

# Disability Discrimination



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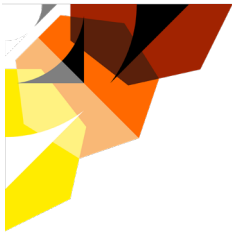
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The Equality Act 2010 governs the law relating to unlawful discrimination, including disability discrimination. There are some special protections for disabled people in addition to those which apply to other protected groups, including the duty to make reasonable adjustments. This Inbrief gives an overview of the law in the employment context.

For more information on general discrimination law, please see our Inbrief on Equality at Work.

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### What is a “disability”?

The definition of “disability” is important because it determines whether an individual is protected by discrimination law.

A disability can be a physical or mental impairment. This is a wide definition which covers both visible and non-visible conditions, and it is not necessary for the individual to have a medical diagnosis. The impairment will be a disability if it has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities. However:

- ▶ An impairment will have long-term effect if it has lasted or is likely to last for 12 months or longer.
- ▶ An impairment will have a “substantial” effect if its effects on an individual are more than minor or trivial. This means more than the normal differences in ability between people but includes activities that someone finds difficult rather than things they are unable to do at all. Progressive conditions are covered, where the initial effects may be minor but will get worse over time. Recurring conditions are also covered if this caused a substantial effect at some point, and this is likely to recur.
- ▶ Normal day-to-day-activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. This can include work-related activities (such as standing for long periods or lifting heavy items), although generally so the

test focuses more on the impact of the condition outside the workplace than on the person’s ability to do their job.

In assessing the effect of an impairment on normal day-to-day activities, any treatment which alleviates or reduces its effects should be disregarded. So, for example, if a person uses a hearing aid due to a hearing impairment, the impact on their normal day-to-day activities will be assessed when they are not using the hearing aid.

Some types of medical condition are deemed to be a disability and do not have to satisfy this test – including blindness or sight impairment, severe disfigurement, HIV, MS, and most types of cancer.

Some things are expressly excluded from the definition of disability – including most types of addiction, tattoos and body piercing, hayfever, and tendencies to various types of criminal conduct such as arson, stealing and abuse of others.

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### Types of disability discrimination

The following types of discrimination apply to disabled people in the same way as other protected groups under the Equality Act:

- ▶ **Direct discrimination** - less favourable treatment because of disability. For example, refusing to appoint a job applicant simply because of a disability they disclosed at interview. An individual does not need to actually be disabled themselves in order to make a claim of direct discrimination. For example, they can make a claim for being treated badly because they are perceived to have a disability, or because they have a disabled child.



However, it is not possible for a non-disabled person to claim that they have been treated less favourably than a disabled person.

- ▶ **Indirect discrimination** - applying a provision, criterion or practice which disadvantages the disabled individual, would put others with the same disability at a particular disadvantage, and which is not a proportionate means of achieving a legitimate aim (i.e. not justified by the employer). 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.
- ▶ **Victimisation** - subjecting someone to a detriment for making a complaint or bringing or assisting with a claim. For example, not promoting an employee because she had previously brought a grievance about disability discrimination.
- ▶ **Harassment** - unwanted conduct related to disability which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. For example, making fun of a colleague's mental health condition. The definition covers both single acts directed at a particular person and more general behaviour that creates an inappropriate environment. A person bringing a claim for harassment does not actually need to be disabled, so long as they have been affected by disability-related conduct such as jokes or inappropriate language.

There are also two special types of disability discrimination protection that do not apply to other protected groups. These are discrimination arising from disability and duty to make reasonable adjustments.

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### Discrimination arising from disability

This occurs where an employer treats a disabled person unfavourably because of something arising in consequence of their 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 meet required standards of performance, an employer may give them a final written warning. The warning would be unfavourable treatment arising in consequence of the employee's depression which caused them to underperform. This would be discrimination unless the employer is able to show that the giving of a final warning was justified as it was a proportionate means of achieving a legitimate aim. This is the case even if the employer can show that other underperforming employees would be treated in the same way. The employer would need to explain what its business aim is in issuing a written warning, and why it was proportionate to do so in this case despite the employee's disability.

This is a wide test. There is no need for the disabled person to compare their treatment with a non-disabled person. It means that any treatment which relates to a consequence of a disability, such as the effects of a disability on an employee's conduct or

performance, may be discrimination (unless the employer can justify it). This issue often overlaps with the duty to make reasonable adjustments, where an employer is expected to adjust things in the workplace to accommodate an employee's disability (explained further below).

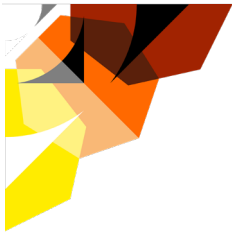
Although the test is wide, an employer will not be liable for discrimination arising from disability if it can show that it did not know and could not reasonably be expected to know that the individual was disabled. This does not mean it is always necessary for the employee to inform their employer about the disability. There can be circumstances where the employer is reasonably expected to know about the disability because of the employee's behaviour or other relevant circumstances. For example, if a previously reliable employee starts to take lots of time off sick, behave erratically in the workplace, or regularly falls asleep at their desk, this may be sufficient to alert the employer that they may have a disability.

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### The duty to make reasonable adjustments

A key part of ensuring that disabled employees are able to participate effectively in the workplace is the requirement under the Equality Act for employers to make adjustments in order to accommodate a disabled person's needs. This is known as the duty to make reasonable adjustments.

Whenever a disabled person is placed at a substantial disadvantage by a provision, criterion or practice ("PCP") 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. 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, altering a performance management or absence process, or providing supervision or other support.

In addition, 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 auxiliary aids include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software, and auxiliary services such as provision of a sign language interpreter or a support worker for a disabled worker.

The duty is to take "reasonable" steps, meaning there will be circumstances in which an employer can argue that it is unreasonable to be expected to make the adjustments. For example, it may be too expensive given the size of the employer, or simply not practical given the needs of the business. This is an objective test, depending on the circumstances of each case. Smaller employers with fewer resources may find it easier than larger employers to show that a particular adjustment is disproportionate and so unreasonable. If an adjustment involves reducing the disabled person's hours or duties, it will also be lawful in most cases to reduce their pay to reflect this.

If the employer fails to make reasonable adjustments, it will be guilty of discrimination. It is good practice to ask the disabled employee or job applicant, about possible adjustments, and advisable to agree them with the individual before they are put in place.

As with discrimination arising from disability, there is no duty to make reasonable adjustments if the employer does not know and could not reasonably have been expected to know that a person is disabled. Again, the test of what the employer is reasonably expected to know means it is not always necessary for the individual to inform the employer about the disability.

The employer will also not be liable if it does not know and could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage by the PCP, physical feature of premises or lack of an auxiliary aid. As with knowledge of disability, it is not always necessary for the individual to inform the employer about any disadvantage. Depending on the circumstances, it may be obvious that something would disadvantage a person with a particular disability – for example, if job applicant who uses a wheelchair is due to attend an interview in a building without step-free access. It is advisable for an employer to have systems in place to find out the relevant information.

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### Pre-employment health questions

The Equality Act contains some 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 automatically 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 in a discrimination claim, meaning 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.

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### Practical tips for assisting an employee with a disability

- ▶ Try to obtain as much information as you can by speaking to the employee about their disability and the effect it may have on their 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 or reduce the effect of their disability on their 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.

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