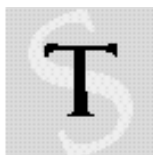


THE DISABILITY DISCRIMINATION ACT 1995

A GUIDE FOR UNION REPRESENTATIVES



THOMPSONS
SOLICITORS

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INTRODUCTION

The Disability Discrimination Act 1995 creates new rights for the estimated 6.5 million disabled people in the UK. It makes it unlawful to discriminate against disabled people in employment, access to goods, services, transport and education.

The employment provisions of the Act came into force on 2nd December 1996. If there is unlawful discrimination then a disabled person can claim compensation from an Industrial Tribunal.

The Act covers Great Britain and Northern Ireland.

The National Disability Council established by the Act will primarily advise the Government in relation to disability. It has limited powers of enforcement so that the role of Trade Unions in securing compliance by employers with the new Act will be crucial.

DEFINITION OF DISABILITY AND OF A DISABLED PERSON

A disabled person is a person who has a disability. Section 1 provides a definition with three elements, all of which have to be met.

A person has a disability if he or she:-

- 1.** has a physical or mental impairment which has
- 2.** a substantial and long term adverse effect on
- 3.** his or her ability to carry out normal day to day activities.

What is a Physical or Mental Impairment?

The word impairment is not defined in the Act. The Disability Discrimination (Meaning of Disability) Regulations 1996 list conditions which will not be treated as amounting to an impairment. These include addictions to alcohol, nicotine or any other substance, unless originally caused by taking prescribed drugs.

The “Guidance on matters to be taken into account in determining questions relating to the definition of disability” does not have the force of law but a Tribunal must take it into account when deciding if a person has an impairment which has a substantial and long term adverse effect.

The Guidance expands on the definition of mental impairment which does not include any impairment resulting from a mental illness unless that illness is “clinically well recognised”. The Guidance says this means that the illness is recognised by a respected body of medical opinion.

Substantial and Long Term Adverse Effect

Long term means at least 12 months or the remainder of the person’s life (if less than 12 months). Where a condition is recurrent it is treated as continuing if it is likely recur.

This would apply to conditions such as epilepsy. The Guidance identifies indicators of potentially substantial effects as:-

- the time taken to carry out tasks
- the way in which tasks are carried out

The Guidance stresses the need to take account of the cumulative effects of impairments which may not in themselves be substantial if taken individually.

The effect of environmental conditions such as temperature, humidity or fatigue are relevant to the issue of whether or not the adverse effect is substantial.

The extent to which an employee can reduce the effects of their condition by modifying their behaviour will be taken into account though beneficial effects of treatment will be disregarded in assessing the severity of effects. This means that the degree of impairment for someone with a hearing aid would be assessed by the level of hearing without the aid. This provision also applies to artificial limbs, but not glasses or contact lenses.

Ability to Carry Out Normal Day to Day Activities

A person is defined as disabled only if their impairment affects their ability to carry out one of the following day to day activities:-

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move every day objects
- speech, hearing, eyesight

- memory or ability to concentrate, learn or understand.
- perception of risk of physical danger

The Guidance lists examples of effects which would amount to an impairment and those which would not. Although it claims these are indicators and not tests, there must be a risk that Tribunals will adopt these as authoritative statements.

For example, the Guidance states that someone who can walk no more than a mile without discomfort will have difficulty establishing this as an impairment. On ability to lift, the Guidance suggests inability to pick up objects of moderate weight with one hand would be a substantial adverse effect, but inability to move heavy objects without a mechanical aid would not. This is likely to prove controversial in both employment cases and personal injury cases following work place injury where a person's employment prospects may be blighted by the injury but do not fall within the definition of disablement.

People Deemed to Be Disabled

People who are registered disabled under the Disabled Persons' (Employment) Act 1944 (or the Northern Ireland equivalent) are deemed to be disabled persons under the new Act for an initial period of 3 years. After 3 years they must satisfy the new statutory test of disablement though will be treated as having had a disability in the past for the purposes of the definition. People with severe disfigurements are covered by the Act. They do not need to show the impairment has a substantial adverse effect

on their ability to carry out normal day to day activities.

People with progressive conditions such as cancer and multiple sclerosis are covered by the Act from the moment the condition leads to an impairment which has some (not necessarily substantial) effect on ability to carry out normal day to day activities if the impairment is likely eventually to have a substantial adverse effect.

NEW EMPLOYMENT RIGHTS

It is unlawful for an employer to discriminate against a disabled job applicant or employee in:-

- selection arrangements
- terms and conditions of employment
- promotion or transfer
- training
- employment benefits
- dismissal or any other detrimental treatment

Victimisation

It is unlawful for an employer to treat an employee less favourably because the employee has brought a claim under the Act, given evidence or information in connection with a claim under the Act, or otherwise done anything under the Act or alleged that a person has contravened the Act or because the employer believes or suspects the employee has done or intends to do any of these things.

Victimisation is a separate act of discrimination.

Small Employers Excluded

The employment sections of the Act do not apply to employers with less than 20 employees.

Specified Exclusion

Certain Crown employees including prison officers, firefighters, persons serving in the armed forces and police officers are excluded from the protection of the Act.

Definition of Discrimination

Section 5 of the Act sets out two elements to test whether an employer has discriminated against a disabled person. An employer will have discriminated if:-

- 1.** for a reason which relates to the disabled person's disability he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
- 2.** he cannot show that the treatment in question is justified.

The word "relates" at (1) above can be used to challenge what has been known in sex and race discrimination cases as indirect discrimination. This means that a disabled person who is treated less favourably because of a requirement or condition of an employer which disproportionately affects disabled people may be protected. So, for example, a requirement or condition that a machine operative have a minimum level of numeracy or literacy may be discriminatory against a disabled person with learning difficulties. Likewise a redundancy selection policy which uses absence rates as a criteria may be discriminatory against disabled persons.

The Employer's Defence - Justification

An employer who discriminates against a disabled person has a defence if he can establish that the discriminatory treatment is justified.

The burden to prove justification is on the employer.

Discrimination will only be justified if “the reason for it is both material to the circumstances of the particular case and substantial”. What is material and substantial will be a matter for the Tribunal.

The Code of Practice suggests that employee or customer preference will not usually justify discrimination and also warns against unjustifiable medical checks and health requirements.

Employer's Duty to Make Reasonable Adjustments to Working Arrangements and to Premises

Section 6 of the Act imposes a duty on employers to make reasonable adjustments where working arrangements and/or the physical features of premises cause a substantial disadvantage for a disabled person in comparison with people who are not disabled.

The Act gives eight examples of reasonable steps which employers might have to take including:-

- 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 another vacancy or another place of work
- giving or arranging training

- providing a reader or interpreter
- acquiring or modifying equipment or reference manuals
- adjusting the premises

An employer's failure to make a reasonable adjustment can be a separate act of discrimination unless it can be justified.

An employer cannot justify discrimination under section 5 if by a reasonable adjustment under Section 6 the justification would become irrelevant.

For example, a large insurance company rejects a job applicant for the position of personal assistant to a director because the applicant has a mobility restriction, the justification being that the mobility restriction will make it difficult for the applicant to hand deliver confidential internal documents. This duty forms a regular and significant part of the job but could easily be reallocated to another person. If the employer fails to consider reallocation of these duties to another person he is unlikely to be able to justify his discrimination.

Arrangements

Section 6 provides that an employer is under a duty to make a reasonable adjustment to:-

- arrangements to determine who is offered employment ie selection arrangements
- terms and conditions or other arrangements on which employment, promotion, transfer, training or any other benefit is offered

Physical Features of Premises

Physical features are defined by the Disability Discrimination (Employment) Regulations 1996 as features:-

- arising from the design or construction of buildings
- exits or access to buildings
- fixtures, fittings, furnishings, equipment or materials
- any other physical element or quality of land or the premises

Some examples of what might cause substantial disadvantage to a disabled person include lighting that is too dim for someone with restricted vision, doors too narrow for wheelchair users or a work start time which causes problems for persons with a mobility restriction.

What is a Reasonable Step for an Employer to Take?

What is or is not a reasonable step will be decided by reference to the cost of the adjustments required, their effectiveness and the financial resources of the employer.

For contract workers the employer and the person to whom the employee is hired will in some circumstances have to make reasonable adjustments.

PAST AND FUTURE DISABILITY

The Act applies to people who had a disability in the past but not those with a genetic predisposition or future risk of disability.

NATIONAL DISABILITY COUNCIL

The powers of the new National Disability Council have been criticised for being unnecessarily weak. Unlike the Equal Opportunities Commission or the Commission for Racial Equality, it does not have the power to assist individuals with their claims to Tribunals and its power to enforce the provisions of the Act are limited.

ABOLITION OF THE 3% QUOTA SYSTEM

The existing 3% quota system set out in the Disabled Persons (Employment) Act 1944 requiring employers of a “substantial number of employees” to give employment to a specified percentage of disabled people is abolished. However, the Act does not outlaw positive discrimination in favour of disabled people.

COMPLAINTS TO AN INDUSTRIAL TRIBUNAL

A complaint of discrimination can be taken to an Industrial Tribunal. The procedures and remedies available are similar to those contained in the Sex Discrimination Act 1975 and the Race Relations Act 1976. In particular:-

- there is a 3 month time limit for lodging applications
- the Industrial Tribunal has the power to make a declaration, recommendation or award compensation. There is no upper limit on the amount of compensation that can be awarded and interest can be payable
- there is provision for the use of the questionnaire procedure to ask questions of employers

CODE OF PRACTICE

The Code of Practice for the elimination of disability discrimination does not impose legal obligations but can be put in evidence before Tribunals and must be taken into account.

For example, Tribunals are likely to be influenced by the view stated at page 42 of the Code that a disabled person whose disability leads to a lower output of work, even after reasonable adjustments, may be paid less than colleagues with a higher output.

DISABILITY DISCRIMINATION (EMPLOYMENT) REGULATIONS 1996

A similar issue arises under the Disability Discrimination Employment Regulations which permit performance related pay. Performance related pay is not to be treated as an arrangement which places disabled people at a substantial disadvantage. There is however still an obligation on an employer to make reasonable adjustments to aspects of the premises or work arrangements which would otherwise reduce the employee's performance with adverse effects on pay.

The Employment Regulations deal with a number of situations where the legislation says discrimination is justified. These include eligibility for benefits under occupational pension schemes. There are also specific provisions dealing with the situation where the premises are leased from a landlord.



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THIS BOOKLET IS DESIGNED TO HELP YOU UNDERSTAND EMPLOYMENT RIGHTS UNDER THE NEW DISABILITY DISCRIMINATION ACT 1995 WHICH CAME INTO FORCE ON 2ND DECEMBER 1996 AND WHICH IS SUPPLEMENTED BY:

- the Disability Discrimination (Meaning of Disability) Regulations 1996
- the Disability Discrimination (Employment) Regulations 1996
- the Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability 1996 – and
- guidance on matters to be taken into account in determining questions relating to the definition of disability.

This booklet does not deal with the non employment provisions of the Act relating to education, the provision of goods and services and so on.

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