

## Legal Factsheet – Discrimination: The Rights of Disabled Employees under the Disability Discrimination Act 1995

2009

This Factsheet covers five areas:

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2. The meaning of “discrimination”
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4. Who’s liable if I am discriminated against by a work colleague?
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### 1. Introduction

- 1.1 The Disability Discrimination Act 1995 (‘DDA’) provides the right for disabled people not to be discriminated against in a number of situations, including in their capacity as a disabled employee.
- 1.2 However, in order to be protected against any form of disability discrimination under the DDA, a person must either currently have a disability or must have previously had a disability as defined in the DDA. (The DDA provides protection against discrimination in respect of a *past* disability, even if that person is no longer disabled. For example, it would be discriminatory to unjustifiably reject a job applicant because he or she had previously experienced a period of mental illness).
- 1.3 What is a ‘disability’?

According to the DDA, a person has a disability if he or she:

- a) has a physical or mental impairment, which has a
- b) substantial (i.e. more than minor or trivial) and
- c) long-term (i.e. likely to last more than 12 months)
- d) adverse effect on his or her ability to carry out normal day-to-day activities (i.e. things that people do on a regular or daily basis, such as shopping, reading and writing, walking and travelling by various forms of transport).

All four (a to d) parts of this quite complex definition must be satisfied. Generally speaking, if you think that you’re disabled and if your employer is unsure then it should arrange for expert medical guidance to be provided about your disabled status.

#### 1.4 Would a facial or other disfigurement count as a disability?

The DDA makes clear that where an impairment consists of a severe disfigurement, it is to be treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities. Examples of disfigurements might include scars, birthmarks or skin diseases. Assessing severity will be mainly a matter of the degree of the disfigurement. However, it may also be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face).

## 2. The meaning of "discrimination"

2.1 The DDA outlaws a number of different forms of discrimination against a disabled employee, namely:

- direct discrimination
- unjustifiable disability-related discrimination
- a failure to make a reasonable adjustment
- harassment
- victimisation

2.2 These different forms of discrimination are illustrated by the following examples. In each case the second example is disfigurement-related:

### Disability-related example

- a) A woman with arthritis in her hands applies for a secretarial job. There is a question on the application form about disability, and she states that she has arthritis in her hands but that it does not affect her typing. The employer rejects her application without interviewing her because it nevertheless wrongly assumes that she will not be able to carry out the job due to her arthritis. This is unlawful **direct discrimination** – i.e. discrimination based upon the fact that the woman is disabled – and this cannot be justified.
- b) In the same situation, the woman instead declares on the application form that her arthritis makes her typing slower, although she maintains that she can still type at an acceptable speed. On this occasion she is interviewed and is asked to undertake a typing test as part of the selection process. She fails the test because she can only type at 60 words per minute rather than the required 80 words. As a consequence, she is turned down for the job. This is not direct discrimination, as the reason for the rejection was not the fact that she was disabled but was instead the impact of her disability on her typing speed. However, the employer may be guilty of unlawful **disability-related discrimination** because it treated her less favourably (by rejecting her) for a reason relating to her disability (namely the fact that she failed the typing test). It would, however, be open to the employer to seek to justify its decision: if it can do so then it won't be guilty of discrimination.
- c) In the above example, the woman asks to be allowed to use a special key board when typing, as this enables her to type faster. There is a duty on the employer under the DDA to make reasonable adjustments to any of its practices or policies (which would include its selection

arrangements) where a disabled job applicant or existing employee would otherwise be placed at a substantial disadvantage. It is likely to be a reasonable adjustment for the employer to provide the special keyboard or else to allow the woman to use her own, thereby ensuring that she is not placed at a substantial disadvantage by the typing test. If it fails to do so then the employer will be **unlawfully discriminating against her by failing to make a reasonable adjustment**.

- d) Because of the way in which she has been treated, the disabled woman makes a claim against the employer under the DDA. Later, the same employer advertises a further secretarial vacancy. The woman applies again but the employer rejects her application because she has previously made a claim under the DDA. This is **unlawful victimisation**.
- e) In an alternative scenario, the woman is recruited. She continues to type more slowly than her secretarial colleagues and they begin to pick on her for this, maintaining that they are having to 'carry her' and that someone with her condition shouldn't be a secretary. This would be **unlawful harassment**.

#### Disfigurement-related example

- a) A woman with a portwine stain on her face applies for a customer-facing job. There is a question on the application form about disability, and she states that she has a facial portwine stain. The employer rejects her application without interviewing her because it nevertheless wrongly assumes that she will not be able to carry out her job as customers will not want to be served by her. This is unlawful **direct discrimination** – i.e. discrimination based upon the fact that the woman is disabled – and this cannot be justified.
- b) In the same situation, the woman instead declares on the application form that she is slightly concerned at some customers' negative reactions, but feels these can be overcome. On this occasion she is interviewed, but the interviewer feels uncomfortable with her. As a consequence, she is turned down for the job. This is not direct discrimination, as the reason for the rejection was not the fact that she is disabled but was instead the assumption that all customers would feel just as awkward as the interviewer. However, the employer may be guilty of unlawful **disability related discrimination** because it treated her less favourably (by rejecting her) for a reason relating to her disability (namely the fact that the interviewer was uncomfortable). It would, however, be open to the employer to seek to justify its decision: if it can do so then it won't be guilty of discrimination.
- c) In the above example, the woman asks that a colleague step in to serve a customer who refuses to be served by her. There is a duty on the employer under the DDA to make reasonable adjustments to any of its practices or policies (which include its selection arrangements) where a disabled job applicant or existing employee would otherwise be placed at a substantial disadvantage. It is likely to be a reasonable

adjustment for the employer to put a strategy in place that allows a colleague to serve a customer in her place, thereby ensuring that she is not placed at a substantial disadvantage by people's assumptions. If it fails to do so then the employer will be **unlawfully discriminating against her by failing to make a reasonable adjustment**.

- d) Because of the way in which she has been treated, the disabled woman makes a claim against the employer under the DDA. Later, the same employer advertises a further customer-facing vacancy. The woman applies again but the employer rejects her application because she has previously made a claim under the DDA. This is **unlawful victimisation**.
- e) In an alternative scenario, the woman is recruited. A couple of customers refuse to be served by her and her begin to pick on her for this, maintaining that they are having to 'carry her' and that someone with her condition shouldn't be in a customer-facing job. This would be **unlawful harassment**.

2.3 In practice, the majority of employment-related disability issues concern the employer's duty to make reasonable adjustments and so it is worth considering this in more detail.

- a) This duty arises whenever an employer's provision or practice (such as its recruitment or promotion selection criteria) or where any physical feature of the employer's premises places a disabled job applicant or existing employee at a substantial disadvantage as compared with non-disabled people. When this happens, the employer must make reasonable adjustments to prevent that disadvantage.
- b) The DDA sets out a non-exhaustive list of examples of possible adjustments. These include:
  - making adjustments to premises;
  - allocating some of the disabled person's duties to another person;
  - transferring the disabled person to fill an existing vacancy;
  - altering his or her hours of working or training;
  - assigning the disabled person to a different place of work or training;
  - acquiring or modifying equipment;
  - modifying procedures for testing or assessment;
- c) It may be necessary for an employer to make more than one adjustment.

### 3. The employer's duties towards disabled job applicants and employees

The DDA makes it unlawful for an employer to discriminate against a disabled job applicant or employee in relation to their recruitment, whilst they are in employment or when considering their dismissal.

3.1 Job Applicants: employers must take care to avoid discriminating against disabled people throughout the recruitment process. For example:

- when specifying or advertising a job vacancy, employers shouldn't include unnecessary or marginal requirements;
- when requested to do so, employers should provide application forms and information about job vacancies in alternative formats and should likewise be willing to accept job applications in alternative formats;
- when establishing selection, assessment and interview arrangements, employers should consider the need to make adjustments when deciding who to short-list for interview and when selecting an accessible venue for interviews. It might also be reasonable to make adjustments to selection tests, such as allowing a disabled person extra time in which to complete the test. (The extent to which such adjustments might be reasonable would depend upon how closely the test is related to the job in question and what adjustments the employer might have to make if the applicant were given the job).

3.2 Existing Employees: employers must avoid discriminating against their existing disabled employees:

- Terms and conditions of service: it might, for example, be a reasonable adjustment to change an individual's hours of work whose disability means that he has difficulty using public transport during the rush hour;
- Induction, training and development: employers may have to make adjustments to an induction programme or to selection criteria for a training course;
- Benefits: employers must not discriminate in the provision of benefits such as dedicated car parking spaces, bonuses, health care, company cars and rights to special leave;
- Promotion and transfer: employers must ensure that arrangements for promoting staff, or for transferring staff between jobs, do not discriminate against disabled people (both at the assessment stage and also in the practical arrangements necessary to enable a promotion or transfer to take place or, indeed, in the new job itself);
- Retention of disabled employees: an employer must not discriminate against an employee who becomes disabled or who has a disability which worsens. For example, if, as a result of a disability, an employer's arrangements or a physical feature of its premises place a disabled employee at a substantial disadvantage in doing his existing job, the employer must consider any reasonable adjustment that would resolve the difficulty.
- Termination of Employment: where a disabled person is dismissed or is selected for redundancy or compulsory early retirement (including compulsory ill-health retirement), the employer must ensure that the employee is not being directly discriminated against. Even if the dismissal or selection is not directly discriminatory, the employer must show that it is

justified if the dismissal or selection is made for a reason related to the disability and, in addition, would have to be able to show that this was a reason which could not be removed by any reasonable adjustment. For example, when establishing criteria for redundancy selection, employers should consider whether any proposed criteria would adversely impact upon a disabled employee. If so, it may be necessary to make reasonable adjustments such as discounting disability-related sickness absence when using past attendance as a redundancy selection criterion, or discounting how “flexible” an employee can be.

### 3.3 After the Termination of Employment:

Even where a disabled person’s employment has come to an end, it will still be unlawful for his/her former employer to discriminate against the disabled person by subjecting him or her to a detriment or to harassment, provided that the discrimination or harassment arises out of the employment which has come to an end and is closely connected to it. It is also unlawful to victimise a person (whether or not he is disabled) after his employment has come to an end.

## 4. **Who’s liable if I am discriminated against by a work colleague?**

As well as being liable where the employer itself discriminates against a disabled job applicant or existing employee, employers are also potentially liable for the actions of their employees which are carried out in the course of their employment. (This is subject to the employer being able to show that it took reasonable steps to prevent such discrimination by colleagues, such as training staff in equal opportunities and disciplining those who do discriminate). Thus if a disabled employee is harassed by his or her work colleague, the employer may be liable for that act of discrimination. In addition, the work colleague himself or herself will be liable.

## 5. **What can I do if I think that I have been discriminated against by either my employer and/or by a work colleague?**

5.1 Disabled job applicants, employees and former employees who believe that they have suffered discrimination may present a complaint to an employment tribunal. There is no minimum qualifying period of service required on the part of the employee before he or she can bring a claim for disability discrimination.

5.2 The time limit for bringing a claim is typically three months beginning on the date when the act of discrimination took place. Although this time limit may be extended in certain circumstances, you would be well advised to seek expert guidance as soon as possible if you believe that you have been discriminated against.

5.3 Where a Tribunal finds a claim to be well-founded, it will take one or more of the following steps:

- a) a declaration as to the rights of the parties;

- b) an Order for the payment of compensation (and there is no maximum limit on the amount of the compensation that a Tribunal may award);
  - c) a recommendation that the employer takes action to remove or reduce the adverse effect in question within the given period.
- 5.4 Claims may be settled through ACAS or by way of a Compromise Agreement.
- 5.5 DDA Questionnaires: an individual who believes that he or she is the victim of discrimination is able to question an employer whom they hold responsible for their treatment via a questionnaire. The questionnaire and any reply to it are admissible in evidence in Employment Tribunal proceedings and a Tribunal may draw any inference which it considers just and equitable from either a failure by the employer to reply to a questionnaire within a period of eight weeks, or from an evasive or equivocal reply. Questionnaires can be served any time up to the presentation of an Employment Tribunal claim or within 21 days thereafter.

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Thank you very much.