



STANDING UP FOR YOU

Summary of the law
on disability discrimination

Our pledge to you

Thompsons Solicitors has been standing up for the injured and mistreated since Harry Thompson founded the firm in 1921. We have fought for millions of people, won countless landmark cases and secured key legal reforms.

We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

Thompsons will stand up for you by:

Staying true to our principles – regardless of how difficult our job is made by government, employers or the insurance industry

Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

standing up for you

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet sets out the basic employment rights to which workers are entitled under the disability discrimination provisions of the Equality Act 2010. These apply in England, Wales and Scotland (except where indicated) only.

- Protection and Liability
- Harassment
- Tribunal claims
- Discrimination
- Victimisation
- Remedies
- Duty to make adjustments

What does the Equality Act cover?

The Act covers all forms of discrimination in the workplace including; recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of disability.



Who is protected?

It covers all forms of employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer if they are complaining about something that was closely connected to their employment.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace.

However, individual employees may also be liable, for example, if they have subjected a colleague to harassment related to disability.

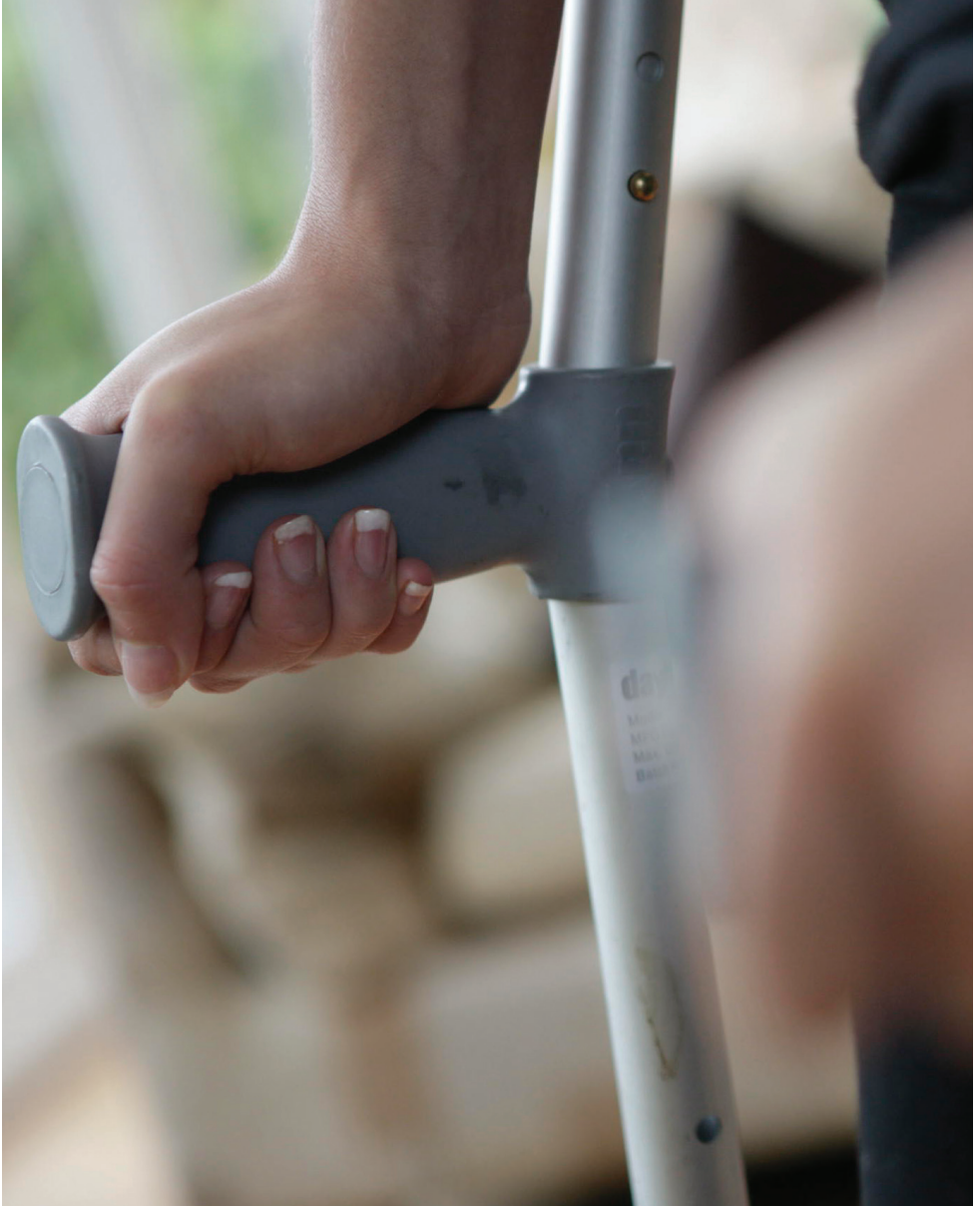
What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day-to-day decisions, both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people from different groups;
- foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Separate regulations set out the specific duties for devolved public authorities in England, Wales and Scotland. Trade unions should check that the employer is complying with the specific regulations according to whether the devolved public authority is in England, Wales or Scotland.



What is positive action?

The Act enables an employer to treat a person with a disability more favourably in the process of recruitment and promotion if the employer reasonably thinks a person with a disability suffers a disadvantage connected to the disability or there are fewer people with a disability employed.

The more favourable treatment must be aimed at encouraging participation of those with a disability who are underrepresented or put at a disadvantage.

The provision effectively allows an employer to choose a candidate with a disability in favour of one who does not have a protected characteristic, provided that the:

- person is “as qualified” as the other candidate;
- employer does not have a recruitment or promotion policy of treating persons of the underrepresented group more favourably;
- more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

Who is classed as disabled under the Act?

To be protected under the Act, workers have to show that they have a disability as defined in the Act i.e. 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.”

When determining if someone has a disability, the Tribunal does not take into account any coping strategies or medication. So, for example, a Tribunal will consider how a person with diabetes would be affected if they were not taking their medication.

People who have had a disability in the past are covered under the Act, as are people with progressive conditions and anyone deemed to have a disability such as those who have been diagnosed with HIV, cancer and multiple sclerosis.

Babies and children under the age of six who have an impairment are also covered. This is significant for the purposes of associative discrimination so that the parent of a child with an impairment will be protected even if the child's condition does not yet have a substantial adverse effect on the child's ability to carry out normal day-to-day activities, but may do in the future.

How long is “long-term”?

To satisfy the definition in the Act, 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).

The Act also covers people whose condition may involve periods of remission. 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 walking, driving and forming social relationships.

What does the Act outlaw?

Direct discrimination

Direct discrimination is when someone is treated less favourably because of disability. Unlike other discrimination legislation, it is not considered to be unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person.

In order to determine whether someone is directly discriminated against, a comparison has to be made with someone who does not have a disability but whose abilities and circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to have a disability, or because they are associated with someone who has a disability. Examples of direct discrimination include:

- someone who is not promoted because they are a wheelchair user;
- someone who is refused flexible working to look after their disabled child where flexible working has been granted to other workers who do not have a disabled child;
- someone who is prevented from attending a training session because they are thought to have bi-polar disorder.

Someone who is not disabled cannot claim direct discrimination with a disabled person who has been treated more favourably because the employer has made a reasonable adjustment, for example.

Indirect discrimination

Indirect discrimination arises when an employer applies a provision, criterion or practice (PCP) which puts those who share a disability at a particular disadvantage compared to those who do not share it and which the employer cannot justify.

Employers can only justify indirect discrimination if they can show that it was "a proportionate means of achieving a legitimate aim". This essentially requires an objective assessment balancing the needs of the business as against the discrimination to the worker with a disability.

Discrimination arising from disability

This occurs when an employer treats a disabled person unfavourably "because of something arising in consequence of" the disabled person's disability.

As with indirect discrimination, employers can justify the treatment if it can be shown to be a proportionate means of achieving a legitimate aim.

Similarly, an employer can defend a claim on the grounds that they did not know, or could not be reasonably expected to have known, that the person had a disability.



Duty to make adjustments

When an employer knows or reasonably ought to know of a person's disability, they are under a duty to make a "reasonable adjustment."

The duty arises when a PCP or physical feature of the premises places a disabled person at a substantial disadvantage in comparison to those who are not disabled.

The duty also applies when a disabled person would be put at a substantial disadvantage because an auxiliary aid was not provided. In that case, the employer must take reasonable steps to provide the auxiliary aid.

The duty on the employer is to take reasonable steps to avoid the disadvantage. What is reasonable may depend on whether the step would remove the disadvantage, the cost and whether there was any financial assistance available, for instance from the government-run Access to Work scheme. An employer cannot require a disabled worker to pay for the cost of any reasonable adjustment.

Examples of reasonable adjustments include:

- 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 a vacancy or another place of work;
- giving or arranging training for 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;
- providing information in accessible formats.

An employer who fails to comply with the duty to make a reasonable adjustment will be discriminating against a disabled worker. An employer cannot argue that they were justified in not making the reasonable adjustment where the duty arises.



Harassment

This occurs when one person subjects another to unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's disability. So, for example, an employee who is subjected to offensive comments about their disabled daughter will be protected under the Act.

Unwanted conduct includes spoken or written word, jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- bringing proceedings under the Act;
- making allegations of a breach of the Act;
- giving evidence or information in connection with proceedings that someone else has brought;
- doing anything else under the Act such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they have a disability in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.

What health-related enquiries can employers make?

An employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful applicants.

However, this is not a blanket ban and an employer can ask questions which are necessary for determining whether the person could attend an interview selection test or carry out the job duties, after having considered the duty to make a reasonable adjustment.

The employer can also ask questions for the purpose of:

- equality monitoring;
- enabling the employer to take positive action; and
- establishing whether the applicant has a particular disability, where that disability is an occupational requirement.

Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities that their employer discriminated against them because of disability.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination the burden shifts to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.



How do claimants gather information from their employer?

Workers can ask an employer questions about the discrimination they have been subject to. ACAS (Advisory, Conciliation and Arbitration Service) has produced non-statutory best practice guidance 'Asking and responding to questions of discrimination in the workplace' which is available on line at www.acas.org.uk. This includes a suggested template format for asking questions as well as guidance on the type of questions that can be asked and how an employer should respond.

There is no time limit restriction and questions can be put to the employer at any time before or after a Tribunal claim is lodged. Although there is no obligation on an employer to respond, a Tribunal can take a failure to respond and any evasive or equivocal replies into account when deciding if there has been disability discrimination.

What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances, the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

If the discrimination is in a form which continues, for example a continuing exclusion from a benefit or a continuing course of harassment, then the three-month time limit runs from the last act of discrimination.

Where the employer unlawfully asks an applicant for health or disability information, the unlawful act is only enforceable by the Equality and Human Rights Commission.

However, if as a result of a question asked by the employer a worker is not successful in obtaining the post, they may be able to bring a claim that they have been discriminated against.

What remedies are available?

There are three remedies available to a Tribunal.

- Declaration
- Compensation
- Recommendations

Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and any financial losses if there are any. The amounts will depend on the facts of the case and will depend on the individual circumstances. There is no statutory limit to 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. Generally, injury to feelings fall into one of three bands: lower, middle and upper, depending on the severity of the discrimination.

Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant.

Examples of recommendations Tribunals have made include requiring an employer to:

- move an individual found to have committed an act of harassment related to disability to another post;
- provide equal opportunities training to the person who had victimised the individual;
- circulate the tribunal's liability and remedy judgments to all those involved;
- destroy an expired caution and related disciplinary documents.

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