Information paper

Disability Discrimination – The Law

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Disability Discrimination – The Law

Introduction
In October 2010, the Equality Act came into effect, thereby providing a whole new legal framework for equality law. The Equality Act incorporated all previous domestic equality legislation (as amended where applicable). The Act applies to England, Scotland and Wales, but not to Northern Ireland which will continue to have its own equality legislation.

The Disability Discrimination Act has been replaced in its entirety by the Equality Act and the new equality duty which came into force in April 2011.

The Equality Act has made a number of changes to the law on disability discrimination, the most significant being that it:

- Extends coverage to people who were not previously protected against discrimination
- Modifies the definition of direct discrimination, and creates a new form of discrimination altogether, discrimination arising from disability
- Creates a new category of indirect disability discrimination, and extends the duty to make reasonable adjustments
- Adds a separate category of disability harassment for the first time and extends the protection against victimisation
- Outlaws the asking of questions about health or disability except in specific and narrowly defined circumstances – which is potentially of great importance in dealing with discrimination in the recruitment process
- Creates the category of combined discrimination

The disability provisions of the Equality Act are complex and this factsheet has been created to explain those parts relevant to employment rights as they currently stand.

Code of Practice and Guidance
There is a single Code of Practice on employment prepared by the Equality and Human Rights Commission (EHRC), which has statutory force (that is can be cited in legal proceedings). This Code is a detailed interpretation of the law and is not easily accessible to lay people.

CSP stewards can download copies of EHRC’S Guidance for Employers, and its Guidance for Workers, which present a clear account of what the law means in practice. There are a number of guides for employers and workers
available from www.equalityandhumanrights.com. The titles include the application of the Equality Act in:

- Recruitment
- Working hours
- Pay and benefits
- Training, development and promotion
- Managing workers
- Dismissal, redundancy and retirement
- Good equality practice (employers only)

This guidance does not constitute a definitive statement of the law, but it lays out clearly what the law means in many practical situations.

**Who is covered by the Act?**

Under Section 6 (1) of the Equality Act a person (P) has a disability if –

(a) P has a physical or mental impairment, and  
(b) The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

Those covered include:

- Part-time workers
- Seasonal and temporary workers
- Those applying for jobs
- Current employees
- People with severe disfigurements which were not deliberately acquired.
- Since December 2005, people with certain progressive conditions such as cancer, HIV infection and multiple sclerosis have been covered from the point of diagnosis
- People who have recovered from a condition which would have met the Act’s definition of disability even if they recovered before the Act was passed - for instance, someone who has previously had cancer.

Until December 2005, there was an additional barrier for people with mental impairments who had to prove their condition was "clinically well recognised". This is no longer a requirement.

Mental impairments are listed as developmental conditions such as autistic spectrum disorders, dyslexia and dyspraxia, and mental health conditions
such as depression, schizophrenia, bi-polar affective disorders, and obsessive compulsive disorders.

The Equality Act has extended protection from discrimination and harassment to people who are wrongly perceived as being disabled, and to those who may be treated less favourably because of a link (association) with a disabled person. Therefore an employer who discriminates against or harasses a worker because of their association with a disabled person (for example because of their caring responsibilities for a child or other relative) might be found guilty of disability discrimination.

**What is meant by ‘substantial’ and ‘long term’?**

Long term effects are defined as those which:

- Have lasted for 12 months or more
- Can reasonably be expected to last 12 months or more
- Can reasonably be expected to last for the rest of the person’s life
- Even if the impairment is no longer affecting the person it is treated as continuing if it is likely to recur, with some recurrence being likely at least 12 months after the first occurrence.

Substantial is defined as more than ‘minor’ or ‘trivial’ and should include an assessment of:

- Time taken to carry out an activity
- The way in which the activity is carried out
- The cumulative effects of the impairment.

**What are ‘normal day to day activities’?**

‘Normal day to day activities’ are defined by looking at how far they are normal for most people and carried out by most people on a daily or frequent and fairly regular basis, such as walking, driving and forming social relationships. This would not include:

- Work of any particular kind because no form of work is normal for most people and a particular job might be highly specialised
- Playing a particular game, musical instrument or sport
- Performing a highly skilled task.
Who is not covered by the Act?

- The DDA does not apply to the armed forces.
- People with deliberately acquired disfigurements, i.e., tattoos, body piercing.
- People with psychopathic or anti-social disorders and additions such as kleptomania, pyromania, addiction to drugs, tobacco, and alcohol. But, for example, liver disease as a result of alcoholism would count as an impairment.
- People who use ordinary spectacles or contact lenses to correct a visual impairment.

Since October 2004, it has been unlawful for employers of any size to discriminate against disabled persons because of their disability (previously the Act applied only to employers with 15 or more staff).

What actions by employers would count as discrimination?

Employers must not discriminate against disabled persons:

- in the recruitment process
- in their terms and conditions of employment
- in chances for promotion, transfer, training or other benefits
- by dismissing them unfairly
- by treating them less fairly than other workers
- by subjecting them to harassment or other detriment.
- By discrimination after the employment has ended.

Discrimination against disabled persons may take the following forms:

a) Direct discrimination:

- the treatment is on the grounds of his/her disability and
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated.

Unlike other areas of discrimination legislation, it is not unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person.
b) Indirect Discrimination:

- when an employer applies a provision, criterion or practice (PCP) which puts those who share a disability at a particular disadvantage compared to those who do not share it and which the employer cannot justify.

Employers can only justify indirect discrimination if they can show that it was “a proportionate means of achieving a legitimate aim”.

c) Discrimination arising from a disability

- when an employer treats a disabled person unfavourably “because of something arising in consequence of” the disabled person’s disability.

As with direct discrimination, employers can justify the treatment if it can be shown to be a proportionate means of achieving a legitimate aim.

Similarly an employer can defend a claim on the ground that they did not know, or could not be reasonably expected to know, that the person had a disability.

Unlike the provision of the DDA which it replaces, it is not necessary to have a comparator to prove a case. The reinstatement of this protection is likely to be helpful to stewards in arguing against the use of employer practices that fail to take into account a member’s disability: for example, disciplinary action against a member for poor time-keeping that is a result of their disability and which could be remedied by the making of adjustments to working hours.

d) Harassment:

- when another person engages in unwanted conduct which may violate the disabled person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that disabled person, for a reason which relates to a person’s disability.

The definition of harassment also applies to those subjected to unwanted conduct because of another person’s disability. So, for example, an employee who is subjected to offensive comments about their disabled child would be protected under the Act.
e) Victimisation:

Victimising someone because they have started or taken part in legal proceedings under the Equality Act or have alleged in good faith that someone else could be in breach of the Act.

f) Combined discrimination

- The new category of combined discrimination makes it possible to claim a breach of the Act on the ground of two relevant protected characteristics (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation). The positive impact of this measure is that a complainant does not have to demonstrate that the discrimination has taken place on each of the alleged grounds taken separately. However, the only form of prohibited conduct covered by this clause is direct discrimination, so it is unlikely to be used much.

g) Failure to comply with a duty to make reasonable adjustments

- When an employer knows or reasonably ought to know of the disabled person’s disability they are under a duty to make a reasonable adjustment.

h) Any action whereby an employer treats a disabled person less favourably for a reason that relates to the disabled person’s disability. You must be able to show:

- The treatment must be less favourable than the employer’s treatment of someone without the disability
- The reason for discrimination must relate to the disability, i.e. it would not be enough for a disabled person just to be generally treated less favourably
- Any treatment related to a person’s disability would be sufficient, i.e. refusing to hire a shop assistant with a facial disfigurement because customers might be upset, not just because of the disfigurement itself.
What actions by employers would not be seen as discrimination?

Less favourable treatment for a reason relating to disability can be justified only if it is both "material to the circumstances of the case and substantial." Disability-related less favourable treatment cannot be justified where the employer is under a duty to make a reasonable adjustment but fails (without justification) to do so, unless the treatment would have been justified even after the adjustment.

Employers must examine the impairment experienced by the individual employee/applicant and not just make a general assumption about all people with a similar impairment. What counts as substantial is a matter for an Employment Tribunal to decide, though the Employment Appeal Tribunal in H J Heinz Co. Ltd V Kenrick [2000] IRLR 144) defined it as "not just trivial or minor" which is a relatively low threshold for employers to meet.

Reasonable adjustments

This was the lynchpin of the DDA, and the most significant element of the Equality Act for disabled workers continues to be the duty on employers to make reasonable adjustments where a disabled worker would be at a substantial disadvantage compared with their non-disabled colleagues.

Employers are obliged to make reasonable adjustments to:

- physical features of their premises
- equipment
- any arrangements
- to avoid a disabled employee or applicant from being subject to a substantial disadvantage.

The employer must know, or be reasonably expected to know, that the person has a disability and is likely to be affected by the provision/physical feature for the duty to make reasonable adjustments to apply.

The requirement covers all aspects of employment:

- Recruitment
- Pay
- Terms and conditions
- Training
- Career development
- Dismissal.
What kinds of adjustments should be made?
The list of possible adjustments provided in Codes of Practice for the DDA has been removed but the same examples are given in the EHRC guidance. They include the following:

- Making physical adjustments to premises (e.g. widening doors, changing décor for visually impaired people)
- Allocating some of a disabled person’s duties to someone else
- Transferring an employee who becomes disabled to another job
- Altering a disabled person’s working hours or training
- Transferring a disabled person to a different place of work
- Allowing a disabled person to be absent during working hours for rehabilitation, assessment or treatment
- Providing training for a disabled person
- Acquiring or modifying equipment
- Modifying instructions or manuals
- Modifying procedures for testing or assessment
- Providing a reader or interpreter (for someone with a visual impairment)
- Providing supervision
- Employing a support worker

How do you decide if an adjustment is reasonable?
For the purposes of the Equality Act the judgment about whether any adjustment or step is ‘reasonable’ rests on five factors in particular:

- The step must be effective - it must significantly reduce the disadvantage the disabled person in question would otherwise face
- The step must be practicable for the employer in these specific circumstances
- The financial and other costs must be reasonable given the organisations resources. Whether a cost is reasonable will, to some extent, depend upon what the employer would otherwise spend in the circumstances. If, for instance, an employer would expect to spend some money on a non-disabled new recruit, it would probably be reasonable to expect him/her to spend the same amount on a disabled recruit
- The extent of the employer’s resources - larger organisations will be expected to be more flexible in making adjustments; richer organisations will be expected to make more expensive adjustments
• The financial or other help available to the employer from outside organisations – for example the Access to Work scheme.

Employers do not have to make adjustments where the disadvantage to the disabled person is minor, or where they do not know that the disabled person in question is disabled.

The issue of resources is not one that any large employer will be able to argue. The extent or resources will be determined by the size of the whole organisation, not only those of the immediate department. Where the organisation is small, the availability of financial support from agencies such as the Access to Work scheme will also be relevant. www.direct.gov.uk/en/disabledpeople/employmentsupport/

Disability and health-related questions in recruitment
The Equality Act contains a new provision which makes it unlawful for an employer to ask questions about health or disability until an offer of job has already been made, or the candidate has been included in a pool to be offered employment (for example when a new workplace is about to be opened). This includes questions relating to previous sickness absence. It is also unlawful to have these questions asked by another: for example sending candidates to an occupational health practitioner before the offer of a job is made.

However, this is not a blanket ban and an employer can ask questions about or whether a person has a disability before offering a job to an applicant if it will help them to:

• Make a reasonable adjustment to the selection process
• Decide whether an applicant can carry out a function that is essential to the job
• Monitor diversity among applicants
• Take positive action to help disabled people
• Ensure that the candidate actually has the disability if the job genuinely requires the job-holder to have a particular disability

Occupational pensions
The Equality Act prohibits discrimination in occupational pension schemes. The non-discrimination rule overrides any scheme rules. Therefore if scheme rules are discriminatory, trustees and managers of occupational pension
schemes have the power to make adjustments to change these. The trustees or managers (including employers involved in creating new schemes) must not discriminate against or harass disabled people in the manner that they admit members to the scheme and treat members, once in the scheme.

The non-discrimination rule does not apply in relation to rights accrued, or benefits payable, in respect of periods of service prior to October 2004, however, it does apply to communications relating to periods of service prior to October 2004. For example, a visually impaired scheme member might ask to receive information in Braille or on tape relating to benefits they had built up before the non-discrimination rule came into force.

Trustees and managers of occupational pension schemes have a duty to make reasonable adjustments to any

- provision, criterion or practice (including a scheme rule)
- physical feature of premises occupied by the trustees or managers

that places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, in order to prevent the provision, criterion or practice, or feature, from having that effect.

For example, a member of a final salary pension scheme with twenty years worth of contributions becomes disabled and reduces their working hours two years before they are due to retire. The final salary scheme’s rules would put the disabled person at a substantial disadvantage because, regardless of their previous twenty years’ service, their pension would only be calculated on their part-time salary as a result of her disability. A possible reasonable adjustment in this case could be that the trustees average out the member’s salary over a period of years prior to their retirement date, enabling full-time earnings to be taken into account.

Trustees and managers of schemes will only be able to justify less favourable treatment of a disabled person if there is no reasonable adjustment that would reduce or eliminate the risk/barrier.

Disabled employees can still be required to pay the same level of contributions as other comparable members who are not disabled, even if they will not receive the same benefits. These provisions also apply to sick pay policies and other similar benefits.

It is illegal for you to be excluded from a scheme or some of its benefits at any time except when you first ask to join (taking into account the above).
You cannot be excluded if you become ill or develop a disability after you have been accepted as a member.

If you are excluded from the scheme you have no right to the employer contributions that would have been paid on your behalf.

**Promoting disability equality**

The disability equality duty introduced in 2006 was merged through the Equality Act with a single equality duty embracing all equality areas from April 2011.

Section 149(1) of the Act puts various requirements on public bodies when exercising their functions. The general duty requires public bodies including NHS organisations to have due regard to the need to:

- Eliminate discrimination, harassment and victimisation and other conduct prohibited under the Act
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Guidance offered to employers on the NHS Employers website stipulates that “due regard means consciously thinking about the three aims of the PSED as part of the process of decision-making”. This means that consideration of equality issues must influence the decisions reached by NHS trusts, such as:

- How they act as employers
- How they develop, evaluate and review policy
- How they design, deliver and evaluate services
- How they commission and procure from others

NHS organisations will need to analyse the effect of existing and new policies and practices in relation to equality. Equality analysis, including the use of Equality Impact Assessments (EqIAs) is a way of considering the effect on different groups protected from discrimination by the Equality Act. Employers need to check if their policies and day to day decisions have any negative consequences for particular groups, as well as considering whether or not their policies will be fully effective for target groups.

Although EqIAs are no longer mandatory under the new PSED, they are likely to continue to play a useful role as part of the equality analysis process. The CSP believes that EqIAs are likely to continue to be the best way of
complying with the General Duty when changes are made. Also key to the implementation of the PSED will be the Equality Delivery System (EDS) introduced in the NHS in 2012. For further guidance on EqIAs and the EDS please see Section 2 of the CSP Equality and Diversity Toolkit. http://www.csp.org.uk/publications/equality-diversity-toolkit

Regulations were approved in Parliament in September 2011 that introduce two specific duties. These duties mean that public bodies including NHS organisations are required to:

- Publish information to demonstrate compliance with the Public Sector Equality Duty (PSED) at least annually starting from 31 January 2012
- Prepare and publish equality objectives at least every four years starting from 6 April 2012

The Scottish Parliament and Welsh Assembly have powers to vary the specific duties, and both approved new specific duties for Wales and Scotland which came into effect in 2012.

**Further resources**

CSP Equality and Diversity Toolkit

Dyslexia resources – a wide range of resources about dyslexia in physiotherapy including videos, Q&A and case studies via the CSP website www.csp.org.uk

Video on the law on reasonable adjustments produced by the CSP: http://www.csp.org.uk/professional-union/union-support/legal-services/reasonable-adjustments-workers-disabilities