

Summary of the law on DISABILITY DISCRIMINATION



This booklet sets out the basic employment rights to which workers are entitled under the age discrimination provisions of the Equality Act 2010. These apply in England, Scotland and Wales only.

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What does the Act cover?

The Act covers all forms of discrimination in the workplace, including recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of disability.

Who is protected?

It covers all employment and applies to apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable, for example if they have subjected a colleague to harassment related to disability.



What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met, set equality objectives and engage with others such as employees and unions when setting the objectives.



What is positive action?

As well as the duty to make reasonable adjustments for disabled people, the Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If employers "reasonably" think the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the characteristic provided that:

- The person is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).



Any action taken by an employer must be proportionate to these aims. Examples include the provision of training and encouraging applications for posts but the types of positive action measures employers can take are not limited to these two examples.

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



Who is disabled under the Act?

To be protected under the Act, workers have to show that they have a “physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities”. People do not lose their right to protection against discrimination because they have been able to control or correct their disability - for example by medical treatment or the use of aids. So the effect of the treatment must be disregarded when assessing whether or not someone is disabled. This provision does not apply to someone who wears glasses or contact lenses.

People who have had a disability in the past are covered under the Act, as are people with progressive conditions and anyone deemed to have a disability such as those who have been diagnosed with HIV infection, cancer and multiple sclerosis.

Babies and children under the age of six who have an impairment are also covered. This is significant for the purposes of associative discrimination so that the parent of a child with an impairment will be protected even if the child’s condition does not yet have a substantial adverse effect on the child’s ability to carry out normal day to day activities, but may do in the future.



How long is long-term?

To satisfy the definition in the Act, the disability must:

- Have lasted at least 12 months, or
- Be likely to last at least 12 months, or
- Be likely to last for the rest of the person's lifetime (if less than 12 months).

The Act also covers people whose condition may involve periods of remission. Although the impairment may no longer have an adverse effect, it will still be deemed to have that effect if it is "likely to recur".

What are normal day-to-day activities?

The phrase "normal day-to-day activities" means those activities that are "normal" for most people in their everyday lives, such as walking, driving and forming social relationships.



What does the Act outlaw?

Direct discrimination

Direct discrimination is when someone is treated less favourably because of disability. Unlike other discrimination legislation, however, it is not unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person.

In order to determine whether someone is directly discriminated against a comparison has to be made with someone without that disability but whose abilities and circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to have a disability or because they are associated with someone who has a disability. Examples of direct discrimination include:

- Someone who is not promoted because they are a wheelchair user.
- Someone who is refused flexible working to look after their disabled child although it has been granted to other workers who do not have a disabled child.
- Someone who is prevented from attending a training session because they are thought to have bi-polar disorder.

Someone who is not disabled cannot claim direct discrimination with a disabled person who has been treated more favourably because the employer has made a reasonable adjustment, for example.



Indirect discrimination

Indirect discrimination arises 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".

Discrimination arising from disability

This occurs when an employer treats a disabled person unfavourably "because of something arising in consequence of" the disabled person's disability.

As with indirect 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 has a disability.



Duty to make 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.

The duty arises when a PCP or physical feature of the premises places a disabled person at a substantial disadvantage in comparison to those who are not disabled.

The duty also applies when a disabled person would be put at a substantial disadvantage because an auxiliary aid was not provided. In that case the employer must take reasonable steps to provide the auxiliary aid.

The duty on the employer is to take such steps as it is reasonable to have to take to avoid the disadvantage. What is reasonable may depend on whether the step would remove the disadvantage, the cost and whether there was any financial assistance available, for instance from the government-run Access to Work scheme. An employer cannot require a disabled worker to pay for the cost of any reasonable adjustment.

Examples of reasonable adjustments include:

- Altering working hours.
- Allowing time off for rehabilitation or treatment.
 - Allocating some of the disabled person's duties to someone else.
- Transferring the disabled person to a vacancy or another place of work.
- Giving or arranging training for the disabled person or others.



- Providing a reader or interpreter.
- Acquiring or modifying equipment or reference manuals.
- Adjusting the premises.
- Providing supervision or other support.
- Providing information in accessible formats.

An employer who fails to comply with the duty to make a reasonable adjustment will be discriminating against a disabled worker. An employer cannot argue that they were justified in not making the reasonable adjustment where the duty arises.

Harassment

This occurs when one person subjects someone else to 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.

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 daughter will be protected under the Act.

Unwanted conduct includes the spoken or written word, jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.



Employers may also be liable for harassment by third parties such as clients or customers, provided the employer knows the worker has been subject to harassment on two previous occasions and has not taken any reasonably practicable steps to prevent the harassment.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- Bringing proceedings under the Act, or previous discrimination legislation.
- Making allegations of a breach of the Act or previous discrimination legislation.
- Giving evidence or information in connection with proceedings that someone else has brought.
- Doing anything else such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they have a disability in order to bring a claim. However, they do have to have acted in good faith when doing a protected act.

A false allegation will not amount to a protected act.



What health-related enquiries can employers make?

An employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful applicants.

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 the disabled.
- Ensure that the candidate actually has the disability if the job genuinely requires the jobholder to have a particular disability.



Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of their disability.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.

How do claimants gather information from their employer?

Workers can request information from their employer about their complaint. There are standard forms for asking and answering questions (the questionnaire procedure), as well as guidance which explains how the procedure works.

A questionnaire can be sent to the employer any time before a claim is lodged at the Tribunal or within 28 days of lodging a claim.

If the employer fails to answer the questions within eight weeks, a Tribunal may use this fact to draw an inference of unlawful discrimination.



What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

Where the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

In the case of pre-employment health questions only the Equality and Human Rights Commission can take enforcement action against an employer. However, where the employer asks a prohibited question and an applicant is not appointed as a result, they may be able to bring a claim of direct disability discrimination. In that case the employer will have to show that the reason the applicant was rejected was not discriminatory.



What remedies are available?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit to the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages can also be awarded if the employer has behaved in a high-handed malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.



Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant or any other person even though they were not a party to the claim.

Examples of recommendations Tribunals can make include requiring an employer to:

- Introduce an equal opportunities policy.
- Ensure their harassment policy is more effectively implemented.
- Set up a review panel to deal with equal opportunities and harassment/grievance procedures.
- Re-train staff, or
- Make public the selection criteria used for the transfer or promotion of staff.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.







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