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Disability discrimination

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Introduction

The main provisions of the Equality Act 2010 ("the Act") came into force on 1 October 2010. The Act attempts to harmonise and consolidate diversity law across all strands of discrimination. With regards to disability discrimination, the Act is mainly a restatement of the law found in the Disability Discrimination Act 1995 ("the DDA"), which it has replaced. However, it also made some significant changes and additions to the law.

An overview

In outline, the provisions on disability in the Act:

- cover all types of workers, including employees, self-employed, agency staff, partners and those undertaking vocational training
- apply to all stages of employment from recruitment, training, pay, benefits, promotion and dismissal to post-employment discrimination
- prohibit less favourable treatment because of disability, and unfavourable treatment of disabled persons for reasons arising from their disability
- prohibit harassment and victimisation
- prohibit discrimination because of association with a disabled person, and discrimination because of a perceived (rather than actual) disability; and
- limit the scope of questions about health or disability that can be asked before offering employment

What is a "disability"?

The definition of "disability" under the Act largely mirrors the position under the DDA. A disability can be a physical or mental impairment, and covers conditions that many people would not ordinarily describe as a disability, such as back problems and clinical depression.

The impairment must have a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. People with HIV, MS, or most types of cancer, are automatically deemed to be disabled and do not have to satisfy this test.

Note that "work" is not a normal day-to-day activity, and so the test focuses more on the impact of the condition outside the workplace than on the person's ability to do their job.

An impairment will have long-term effect if it has lasted or is likely to last 12 months or longer, and a 'substantial' effect if its effects on an individual are more than minor or trivial.

In assessing the effect on normal day-to-day activities, any treatment which alleviates/reduces the impairment's effect will not be taken into account. So, for example, if a person uses a hearing aid due to a hearing impairment, the impact on his/her normal day-to-day activities will be assessed when he/she is not using the hearing aid.

When does an employer have a duty to make reasonable adjustments?

Whenever a disabled person is placed at a substantial disadvantage by a provision, criterion or practice imposed by the employer or by a physical feature of the employer's premises, the employer has a duty to take reasonable steps to avoid that disadvantage.

Additionally, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, an employer has a duty to take reasonable steps to provide that auxiliary aid.

Examples of adjustments include allocating some of the disabled person's duties to another person, transferring the person to fill an existing vacancy, adjustments to premises, altering the person's hours of work or providing supervision or other support.

However, there will be circumstances in which an employer can argue that it is unreasonable to be expected to make the adjustments, for example, if it is too expensive given the size of the employer or simply not practical given the needs of the business. If the disabled person's hours or duties need to be reduced, bear in mind that it is lawful to reduce their pay to reflect this.

If the employer fails to make reasonable adjustments, it will be guilty of discrimination. However, the employer will have a defence if the employer does not know and could not reasonably have been expected to know that a person was disabled.

In what other situations does discrimination occur?

Direct discrimination
An employer will discriminate against a person if it treats him/her less favourably because of disability. For example, if a job applicant is not appointed simply because of a disability he/she disclosed at interview.

This type of discrimination tackles prejudice against disability and cannot be justified. Unlike under the DDA, the Act no longer requires the employee actually to be disabled in order to bring a direct discrimination claim.

Discrimination arising from disability
This occurs where an employer treats a disabled person unfavourably because of something arising in consequence of his or her disability, and the employer cannot justify this by showing that the treatment is a proportionate means of achieving a legitimate aim. For example, if an employee has clinical depression amounting to a disability and as a consequence does not turn up for work, an employer who treats him/her unfavourably (e.g. by giving a final written warning) would discriminate unless able to show that the giving of a final warning was a proportionate means of achieving a legitimate aim. This is potentially discrimination even if the employer can show that other absent employees would be treated in the same way.

This is similar to the old "disability-related discrimination" test in the DDA before the courts interpreted it in a restrictive way. However, the new law does not require a disabled person to compare his or her treatment with a non-disabled person.

This new test is wide. It means that any treatment which relates to a consequence of a disability, such as an employee's conduct or performance, may be discrimination. However, an employer will not be liable if it can show that it did not know and could not reasonably be expected to know that the employee was disabled.

Indirect discrimination
Indirect disability discrimination follows the same test that applies to other grounds of discrimination, but the Act applies this to disability for the first time. It arises if an employer applies a provision, criterion or practice to a disabled employee which:

- is also applied to non disabled persons (or persons with different disabilities)
- puts persons who have the same disability as the disabled employee at a particular disadvantage when compared with persons who do not have the same disability
- puts the disabled person at that disadvantage; and
- the employer cannot show to be a proportionate means of achieving a legitimate aim

For example, if an employer requires all employees in a particular role to be able to read, this is likely to be indirect discrimination against a blind job applicant unless the requirement can be justified – the requirement would disadvantage blind people generally, and also disadvantage this job applicant.

Indirect discrimination overlaps with other types of disability discrimination, and it is likely that all indirect disability discrimination claims could also be brought as claims for discrimination arising from disability and/or a failure to make reasonable adjustments.

Harassment

An employer will discriminate against a person if it subjects him/her to harassment which is related to disability. Harassment includes creating a hostile or offensive environment for an employee - for example, if work colleagues tell offensive jokes about disabled people in front of a disabled employee. However, a person bringing a claim for harassment does not actually need to be disabled. This means that a non-disabled employee could bring a claim where another employee creates an offensive environment by, for example, using inappropriate language which is related to disability. The Act also covers harassment by external third parties, such as clients or customers, where the employer is aware of harassment having occurred twice previously and has not acted to prevent it happening again.

Victimisation

An employer will be guilty of discrimination if it dismisses or treats detrimentally a person who makes a complaint about disability discrimination, brings proceedings for disability discrimination, or assists any person in relation to proceedings for disability discrimination.

Association and perception
Provided that disability is the reason for the treatment, a person will benefit from the protection of the direct discrimination and harassment provisions of the Act even if they themselves are not disabled. This would protect, for example, the parent of a disabled child from discrimination because of their child's disability. Similarly, a person is also protected from discrimination or harassment based on the perception that they are disabled, even if they are not.

Discriminatory advertisements

Employers must not publish advertisements for jobs (including promotions, transfers, work placements or any other appointments) which state or give the impression that having a disability may affect a person's chance of getting the job or that the employer may be reluctant to comply with a duty to make reasonable adjustments.

Pre-employment health questions

The Act introduced new restrictions on employers asking pre-employment health questions. The basic rule is that employers must not ask about the health of job applicants before offering work. There are a few limited exceptions to this – including where questions are asked to assess whether an employee is able to carry out a function intrinsic to the job, for diversity monitoring, and to establish if the employee is able to comply with a requirement to attend an interview or requires adjustments to do so.

Although an employer does not unlawfully discriminate merely by asking about health, its conduct in relying on information received (e.g. turning down an application for a job) may be unlawful discrimination. The fact that the employer has asked the

question would switch the burden of proof, so that it would be for the employer to show that it did not discriminate. In addition, the Equality and Human Rights Commission has power to investigate and take enforcement action.

It is still permissible for job offers to be made subject to satisfactory health checks.

Questionnaire procedure

An employee who believes he/she has been subjected to an act of discrimination can ask questions of his/her employer using a questionnaire. If the employer does not reply to the questionnaire within 8 weeks of the date it is served, a tribunal can decide that there has been discrimination.

The questionnaire and the employer's responses can be used in evidence in the employment tribunal.

What is the time limit for bringing a claim for disability discrimination?

The general rule is that a complaint of disability discrimination must be presented to the employment tribunal within 3 months of the date when the alleged discrimination took place.

What are the consequences of an employer being found guilty of disability discrimination?

If an employment tribunal decides that discrimination has taken place, the employer can be ordered to:

> pay uncapped compensation to the disabled person (based on loss suffered as a result of the discrimination including financial losses and injury to feelings); and/or

> take action to alleviate/reduce the adverse effect of the treatment/conduct the disabled person has complained about (e.g. make specific adjustments to its premises); and/or

> take action to alleviate/reduce the adverse effect of any matter to which the proceedings relate on any other person (e.g. make adjustments for other disabled employees in the workplace)

Transitional provisions

The Act applies to all discrimination arising on or after 1 October 2010. Where the conduct complained of occurred entirely before 1 October, the Act will not apply. Instead, the rules, procedures and remedies under the DDA will be applicable.

However, the Act's provisions will apply to continuing acts which began before 1 October and continued on or after that date. In 'borderline' cases of this kind, both the Equality Act and the relevant "old" DDA legislation will need to be considered to ensure correct application of the law.

Practical tips for handling an employee with a disability

> Try to obtain as much information as you can by speaking to the employee about his/her disability and the effect it may have on his/her ability to work

> Seek consent from the employee to undergo an independent medical examination and find out more about the impairment, its impact on normal day-to-day activities, its prognosis and any possible reasonable adjustments which could be made. Draft the instructions to the medical expert carefully: it is important that you get all the information you need

> Speak to the employee about any reasonable adjustments which you could make to alleviate/reduce the effect of his/her disability on his/her ability to work

> Find out how non-disabled people have been treated in similar circumstances – for example, if a long period of sickness absence has been tolerated for a non-disabled employee, it will be hard to defend a discrimination claim if the disabled employee is dismissed for the same length of sickness absence

> Always consider redeployment before dismissal: case law establishes that the duty to make reasonable adjustments can cover slotting a disabled person into an existing vacancy (even where there are other candidates)

> The Equality and Human Rights Commission has produced a Code of Practice on employment discrimination, which gives guidance on disability issues and reasonable adjustments

For further information on this subject, please contact:

Karen Baxter
Partner
T: +44 (0) 20 7074 8121
E: karen.baxter@lewissilkin.com

or another member of our Employment, Reward and Immigration Department known to you.

lewissilkin

Lewis Silkin LLP
5 Chancery Lane
Clifford's Inn
London EC4A 1BL

DX 182 Chancery Lane

T: +44 (0) 20 7074 8000
F: +44 (0) 20 7864 1200
E: info@lewissilkin.com
www.lewissilkin.com

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