

A summary of the law on:
Disability Discrimination



THOMPSONS NI

The Disability Discrimination Act 1995 (DDA) makes it unlawful to discriminate in the fields of employment, education, transport and the provision of goods and services.

This information sheet is solely concerned with the employment aspects of the DDA.

Who does the DDA apply to and when?

The DDA applies to employees, workers, the self-employed, temporary and agency workers. It also extends to job applicants, apprentices, contractors, prison officers, fire fighters and police officers. Members of the armed forces and volunteers are excluded from DDA protection.

There is no qualifying period of service required under the DDA, so a worker is protected from the time they apply for a job. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment such as something detrimental that was said in a reference. It applies to all discrimination in the workplace such as selection for a job, terms and conditions of employment, promotion or transfer, training, employment benefits and dismissal or any other disadvantage such as harassment.

Unlike sex and race discrimination legislation, which provide rights to equal treatment for everyone, the DDA only offers protection to disabled people (and a limited number of others, namely carers of disabled people). It also allows employers to discriminate positively in favour of the disabled.

Who is disabled under the DDA?

To be protected by the DDA, employees have to show that they have a “physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities”. People do not lose their right to protection against discrimination because they have been able to control or correct their disability - for example by medical treatment or the use of aids. So the effect of the treatment must be disregarded when assessing whether or not someone is disabled. This provision also applies to artificial limbs, but not glasses or contact lenses. People with a disability but have since recovered are included under the Act, as are people with progressive conditions such as HIV, Aids, cancer and multiple sclerosis from the date of diagnosis.

How long is long-term?

To satisfy the definition in the DDA, the disability must:

- Have lasted at least 12 months, or
- Be likely to last at least 12 months, or
- Be likely to last for the rest of the person's lifetime (if less than 12 months)

For people with conditions that have periods of remission, the legislation says that although the impairment may no longer have an adverse effect, it will still be deemed to have that effect if it is “likely to recur”.

What are normal day-to-day activities?

The phrase “normal day-to-day activities” means those activities that are “normal” for most people in their everyday lives, such as using a knife and fork, putting on the kettle, cooking etc.

A person is likely to be regarded 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 and eyesight
- Memory or ability to concentrate, learn or understand
- Perception of risk of physical danger

Guidance to the Act lists examples of effects that are likely to amount to an impairment and those that are not. So, for example, it would be reasonable to regard a condition as having a substantial adverse effect if the person could only walk at a slow pace, but not if they had difficulty in walking any more than a mile without discomfort. On ability to lift, the guidance suggests that inability to pick up objects of moderate weight with one hand would be a substantial adverse effect, but not an inability to move heavy objects without mechanical aid.

Types of Discrimination

There are five types of disability discrimination under the DDA –

- Direct discrimination on the ground of a disabled person's disability
- Disability related discrimination
- Breach of the duty to carry out reasonable adjustments (this duty to adjust is an important protection provided to disabled workers and there is no equivalent right under any of the other anti-discrimination laws)
- Harassment
- Victimisation

Direct Discrimination

Direct discrimination is when someone is treated less favourably than someone else who is not disabled, solely because of their disability. This covers situations when a person is treated differently because of stereotypical assumptions or prejudice about their condition or abilities. There is no defence to direct discrimination. For instance, an employer turns down an applicant for a job who has schizophrenia. This is because of a negative medical report based on stereotypical assumptions about the effects of the condition without reference to the individual concerned.

Direct discrimination cannot be justified.

Disability-Related Discrimination

There are two elements to test whether an employer has discriminated against a disabled person for a disability related reason:

1. For a reason that relates to the disabled person's disability the employer treats the worker less favourably than they treat or would treat others to whom that reason does not or would not apply.
2. The employer cannot show that the treatment in question was justified. This is wider than direct discrimination where the reason for the less favourable treatment is the disability itself. Here the less favourable treatment occurs as result of a reason connected with the disability e.g. disability related absence. If an employer can show that it has or would have treated a non disabled person in the same way as the person who had a disability, then it can escape liability for disability related discrimination. They then have a "second bite at the cherry" and will be able to defeat any claim if they can show more than a minor or trivial reason, material to the facts of the case, for the less favourable treatment. Winning such claims is likely to be difficult.

Breach of the Duty to Carry Out Reasonable Adjustments

The DDA imposes a duty on employers to make reasonable adjustments where a provision, criterion or practice ("PCP") and/or any physical features of premises cause a substantial disadvantage for a disabled person in comparison with persons who are not disabled. The duty to adjust only applies where the employer either knows or reasonably ought to know of the disabled person's disability and the likelihood of them being at a more than minor or trivial disadvantage, compared to a non disabled person, by the PCP. The DDA gives examples of reasonable steps that 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 to the disabled person or others
- Providing a reader or interpreter

- Acquiring or modifying equipment or reference manuals
- Adjusting the premises
- Providing supervision or other support

The key question is what is "reasonable"? The DDA says that this should be decided by looking at the extent to which making the adjustment would address the problem, how practical it is for the employer to do it, the cost of making it and the financial resources of the employer. An employer cannot justify disability related discrimination (see above), if a reasonable adjustment would have prevented the reason from arising in the first place.

For example, a company rejects a job applicant because they have a mobility restriction, which will make it difficult for them 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 the duties they are unlikely to be able to justify the disability-related discrimination.

Harassment

A person is unlawfully harassed if, for a reason related to their disability, they are subjected to unwanted conduct that has the purpose or effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. The conduct will only be regarded as harassment when all the circumstances are taken into account, including, in particular, the perceptions of the person being harassed and if it is reasonable to conclude that it could have that effect.

Victimisation

The DDA contains provisions to prevent people from being deterred from bringing or getting involved with a complaint of disability discrimination. Both disabled and non-disabled people are protected. It is unlawful for employers to victimise someone because they brought a discrimination claim, gave evidence in a case or made an allegation of disability discrimination.

Who is liable?

Responsibility for disability discrimination usually lies with the employer; but if another employee or worker is found to have discriminated, then the employer will normally be "vicariously" liable for them as well. This covers not only incidents of discrimination occurring in the actual work place, but may also extend to out of work activities such as Christmas parties and drinks in the pub after work. If the alleged discrimination relates to the conduct of another employee, it is advisable to name them as well as the employer in the any application to the Tribunal.

Employers can defend a complaint of discrimination if they can show that they took all reasonably practicable steps to prevent the discrimination occurring. It is rare for employers to succeed with this defence. But even if they do, claimants can still pursue their claim against the individual employee who discriminated against them.

Lodging a Grievance

While it is not a legal requirement that a person lodges an internal grievance prior to bringing a claim for disability discrimination, it is strongly advisable to do so. This creates the possibility that the matter might be successfully resolved in the workplace. In the first instance a worker should try to resolve the matter informally with their employer. If it is not possible to resolve the matter informally, the worker should, without unreasonable delay, raise the matter formally, in writing, setting out the nature of the grievance and how it might be resolved. Even if any such workplace resolution is unlikely, it is still advisable to take these steps as any failure to do so may result in any compensation awarded if the claim is successful being reduced by up to 50%.

It should be noted that lodging a grievance does not result in the time limit being extended - the time limit remains three months less one day from the act complained of even if the grievance proceedings are not completed when the deadline expires.

Tribunal Claims and Time Limits

The time limit for lodging a claim with the Tribunal is three months less one day from the act complained of (or the last act complained of if a series of acts can be considered as a single continuing act of discrimination e.g. ongoing harassment). No extensions are available unless the Tribunal considers it just and equitable in the circumstances of the case. This is relatively rare.

Serving a Questionnaire

Given the difficulty of proving discrimination, claimants are allowed to serve a Questionnaire on their employer to obtain information to ascertain the strength of their claim and to establish as far as possible, what the facts are and the reason for their treatment. This information can be used as evidence at any Tribunal hearing. If the employer fails to answer the questions within eight weeks, or does so in an evasive or equivocal manner, a Tribunal may use such facts to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application (although an extension of time can be sought from the Tribunal if this is missed). Serving a Questionnaire does not count as raising a formal grievance.

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. It provides a number of helpful examples as to what amounts to unlawful discrimination. A copy of the Code of Practice can be obtained from the Equality Commission for Northern Ireland: www.equalityni.org.

What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination. Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim. Compensation can be reduced by up to 50% if the claimant does not raise a grievance.

Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that the person complained about. For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications. If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

Disability Equality Duties

Under the DDA, since 1 January 2007, public authorities have to have due regard, when carrying out their functions to promote positive attitudes towards disabled people and the need to encourage participation by disabled people in public life. Such organisations must develop action plans addressing how they will meet these responsibilities and submit these to the Equality Commission for Northern Ireland. In addition, section 75 of the Northern Ireland Act 1998 places public authorities under a duty to have due regard to the need to promote equality between disabled and non disabled people. This means that service providers and public sector employers have to design employment and services with the different needs of disabled and non disabled people in mind.

This information sheet provides a summary of the rights of employees in relation to Disability Discrimination. This information should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.

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