

Disability Discrimination

In the workplace: your legal rights



Overview

Before 1st October 2010, the Disability Discrimination Act ('the DDA') governed, amongst other things, the rights of disabled people in the workplace. As of 1st October 2010, most existing equality legislation (including the DDA) was consolidated into the Equality Act 2010 ('The Act').

For more information on disability discrimination in the provision of goods and services, see our factsheet 'Access All Areas', part of the Employment Law series.

The meaning of disability

'The Act' provides protection for people who have a disability, defined as 'a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities'. But what exactly does this mean for you?

Four-part definition of 'disability':

1. **Physical or mental impairment** – this is broadly interpreted and includes sensory impairments, autism, dyslexia and mental health conditions. The need for a mental impairment to be a clinically recognised illness has been removed since 2005.

2. **A substantial adverse effect** – this requirement is meant to rule out minor or trivial impairments, so simply being under the weather will not be enough. Even if an individual can carry out a normal day to day activity, there may still be a substantial adverse effect on how those activities are carried out. The Tribunal should consider how the individual would carry out those activities without the impairment.

3. **A long-term effect** – means an impairment that has lasted 12 months or is likely to last 12 months, or for the rest of your life. If the impairment's substantial adverse effect ceases, but the effect is likely to recur at some point in the future, then the substantial adverse effect is treated as continuing. The word 'likely' means 'could well happen'.

4. **The ability to carry out normal day-to-day activities** – the DDA included a 'list of capacities' and an individual was required to show that they were impaired in carrying out one of those capacities. Under 'The Act', there is no such list allowing for a greater scope of activities that fall within the definition. Examples of capacities that might be affected could include eating, walking, driving, normal social interaction. Also, activities that are only done at work may also be covered under the definition.

'The Act' also covers progressive conditions such as Multiple Sclerosis. Further, 'The Act' provides that if you are diagnosed with cancer or as HIV positive you will automatically be protected by 'The Act', without having to fit the definition of 'disability'.

The meaning of 'disability' is fairly wide and covers a variety of people,

some of whom might not traditionally be considered disabled, such as those with epilepsy or depression. Legal cases so far emphasise that the effect of the disability is the key, rather than the type of disability. Furthermore, if you suffer from a range of impairments, the focus should be on the overall effect of the impairments on your ability to function, rather than the separate effect of each individual impairment.

When considering whether you have a disability, the effect of any medication or treatment you receive for your condition must be discounted in considering the impact on your ability to carry out day to day activities. This is crucial. For example, medication, or the use of a hearing aid or walking stick should be ignored.

Perceived and Associative Discrimination

'The Act' has also been extended to cover direct discrimination and harassment (see below) suffered because of a disability of a person with whom you are associated, even if you are not yourself disabled. This would protect, for example, carers of disabled persons from detrimental treatment or comments made because of their association with a disabled person. The concept of 'Associative Discrimination' does not, however, extend to other types of disability discrimination such as the duty to make reasonable adjustments or discrimination arising from disability (see below).

Further, individuals perceived to be disabled even if they are not disabled, should also be covered by 'The Act' against acts of direct discrimination and harassment. In perception cases, it may not be necessary for an individual to fulfil the statutory definition of disability.

Discrimination in employment

Who is protected? 'The Act' makes it unlawful for all employers in Great Britain to discriminate against individuals because of disability. In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. Pre-employment health questionnaires have also been prohibited under 'The Act' – please see below. It is unlawful to discriminate against someone because of disability, from the initial job application process through to dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships, Crown employees and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. 'The Act' extends still further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others. There is no opt-out clause for small employers.

What is prohibited? - 'The Act' outlaws direct and indirect discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer. In fact, employers may be responsible for the acts of their agents, as well as the acts of their employees and in some circumstances the acts of third parties (see harassment below). Importantly, 'The Act' also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a former employer provides a discriminatory reference, or refuses to provide a reference at all, because of a person's disability, this could amount to unlawful discrimination.

There are six ways in which discrimination may arise.

Discrimination in employment

1. Direct discrimination - It is unlawful to treat a person less favourably because of their disability. In order to bring a claim of direct discrimination, you must show:

- That you have been treated less favourably because of disability
- That you were subject to disadvantage or detriment as a result of that treatment.

'The Act' requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone who does not have your disability, but whose position is the same or not materially different to yours in all other respects, including abilities. This 'comparator' can be an actual person or hypothetical. Where a disability carries stigma (for example, certain mental health conditions are still subject to stigma), then the misperception resulting from that stigma should not also be carried over to the comparator.

Direct discrimination cannot be justified. For example, if you are subject to stereotypical comments where your colleagues are not, this could amount to direct discrimination. There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious or that the discriminatory reason was the sole reason for their actions. Further, it does not matter if the discriminator shares the disability of the individual being discriminated against.

In most other cases under 'The Act', protection against direct discrimination applies equally to all persons. For example, women and men are equally protected against sex discrimination; black and white people are protected against race discrimination. However, there is a requirement that disabled persons may be treated 'more favourably' in order to 'level the playing field'. It is lawful, therefore, to treat a disabled person more favourably than a non-disabled person.

2. Discrimination arising from disability - This is a new type of discrimination prohibited by 'The Act'. A disabled person is entitled not to be treated unfavourably because of something arising in consequence of their disability. If they are treated unfavourably, then the discriminator must objectively justify that treatment. There is no need for a comparison of treatments afforded to a disabled and non-disabled persons to succeed in this claim.

There is no need to establish a direct link between the disability and the unfavourable treatment.

The unfavourable treatment should have been caused by something arising from the disability, for example, being treated unfavourably because of sickness absence, or the need to be accompanied by a guide dog, or because of behavioural issues.

A discriminator will struggle to justify unfavourable treatment if they could have made a related reasonable adjustment (see below) but failed to do so.

3. Indirect discrimination - This is the first time that indirect disability discrimination has been implemented into law. 'The Act' provides that a person also discriminates if an arrangement or feature relating to the employment (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all employees, but -

- Puts people of a particular disability at a particular disadvantage when compared with people without that disability
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a lawyer with dyslexia might be disadvantaged by their employer's requirement that all lawyers should proof read the final version of their own work to ensure accuracy before sending it out externally. The employer will need to justify the practice objectively and consider if there are more proportionate ways to achieve the aim of sending out accurate work, such as asking a colleague to proof read.

4. The duty to make reasonable adjustments - Discrimination may also occur if the employer fails to make reasonable adjustments in or around the workplace. If working practices or features of the premises put you at a substantial disadvantage, compared to your non-disabled colleagues, the employer must make reasonable adjustments to remove or minimise the disadvantage. For example, if you suffer from depression you may need to be allowed to work part-time, or if you use a wheelchair and you have to travel to work using public transport, then changing start times so that you can avoid rush hour traffic could be a reasonable adjustment. The comparator in a reasonable adjustments case will be more general than the comparator in direct discrimination cases.

"The Act' makes it unlawful for all employers in Great Britain to discriminate against individuals because of disability. This covers applications for employment, promotion, training, terms and conditions, benefits, dismissal and employment arrangements".



Under section 18B of the DDA, there was a list of factors to help determine whether an adjustment would be reasonable including: the cost, the impact of the adjustment and the resources of your employer. This list does not appear in 'The Act' but these factors are still likely to be relevant to the consideration of reasonableness. There is no financial cap on the possible cost of a reasonable adjustment, but the size and wealth of an employer is likely to be taken into consideration when determining whether the adjustment is reasonable or not.

5. Victimisation – The law protects people who seek to enforce their rights under 'The Act'. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under 'The Act'. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the DDA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the DDA; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the DDA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act' or the DDA. This would include raising a grievance of disability discrimination.

So for example, if you have made a complaint about disability discrimination and are later treated unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

"Discrimination may also occur if the employer fails to make reasonable adjustments in or around the workplace"



6. Harassment – Harassment related to disability is a form of discrimination. It is defined as being:

- Unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

Employees who experience harassment related to disability at the hands of a third party in the course of employment can claim against the employer if it can be shown that (i) the employer knew that the employee had been subjected to harassment on at least two previous occasions and (ii) the employer failed to take reasonable action to

prevent a further act of harassment by the same or another third party. Third parties can include customers or contractors.

A claim can also be brought if harassment occurs because of an association with someone of a particular disability, or if someone is perceived to have a particular disability.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, 'The Act' provides that the claimant is required to establish clear facts which could enable the Tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate explanation not related to disability from the respondent, the Tribunal must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

Pre-employment health questionnaires

A new provision introduced by 'The Act' prevents an employer from making enquiries about disability and health which could lead to discriminatory decisions regarding an individual's suitability for a role. 'The Act' makes it unlawful for an employer to ask a job applicant about his/her health before making an offer of employment. Employers contravening this provision can be investigated by the Equality and Human Rights Commission. Further, individuals can bring claims of direct discrimination as a result of not being offered a job following disclosures in a pre-employment questionnaire.

Employers can make health enquiries in certain circumstances but a Tribunal can treat such action as a fact that would shift the burden of proof to the employer to explain why a job was not offered following the use of such a questionnaire.

Knowledge of disability

For all disability claims under 'The Act' to succeed (save for indirect disability discrimination), the discriminator must know about the disability or be reasonably expected to know of it. Disclosure of a disability is, therefore, essential for protection under 'The Act'.

Questionnaires: getting the facts together

You can serve a questionnaire on your employer any time before lodging a claim at an Employment Tribunal or within 28 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, the Tribunal may draw an inference of unlawful discrimination.

Time limits and the correct legislation

Most claims will need to be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct.

In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on.

You may also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code.

If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or Tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

If the treatment you complain about happened or began before 1st October 2010, you should bring claims under 'The Act' and the DDA. 'The Act' will be used in all cases where the claim arose after 1st October 2010 in its entirety. You should seek legal advice if you are unsure about which legislation applies to your claims.

These provisions are complicated and you should obtain legal advice.

Remedies

If the Tribunal finds that you have been unlawfully discriminated against, the tribunal may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has been dismissed (only available in unfair dismissal claims where the individual has over one year's service)
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's discrimination.

"If your disability is not obvious, then you should let your employer know, otherwise there is no duty to make reasonable adjustments or protect you from discrimination".



Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:



0800 916 9015



Email: enquiries@rjw.co.uk



Web: www.rjw.co.uk



Our offices:

Birmingham, Bristol, Cardiff, Edinburgh (Associated Office), London, Manchester, Milton Keynes, Newcastle, Sheffield, Wakefield

Regulated by the Solicitors Regulation Authority. (SRA No. 54695)
Prepared by Russell Jones & Walker Solicitors 2011.

This factsheet is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this factsheet please seek formal legal advice. This information was correct at time of going to press August 2011.