

## **THE DISABILITY DISCRIMINATION ACT**

### **YOUR QUESTIONS ANSWERED**

#### **A LIFE SUPPORT FOR EMPLOYEES?**

The Disability Discrimination Act 1995 came into force on the 2nd December 1996. It was the most comprehensive and wide ranging piece of legislation to be introduced within the last decade and has been responsible for giving all employees enforceable rights and protections within the workplace.

The Act gives all employees, irrespective of age or length of service, protection against discrimination, unfair treatment or dismissal if it is on the grounds of their disability or serious illness, but does it apply to you? In order to find out, read the following questions and answers typically posed about the Act and, if you think that you are disabled or that you have suffered discrimination under the Act, contact your union representative or union headquarters immediately.

#### **Linda Roy**

National Equality Officer

## WILL THE ACT APPLY TO ME?

**Q** “But I’m not registered disabled, does it apply to me?”

**A** If you were a Green Card holder between December 1996 and December 1999 you are automatically protected by the Act but only in respect of past disabilities. Registration no longer applies in respect of the Act. Whether you are covered by the Act in respect of current disabilities will be determined by the criteria listed further on in this booklet.

**Q** “I have had a medical problem on and off for years – will the Act help me in any way?”

**A** It is difficult to say but, in order to prove you are “disabled” for the purposes of the Disability Discrimination Act, you will have to show the following:

- that you have a physical or mental impairment.
- the impairment must have a substantial effect which is long term and;
- the long term substantial effect must have an adverse effect on normal day to day activities.
- In other words, if you are suffering from a physical or mental impairment which has lasted for 12 months or more, or is likely to last for 12 months or more, which is serious and affects your life in more than a minor way, you will have a disability for the purposes of the Act.

**Q** “But I suffer from diabetes and as long as I take my medication I have few symptoms, if any. Does the Act apply to me?”

**A** The Guidance and Regulations to the Act states that where an impairment is being treated, “the impairment is to be treated as having the effect without the measures in question provided that in future the adverse effect is more likely than not to become substantial”.

In other words, in order to assess whether your impairment has a substantial effect, you take the condition as if you were not taking your medication or treatment, e.g. if you are a diabetic, you would assess your condition as if you were not taking your medication and if you are deaf, you would assess the severity of your condition without the use of a hearing aid.

**Q** “I have a medical condition which was diagnosed when I was a child but is in remission and I presently have no symptoms. Does the Act apply to me?”

**A** YES. Many progressive conditions are those which are likely to change and develop over time, for example, conditions such as cancer, multiple sclerosis, muscular dystrophy and HIV. Persons with such conditions are regarded as having an impairment under the Act. The Act will apply as soon as the condition has some effect on the person’s ability to carry out normal day to day activities.

Periods of remission are counted as part of the length of the illness if the effects of the condition are likely to recur.

**Q** “I’ve been told that a medical procedure or drugs will cure my condition. Am I disabled under the Act?”

**A** No. If you can be cured by a one-off procedure or a course of medication you will not be counted as having a disability under the Act. However, if the medication only controls the symptoms, the medication can be disregarded under the Act.

**Q** “I suffer from clinical depression. Would I be covered under the Act as my condition affects me psychologically but not in any physical way?”

**A** YES. The Act would apply to you. What you need to show is that the impairment you have has a long term, substantial, adverse effect on normal day to day activities. In other words, it must have a considerable effect on your ordinary everyday life. In order to bring a medical condition under the protection of the Act, it must be shown that it affects the person’s ability to carry out normal daily activities in any of the following areas:

- mobility,
- manual dexterity,
- physical co-ordination,
- continence,
- ability to lift, carry or otherwise move everyday objects,
- speech, hearing or eyesight,
- memory or ability to concentrate, learn or understand, or
- perception of the risk of physical danger.

In the case of depression it may affect a person’s ability to concentrate and it may also affect a person’s ability to maintain performance of the task over a certain period of time.

If a person can show they are adversely substantially affected by the condition under one of the above headings, their medical condition may be deemed to be a disability under the Act.

**Q** “So every medical condition which is long term amounts to a disability under the Act?”

**A** No. Certain things are not covered, for example, glasses wearers are not deemed to be disabled, hay fever is not covered under the Act. Also, addiction to alcohol or drugs are not covered, unless the drugs are prescribed by a GP, for example, Valium or Prozac.

In order for a medical condition to be a disability, the individual must show that it has a substantial adverse effect on their ability to carry out day to day activities. If the condition is only trivial or minor, or its effect is only trivial or minor, it may not be a disability.

## HOW WILL THE ACT HELP ME?

**Q** “If my medical condition amounts to a disability for the purposes of the Disability Discrimination Act, what protection does the Act give me?”

**A** If you are deemed to have a disability under the Act, it will then be unlawful for your employer (or prospective employer) to discriminate against you on the grounds of your disability, in any of the following ways:

- by not offering you a job,
- by offering you a job on less favourable terms than a non-disabled employee,
- by not offering you opportunities for promotion, transfer, training or receiving any other benefits available to a non-disabled employee,
- by being denied any other opportunity, or
- by being dismissed, or subjected to any other detriment, for example: harassment or victimisation on grounds of your disability.

### **The Act outlaws the following forms of discrimination:**

- Direct discrimination i.e. if on the grounds of your disability, your employer treats you less favourably than he treats or would treat an employee who did not have your disability and whose circumstances, including their skills and experience were not materially different to your skills and experience.
- Disability related discrimination. This occurs when for a reason which relates to the disabled person's disability, the employer treats him less favourably than he treats or would treat others to whom that reason does not or would not apply and the employer cannot show that the treatment is justified.

*At present, you need to compare yourself to someone who is in the same circumstances as you, but is not disabled/has a different disability and for example, has had six months off on sick leave. If they would have been treated in the same way as you, then there is no disability-related discrimination. Essentially, it is the same now as direct discrimination.*

*The draft Equality Bill was issued by the Government in April 2009 and if passed is set to change the position with regard to claiming disability-related discrimination. It is not possible for us to confirm when that will be at the moment.*

- Failure to make reasonable adjustments. If your employer fails to make a reasonable adjustment to any policy, criterion or practice which places you at a substantial disadvantage in comparison to a non-disabled person, that will amount to discrimination.
- Harassment. This occurs where, for a reason related to the disabled person's disability, the employer engages in unwanted conduct which has the purpose or effect of: violating the disabled person's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her.

- **Victimisation.** A person is victimised and will be able to make a claim if they are treated less favourably by their employer and the reason for the less favourable treatment is that the employee: brought proceedings against the employer; gave evidence/information in connection with proceedings brought by someone else; alleged that the employer had breached the Act; and includes where the employer suspects or believes that a person has done any of the forgoing things.

**Q** “I started working for my employer some years ago but since joining have developed diabetes. I have never told my employer as I am afraid of losing my job. What is my position?”

**A** Many people are concerned about disclosing their medical conditions both when applying for jobs and during employment.

If you had a medical condition on joining, you should have disclosed it. However, failure to disclose a medical condition is not of itself grounds for dismissal.

However, as soon as you become aware that you are suffering from a medical condition, it is in your interest to disclose it to your employer. An employer will only be held responsible for discrimination on the grounds of a disability if they actually know, or ought reasonably to know that you are suffering from that disability. It is important that all medical conditions are disclosed to the employer so that any special needs are taken into account.

**Q** “I suffer from dyslexia and want to go for promotion. However, I have been told that I must sit a test which involves a written exercise and an assessment performed under timed conditions. My condition gets worse if I am under pressure. Is there anything I can do?”

**A** YES. Dyslexia is a Disability under the Act.

If you were forced to pass tests for promotion which automatically placed you at a disadvantage, you may be subject to discriminatory conditions.

What you should do is to inform your employer of your disability (if they do not already know), and then ask them to make reasonable adjustments to the testing procedure. This may include, allowing you more time to take the test or to ask for alternative conditions under which to take the test. You should not be placed at a disadvantage because of your disability.

Every employer is obliged to take reasonable steps to ensure that any provision, criterion or practice which they apply or any physical feature of their premises does not place a disabled person at a substantial disadvantage compared to an able-bodied person.

This is known as the employer’s duty to make reasonable adjustments. An employer cannot justify a refusal to make reasonable adjustments. If an employer fails to comply with their duty to make a reasonable adjustment, that will amount to discrimination.

**Q** “I am an epileptic and have been “fit free” for 5 years. I now hold a full driving licence, but I have been told by my manager that I cannot drive or operate machinery in work. Is that right?”

**A** It looks like a discriminatory policy is being applied to you as a direct result of your medical condition.

Obviously, your employer has a duty to protect you and all other staff at work from all risks and if they feel that you may be a danger to others at work they may be justified in preventing you from taking control of machinery or from driving.

However, simply to apply a rule to you without conducting a medical examination to see if such a risk exists looks like a discriminatory policy. What should happen is that your manager should send you to their medical advisors for a medical assessment of your condition, you may also like to invite them to write to your GP or consultant for further advice.

If the DVLA feel that you are fit to drive a vehicle on the road, there may be no good reason to deny you an opportunity to drive as part of your duties at work, when a suitable position arises.

However, it may be reasonable for the employer to impose certain restrictions on your driving, in the form of a time limit or tonnage of vehicle. These restrictions can only be justified if they are relevant to your particular situation and following a risk assessment.

**Q** “So what type of reasonable adjustment can I ask the employer to make if I suffer from a disability under the Act?”

**A** The types of reasonable adjustment that your employer may be under a duty to make includes:

- making adjustments to the physical premises
- allocating some of your duties to another
- transferring you to an existing vacancy in another department
- altering your working hours
- moving you to a different place of work
- allowing you to be absent during working hours for rehabilitation, assessment or treatment
- giving you training to do another job
- acquiring and modifying equipment
- modifying instruction/reference manuals
- modifying procedure, suggestion or assessment
- providing a reader interpreter and
- providing supervision

Remember you are not expected to contribute to the cost of making any reasonable adjustments. Consider any alternative sources of assistance, for example, Access to Work through Job Centre Plus.

**Q** “I have had a lot of sick leave due to a long term medical condition which has finally, after 18 months, been diagnosed as ME. My employer has started proceedings against me under the Attendance Procedure. Can they do that?”

**A** An employer is entitled to expect regular attendance of its employees, however the Disability Discrimination Act protects employees from discrimination if it appears on the grounds of their disability. You should immediately inform your employer that you are suffering from a disability under the Act and that therefore they should consider making reasonable adjustment to enable you to stay in work. This may include allowing you to work reduced hours or to have time off for treatment.

You should ask them to discount all the absences relating to ME for the purposes of the Attendance Procedure. If they refuse to discount your disability related absences and dismiss you on those grounds, that may be discriminatory.

**Q** “I suffer from a back condition and I have now developed arthritis. I can no longer stand for long periods and I find walking difficult. As a result of the physical nature of the job I have had time off sick. My doctor has told me I can return to work as long as it’s on light duties with less walking, however I am a Postman. Will I lose my job?”

**A** NO. Not necessarily. The Disability Discrimination Act provides that where an employee has a disability under the Act, the employer has a duty to comply with an obligation to make reasonable adjustments to assist the disabled person. In your case a reasonable adjustment may be placing you on light duties, providing you with a chair which is ergonomically designed and allowing you to work indoors on a variety of administrative and sorting duties.

It is your responsibility to request the employer to make reasonable adjustments to your job and to allow you to return to work or to continue in work. If possible get your GP to write to the employer and get the union to make representations on your behalf regarding reasonable adjustments. You may also wish to request a referral to the Occupational Health Service with a request that they advise on what reasonable adjustments could be made.

Once you have suggested an adjustment that could be made, the employer can only refuse to implement it if the suggested change did not amount to a reasonable adjustment. Employers are only obliged to make reasonable adjustments. In determining whether an adjustment is “reasonable” or not, the matters to be considered will include:

- the extent to which making the adjustment would prevent the adverse effect complained of
- the extent to which it is practicable for the employer to make the adjustment
- the financial/other costs which would be incurred in making the adjustment and the extent to which it would disrupt any of the employer’s other activities
- the extent of the employer’s financial and other resources
- the nature of the employer’s activities and the size of the business.

If your employer fails to make a reasonable adjustment, then you could claim for disability discrimination.

## WHAT DO I DO NOW?

**Q** “So what do I do if I think I have been discriminated against?”

**A** You must remember that if you feel you are suffering discrimination, you must lodge proceedings in the Employment Tribunal within three months of the act complained of. For example, if you have suffered harassment or a detriment in the work place on the grounds of your disability, the date begins to run from the time you suffer the harassment. Even if you bring a grievance or attempt to deal with the matter internally, the time will still be running against you for the purposes of lodging an application in the tribunal.

Before you make a claim, we strongly advise you to find out more from your employer about their treatment of you and the reasons behind it.

The DL56 questionnaire is a procedure under the Disability Discrimination Act (DDA) which you can use to gather evidence about the way you have been treated.

### **We strongly recommend that you use form DL56 because:**

It is an effective method of helping you to identify the strengths and weaknesses of your claim. You can ask the employer certain questions and their answers to the questionnaire can be used as evidence at the employment tribunal.

Using a questionnaire at this stage does not commit you to taking a tribunal claim. Any reply you receive will help you to decide whether your employer's treatment of you related to your disability or was for some other reason.

**Our advice is always try to use the questionnaire before making a claim to a tribunal. Of course, this is not always possible and you must not miss your deadline for making a claim to the tribunal while using, or waiting for a response to, the DL56 questionnaire.**

The DDA questionnaire (DL56) can be downloaded from the website using the search engine and from some Citizens Advice Bureaux.

If you feel you have a claim under the Disability Discrimination Act, you must not hesitate to contact your union representative or contact CWU Headquarters on **020 8971 7200**.

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