

Briefing Note – Does Disability Discrimination Law Protect Workers with Mental Illness?

Introduction

Since the Disability Discrimination Act 1995 ('DDA') came into effect in 1996, it has been unlawful to discriminate against disabled people at work. The DDA has been subject to continual expansion, evolution and interpretation. On 1st October 2004, further changes to the DDA came into force, increasing protection for disabled people and ensuring equality of opportunity.

The DDA has also been amended by the Disability Discrimination Act 2005 ('DDA 2005'). The DDA 2005 builds on and extends the DDA. In particular it extended the definition of disability.

Protection for Workers with Mental Health Problems

It is estimated that potentially 1 in 4 people in the UK have a mental health problem, and 1 in 50 suffer from schizophrenia and manic depression. However, prior to the DDA 2005 people with mental illness would not meet the definition of a disabled person under the DDA and therefore would not be afforded protection against discrimination on the basis of their illness. It is reported that by extending the coverage of the DDA, the Act will provide protection to another 250,000 disabled people.

Unfortunately, many employers and employees (including those with mental illness) do not know or understand the law in this area. It is important to raise awareness, so that workers with mental health problems know their rights and can be assured of fair treatment and support, and employers do not lose valuable workers or fall foul of the DDA.

The Changed Law

Since 1st October 2004 the DDA applies to all employers, except for the Armed Forces, regardless of how many people they employ. It protects all workers, whether full-time, part-time, apprentices or contractors. There are now 4 types of discrimination (see below), and the scope of the legislation has considerably widened.

Part 2 of the DDA is based on the principle that disabled people should not be discriminated against in employment or when seeking employment (e.g. through application forms, interview arrangements, proficiency tests, job offers, terms of employment, promotion, transfer or training, benefits, and dismissal or redundancy).

Of course, the DDA does not prevent employers taking on the best person for the job, nor does it prevent employers providing more favourable treatment to disabled people than non-disabled people.

1) Direct Discrimination

The employer's treatment of a disabled person amounts to direct discrimination if it is **on the grounds of their disability** and it is less favourable than the way in which a person not having that disability would be treated, and the material circumstances (including abilities) of the comparator are the same as, or not materially different from those of the disabled person.

Disability does not have to be the main cause for the treatment, provided it is an effective cause.

2) 'Disability-related Discrimination' (since 1st October)

The employer's treatment of a disabled person amounts to discrimination if it is **for a reason related to their disability** and it is less favourable than the way in which the employer treats others to whom that reason does not apply.

For example, an employee takes 6 months sick leave, which is disability related. He is dismissed for this. The correct comparator is someone who has not taken 6 months sick leave. This could be discrimination, as the comparator would not have been dismissed.

3) Failure to make Reasonable Adjustments

The duty to make reasonable adjustments arises where a **provision, criterion or practice** (e.g. the terms on which employment, promotions, transfers, training, or other benefits are offered) applied by the employer, or **any physical feature of the employer's premises**, places a disabled person at a **substantial disadvantage** compared with non-disabled people. The employer must take such steps as are reasonable in all the circumstances to prevent that disadvantage i.e. the employer must make *reasonable adjustments*. The duty is owed specifically to the individual disabled person/s.

For example, providing extra time to somebody with dyslexia to take a job application test is likely to be a reasonable adjustment. Other examples of reasonable adjustments include; changing the disabled person's duties, transferring to another role, providing aids and equipment, altering working hours, adjusting premises, allowing absence for treatment, providing mentoring and other support, and permitting flexible working.

In the case of obesity, where an employee is obese which has been caused by a medical problem that amounts to a disability, an employer will be under a duty to make reasonable adjustments to account for an employees weight. It is suggested that in this situation, it would be advisable for an employer to advise the employee of the options that will help them to lose weight.

To decide whether it is 'reasonable' to make adjustments, there are certain factors to consider: how effective the adjustment is in preventing the disadvantage, how practical it is, the costs and extent of any disruption, the extent of the employer's financial and other resources, the availability of help to make the adjustment, and the size and type of business.

The duty applies in recruitment and during all stages of employment, including dismissal. It relates to disabled employees and disabled job applicants.

Although there is no duty to anticipate the needs of disabled people in general, it is sensible for employers to keep all policies under review, considering the needs of disabled people. Such policies might include flexible working arrangements, sickness absence, redundancy selection, and employee training and development.

4) Victimisation

It is unlawful for someone to treat another ('the victim') less favourably than he treats others in the same circumstances, because the victim has brought or given evidence or information in connection with proceedings under the DDA, has done anything else in reference to the DDA, or has alleged someone has contravened the DDA, or because the person believes or suspects the victim has done or intends to do any of those things.

Harassment of a disabled person has also been made unlawful under the DDA. This occurs where, for a reason relating to a person's disability, another person engages in unwanted conduct which has the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Who is Disabled under the DDA?

Disabled people aren't just those who have a visible impairment. There are many types of disability, and employers may not always be aware that they employ someone who is disabled.

A disabled person is defined under the DDA as someone who has a **physical or mental impairment** that has a **substantial and long-term adverse effect** on their ability to carry out **normal day to day activities** (those carried out by most people on a regular and frequent basis, and the impairment affects either: mobility, manual dexterity, physical coordination, continence, ability to lift carry or move everyday objects, speaking, hearing or seeing, memory or ability to concentrate, learn or understand, or perception of the risk of physical danger).

Substantial effect means an effect which is more than minor or trivial, and *long-term effect* means one that has lasted at least 12 months, or the total period for which it is likely to last will be at least 12 months, or it is likely to last the rest of the person's life.

Those who have since recovered from a disability remain protected by the DDA.

Some conditions are specifically excluded, including addiction to or dependency on alcohol, nicotine or any other substance.

Which persons with mental health problems are Disabled under the DDA?

Prior to the DDA 2005 the term 'Mental impairment' included an impairment resulting from or consisting of a mental illness ONLY if the illness was clinically well recognised. The DDA 2005 removes this requirement, so people who suffer from mental illnesses which are not necessarily clinically well recognised may be able to bring a claim under the DDA 2005.

The starting point is to establish whether the impairment is a mental or physical impairment. This can be difficult, when a person experiences physical symptoms but there is no physical cause. In the *College of Ripon & York St John v Hobbs* 2002 IRLR 185, the EAT decided that an impairment can be something that results from an illness, rather than itself being an illness. It can thus be a cause or effect.

The applicant also still has to prove that their impairment has a long term and substantial adverse effect on their ability to carry out normal day to day activities. It can be difficult to establish that some forms of mental impairment have a substantial and long-term effect, because it might only be substantial for short periods of time. However, if it is recurrent (i.e. more likely than not it will recur), it will be caught. Employers ought to be aware that any illness which leads to clinical features such as depression that has a substantial and long-term effect on the employee's day-to-day

activities may be covered under the DDA 2005. This could include, for example, obesity, which could be classed as a mental impairment if it leads to depression, anxiety or eating disorders.

In addition to the removal of the need to prove that a mental illness is "clinically well recognised", the DDA 2005 also inserted an additional paragraph to Schedule 1 of the DDA. The new paragraph provides that a person who has cancer, HIV or multiple sclerosis is deemed to have a disability and hence be a disabled person under the Act. The important change means that people with any of the above disease's will be deemed to be covered by the Act effectively from the point of diagnosis, rather than from the point where the condition has some adverse effect on their ability to carry out normal day-to-day activities.

This can be contrasted with paragraph 8 Schedule 1 DDA which originally provided that applicants who had a progressive condition (such as Cancer, MS or HIV) could not benefit from protection under the Act unless the illness had an effect on his or her normal day-to-day activities. Under paragraph 8, mere diagnosis of a progressive condition would have been insufficient.

However under the DDA 2005 an applicant would not be afforded protection under the Act if he/she has cancer of a prescribed description. This would prevent people suffering from mild forms of minor cancers (e.g. some types of skin cancer) from being afforded protection, as they require only limited treatment.

Another hurdle for applicants is the list of 'activities'. They are inadequate to reflect the range of activities that may be affected by mental illness.

It is therefore a long and complex task to decide whether a person with mental health problems will be protected from discrimination under the DDA. The advice to employers is to follow the DDA, and its guidance, to create a healthy working environment for all potentially disabled people.

Comparison with the definition under the Mental Health Act 1983

The MHA applies to those with a 'Mental Disorder', which is defined as 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'. 'Mental Impairment' is defined as '...a state of arrested or incomplete development of mind (*not amounting to severe mental impairment*) which includes *significant* impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.' This is different to its meaning under the DDA.

Mental illness is not legally defined, despite it being the most common form of mental disorder dealt with under the MHA. In practice, it is left to a doctor to certify if the person has a mental illness.

Can an employer justify discrimination?

Only for the second type of discrimination (**Disability-Related discrimination**). He cannot justify the other types. He will only be able to justify Disability-Related discrimination if the reason for his action was material to the circumstances (of employer and employee) and is substantial. It is an objective test. The tribunal will consider whether there are policy reasons to suggest the treatment was objectively justifiable and could be described as necessary (*Staffordshire County Council v Black* IRLR 234 EAT). For example, a person with severe facial disfigurement from psoriasis may be rejected from a job modelling cosmetics, as the reason is substantial, and is directly related to the circumstances.

Who is liable for unlawful acts?

Employers are responsible for the acts of their employees in the course of their employment, and are also liable for the acts of their agents acting with the employer's express or implied authority. In relation to employees, it is a defence for the employer to argue he took 'such steps that were reasonably practicable' to prevent such actions. It is therefore important for employers to take such steps, including training staff on the DDA and disability awareness, and not tolerating any discrimination by staff.

Complaints to Tribunals

A person who believes they have been discriminated against under the DDA may make a complaint to a tribunal, providing they do so within 3 months of the action complained of. If the tribunal finds the complaint well founded it will take such steps, as it believes just and equitable, including;

(1) making a declaration as to the rights of the complainant and the respondent in relation to the matters to which the complaint relates;

(2) ordering the respondent to pay compensation to the complainant; and

(3) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

Advice to Employers to avoid Disability Discrimination

Prevention is better than cure. There are various actions that employers can take, often relatively inexpensive and easy to implement, and they will help improve general performance and quality of operations. For example:

- Employers should avoid making assumptions about disabled people. Listen carefully to them, and find out their needs. The employer may discover that suitable adjustments can easily be made.
- Carry out an audit of the building to identify necessary adjustments. Regularly review the effectiveness of reasonable adjustments made.
- Implement anti-discrimination policies and procedures, and communicate these to staff. Inform staff and agents that conduct which breaches the policy will not be tolerated, and may lead to disciplinary procedures. Provide disability awareness and equality training to staff.
- Advertisements should actively encourage disabled people to apply and be in a wide range of formats.
- Ensure selection procedures do not disadvantage disabled people at interview or when doing tests
- Modify redundancy selection criteria, and disciplinary or grievance procedures
- Permit flexible working

Sources of Help and Guidance

The Code of Practice on Employment and Occupation (April 2004) provides useful guidance, and although it does not impose legal obligations, it can be used in evidence in legal proceedings under the DDA. It is therefore sensible to read this. It is available on the Disability Rights Commission ('DRC') website: www.drc.org.uk/library/publications/employment/code_of_practice_-_employment.aspx

A wide range of leaflets can be obtained free via the DRC helpline (08457 622 633), and copies of BS8300 'Designing buildings and their approaches to meet the access needs of disabled people' can be obtained from the British Standards Institute (020 8996 9001), web address: www.bsi-global.com

The Health & Safety Commission and the Health & Safety Executive are responsible for regulating risks to health and safety at work: www.hse.gov.uk

Jobcentre Plus provides a range of help and advice to assist employers in the recruitment and employment of disabled people. Local Jobcentre Plus offices can be found at www.jobcentreplus.gov.uk. It also gives information and advice to disabled people in work or looking for work. There is a dedicated Disability Employment Advisor in each office.

The Access to Work scheme is administered by Jobcentre Plus, and can offer advice to disabled people and their employers to overcome work related obstacles resulting from disability. It can provide grants to employers towards certain extra employment costs resulting from disability, including costs of adaptations to premises, special aids and equipment, and support workers.

The Job Introduction Scheme is run by Jobcentre Plus, and enables employers to give disabled people a 'taster' of a job if they think the disabled person has the required skills and experience for the job but they are unsure about practicalities. The employer receives a grant from the government to employ them for up to 6 months (full or part time). The WorkStep scheme, also run by Jobcentre Plus, is a new name for the Supported Employment programme. It offers practical assistance to employers wanting to provide support to disabled people who face more complex barriers to getting or retaining a job.

Other Useful Organisations and Links

Equality Direct (confidential advice for businesses): 0845 6003444, www.equalitydirect.org.uk

Jobability.com (job site for employers and disabled job seekers): www.jobability.com

Department for Work and Pensions (link to the department responsible for employment issues): www.disability.gov.uk

New Deal for Disabled People: www.jobcentreplus.gov.uk/jcp/customers/new_deal/new_deal_for_disabled_people/dev_011417.xml.html

Employers Forum on Disability (guidance on DDA): www.efd.org.uk

Employment Opportunities (links disabled job seekers and employers): www.opportunities.org.uk

The Shaw Trust (charity that provides trust to disabled job seekers):

www.shaw-trust.org.uk

Department for Employment and Learning (guidance on recruiting and retaining people with disabilities): www.delni.gov.uk/index/finding-employment-finding-staff/fs-help-to-find-staff/fefs-recruit-and-retain-people-with-disabilities.htm

If you would like further information on Public Law matters generally please contact :

John Bosworth (Partner and Head of Public Law) on 0870 427 3842 or e-mail him on
j.bosworth@ashfords.co.uk

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