxes, but that doesn't really work with addiction and it is often extremely difficult to categorise the symptoms or behaviours. And really, I would say that we've moved on a great deal in our understanding of disability to a more socio-functional model than a medical model of disability, which focuses on the impairment as viewed through the prism of the person whose day-to-day activities are affected.

Whereas the exclusions we have in statutes have to be applied by tribunals, there may be an increasingly purposeful interpretation of the connection between addiction and disability in both directions. So, in other words, disability which gives rise to addiction and addiction which gives rise to disability. It might be worth just noting a well-known case from over a decade ago called *Power v Panasonic*, which makes it clear that you don't need to look at the cause of the disability. So, the fact that a disability has been caused by an addiction would not be relevant or would not make it an excluded disability. And we've got to bear in mind, I think, that people with disabilities and people who are labelled as having an addiction are widely recognised as two of the most

stigmatised groups in society. Both groups are frequently subjected to discrimination and exclusion from various social, cultural and political spaces. So, it does interest me that whereas you would not deny someone with an addiction to medical care, they're not recognised as having a characteristic that is worthy in its own right to have protection under the Equality Act 2010. But that is ultimately a political question, and we know that these things can and do change. The interplay, however, with human rights is also a very ripe area for further exploration.

Ellie: Okay, so Charlotte, how else could an addiction form the basis of a disability discrimination claim?

Charlotte: Yes, Ellie. So, we've covered the discrimination arising from a disability angle. One of the other main things that springs to my mind is the duty to make reasonable adjustments. We need to think about whether and how that arises. So, the question will be, is there an underlying disability which needs looking at and reasonable adjustments made for the same? For example, does this person need time off work to attend meetings or a therapy session every week? We all know reasonable adjustments can look like whatever the employee medically requires them to look like. And it's important to get input on that from the employee, occupational health and whomever else, from a medical perspective, may be managing the dependency and or disability with the employee. It could mean allowing the person to work from home rather than coming into the office which they may find to be triggering because it's right over a bar for example, or ensuring non-alcoholic options are offered at work events, or ensuring that certain ads which encourage gambling are blocked from work IT systems. And these are just kind of examples of the many and varied ways employers can make adjustments and be supportive of the lived realities of their staff.

Ellie: And a person's addiction is, it's often going to have an adverse impact on their behaviour and their interactions with other people. And of course, employers are going to be interested in this because of that sometimes unavoidable crossover into the workplace. So can you sort of outline some of the pertinent questions that employers need to ask right at the outset when they're faced with this situation?

Charlotte: Absolutely, you know, first and foremost in employers mind will be the question, what shall we do? And it really depends on what's happening and what is likely or what could happen. For example, if an employee's performance or behaviour at work is affected by alcohol or drugs, there are things an employer will want and often must do.

Health and safety of all will be key. If, for example, this employee operates heavy machinery, then of course there is no way they can be permitted to continue to do that, at the very least in the short term. Employers will be thinking about the employees' mental health. What is happening? Is a medical professional involved? What can we do to manage this so as to safeguard their mental wellbeing? They'll be thinking, has there actually been an incident at work, or is this just a worry? What precisely has happened and when. Is this something private? So, I'm sort of thinking right to private life under the European Convention on Human Rights, Elle, you touched very briefly on that earlier. Or is this a wider and further reaching issue in which you, the employer, do need to become involved and have a view on it? Employers might be thinking is some sort of test necessary, for example, drugs and alcohol. Is testing even permitted or authorized or consented to in these circumstances or a review of CCTV or other evidence? for example, in cases of alleged theft or misuse of money. Another key strand of the sort of "what" is, is this a conduct issue or is this a capacity or capability issue? Communication is again, like health and safety, going to be absolutely key. And this is the hard bit. This is where difficult conversations will need to be had. But you need to know what the employee has to say. Research by CIPD found that around a fifth of employers see alcohol and drug misuse as mainly a performance and disciplinary issue. But likewise, avoiding knee-jerk reactions is also going to be important. Swift and engaged actions, yes, but knee-jerk and automatic responses for on the spot dismissal are unlikely to be appropriate. You need to be thinking about how you investigate as well as...how you communicate with all members of staff, not just the employee in question. It might be that suspension is appropriate whilst those investigations are undertaken. You might be thinking, is there context to what has happened? Is this just a case of one, too many, at a work function, or is this something else? So, in other words, is this a one-off incident? Is this something we're seeing progression on? Is it getting worse? What does the employee say? Is there genuinely a dependency or an addiction issue. Again, going back to what has happened, is the incident or the issue something that could genuinely bring the business into disrepute? Is a disciplinary process going to be needed? And I would have thought that in most cases of drinking or drug use at work, for example, this will become incredibly relevant, albeit the outcome won't be certain. And I think lastly, although by no means least, is there support that can be offered in terms of treatment? Have a look at what your insurance policy covers and provides employees with access to. So for example, considering financial assistance for rehab can be incredibly expensive. Some policies cover that kind of thing. Counselling via organisations, mental health and wellbeing platforms, and signposting to other sources of support and charities on the intranet and within your own wellbeing policies and procedures.

Ellie: So, lots of questions to ask yourself there, really depending on the facts of the case. And on that Eleena, has there been much case law on where employers have got it right or got it wrong?

Eleena: Well, let me just caveat what I'm about to say by the fact that most first instance decisions, so that is decisions by employment tribunals, are going to be decisions taken on the facts of the case itself. So, they're rarely going to be things that employers can look to say, well, that's what happened in that case so if I do the same thing, I'll be right or wrong. Each case will, of course, turn on its own facts. And the second point, Ellie, is that in fact, there is not a huge amount of case law that's directly on point in relation to addiction.

But there are some cases which touch upon this area, which I'm going to look at in a moment. The other thing I just wanted to add was in terms of that, have they got it right or wrong, steer? If employers are doing what Charlotte has just referred to, which is looking at what has gone on, why it's happened and what the impact is on the employee and what the impact is on the employer, that's naturally going to bring in a proportionality check in what the employee is doing, which is going to be a really good...barometer of what is right or wrong in a legal sense. So, there is some interesting case law containing wider points of relevance in the context of addiction. And a lot of case law is to do with substance misuse, but we know that all addiction is not substance dependency, and you get a wide variety of things that fall in that category. But in the case of *McElroy v Cambridgeshire Community Services NHS Trust*, here we saw a case where a healthcare assistant was sacked without notice for coming to work smelling of alcohol and that was found to be unfair.

It was found that a reasonable employer would not have treated attending for work smelling of alcohol as gross misconduct or conduct justifying dismissal in the absence of either evidence of an adverse effect on the employee's ability to do his job or in the absence of a previous warning given under the employer's disciplinary policy not to do so. Pausing there a moment, that was a case that obviously turned on its own facts in an NHS setting. And you can see that that could go different ways depending on how the individual presented you can see that might have gone a completely different way if it was a pilot who showed up to do a transatlantic flight smelling of alcohol. But so that's just one example. And then by contrast in the case of *Asda Stores Ltd v Coughlan*, Mr Coughlan had 21 years of completely unblemished service, but he was found to be in possession of cannabis at work.

And that's because the smell of the cannabis had, in fact, attracted attention, which resulted in him being subjected to a search. And so, he was sacked with no notice for gross misconduct. And that dismissal was found to be fair. So, I should just pause there for a moment, saying that here we're looking at cases that are focusing on dismissal. There are, of course, other types of detriment that an employee can be subjected to. And we were looking a little earlier at the Equality Act 2010. But there are many cases where there is an interplay between the fairness of a dismissal and whether it's discriminatory or not.

So, we're back to the subject of drugs tests in the case of *First Bristol Limited v Bailes*. So here Mr Bailes was a bus driver with an unblemished disciplinary record of over 20 years until his dismissal for failing a drugs test. Now during his appeal Mr Bailes queried whether the fact that he was taking an antibiotic could have produced a false positive. He also queried whether the fact that he had handled a significant number of banknotes which are generally known to be contaminated to some extent by cocaine. I say generally known. I didn't actually know that till I looked at that. But it meant that he might have been unknowingly taking in cocaine. So that dismissal was found to be unfair. And the Employment Appeal Tribunal felt that relevant factors for the employer to have considered ought to have included proper investigations into the possibilities of drug contamination and Mr Bailes's very long and unblemished service. And you can see that there may be many cases in which the scope and the investigation will very much depend on what's being said by the employee in the first instance and the particular facts of the case.

Ellie: I think those examples are really helpful just to demonstrate those factors that Charlotte mentioned in terms of what you need to be looking at to get a handle of exactly what's going on and the proportionate response to that. So, I wanted to ask both of you then, so given the scale of mental health issues across the UK's workforce, would you say education is going to be key in terms of reducing that stigma we've talked about and raising awareness so that addiction in all its many forms can be discussed and responded to effectively?

Charlotte: Yes Ellie. Education is, as you say, key in communication as well. Because I think we can all accept silence feeds addiction and perpetuates that damaging cycle that people can find themselves in. It occurs to me just listening to Elle and also not listening to myself, but just the topics of conversation that have come up in this podcast. There needs to be some sort of safe space where people feel that they can discuss when they think there's a problem. And it's tricky opening up in a workplace context.

Eleena: I agree with that Charlotte, completely. Well, I think there does need to be a safe space, but being entirely objective about it, and I know you and I deal with both claimants and respondents, but in particular, advise employers, the safe space might be a third party. It might actually have to be an agent of the employer or some person who is not then duty-bound effectively to trigger a disciplinary process or a series of steps that might do more harm than good. It could put a manager in a very difficult position. So, I guess there isn't one size fits all, but I certainly agree with you that some form of safe space is a good thing. And what we can't forget is that we're obviously discussing all of this at a point in history when we are technically outside a pandemic, but we've had a massive global health event that will have put a lot of people into addictions, to put it bluntly. And there'll still be the ramifications of that being felt in many workplaces and for many individuals. But Charlotte, don't you think it's really interesting how if you had an individual with a disability, as the law tells us very clearly, you don't probe into why that disability has arisen. So, for example, if someone is diabetic, you wouldn't be probing to find out whether that was because of a genetic predisposition, because of dietary choices, because of exercise choices, or whatever myriad of factors might have led to that person becoming diabetic you would be looking to support and manage. Whereas we have, in terms of the law, we've basically put addiction in a box of societal evil, as it were. This is in a box of things where you, the employer, don't have to deal with it in the same way that you would with the disability. So, I think, obviously, that's a matter for law reform potentially, but the interplay between the two areas is quite an interesting one.

Charlotte: Absolutely and there's a potential lag isn't there in the law and what's been happening in the world for the last five years or four or five years.

Ellie: I think that's really interesting and we have discussed quite a few topics haven't we, not least when we last spoke to you both about how the law affects people affected by pregnancy loss and it's just another interesting example where the law hasn't necessarily kept up. Well thank you both so much for expertly guiding us through those legal considerations that employers need to bear in mind when responding to addiction at work. And as you've both said that the importance of sympathy and understanding cannot be underestimated when supporting somebody affected by addiction, which can take hold of anybody regardless of their role, seniority or circumstances. So, thank you for sharing your expertise, really useful practical tips.

Charlotte: Thanks, Ellie.

Eleena: Thank you very much, Ellie.

Ellie: And for those of you who are struggling with addiction or someone close to you is, please don't suffer alone. In addition to speaking to your GP, there are many amazing sources of support out there, including We Are with You, formerly known as AdAction, GamCare, which offers gambling harm support, and Talk to Frank, who will help you find drug and alcohol support near you. There's always someone to listen. Or if you would prefer to text, you can use the text service from Talk to Frank on 82111.

Ellie: If you would like to revisit anything we discussed today, you can access transcripts of every episode of the Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or if you have questions for me, Charlotte or Eleena, or perhaps you have suggestions of topics you'd like us to cover in a future episode, please get in touch you can email us at theworkcouch@rpc.co.uk. We'd really love to hear from you. Thank you all for listening and we hope you'll join us again in two weeks.



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