

# DISABILITY AND WORK

A trade union guide to the law and good practice



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# PREFACE

When the TUC published *Disability and Work* in 2006, steady progress was being made towards the goal of achieving equality for Britain's ten million disabled people. Unions were making a growing contribution towards the elimination of disability discrimination in employment.

The onset of recession in 2008, followed by the announcement of large-scale cuts in the public sector, where a disproportionate number of disabled people work, and sweeping reforms of the benefits system, represented a setback to that progress. In the same period, the passing into law of the Equality Act 2010 created a single statute out of all the preceding equality legislation, including the Disability Discrimination Act, and from April 2011 a new, single public sector equality duty incorporated the previous disability equality duty, with a significant change of approach.

Unions now face new challenges: and these include ensuring fair treatment for disabled members. This new edition of *Disability and Work* not only explains the new law, it also highlights good practice on the issues that union representatives are likely to be faced with in the workplace.

Disabled people continue to face severe barriers to participation and equality across society: unions can help to challenge these by tackling discrimination at work, by negotiating good policy and ensuring that employers adopt a positive approach to the employment of disabled people.

This revised edition of *Disability and Work* is designed to help representatives achieve this goal. I commend it to you.

A handwritten signature in black ink that reads "Brendan Barber". The signature is written in a cursive, flowing style.

Brendan Barber  
General Secretary  
Trades Union Congress.

# PART ONE: INTRODUCTION

## CHALLENGING DISABILITY DISCRIMINATION

During the 10 years from 1998, there was a welcome increase in the employment rate for disabled people. However, at the point at which the UK economy went into recession in 2008, it still stood at less than 50 per cent of disabled people of working age, a full 25 per cent less than the employment rate for non-disabled people. From then on, there has been no further improvement, and trade unions are deeply concerned that the position may worsen through the period of public sector cuts that came into effect from 2010.

It is well known that the overall statistic conceals many different realities. People with mental illness issues have an employment rate of little more than 10 per cent and people identified as having severe or specific learning difficulties only 15 per cent. Disabled people are disproportionately likely to have fewer qualifications, as a result of discrimination faced during childhood, and only 18 per cent of disabled people without qualifications have jobs.

The raw statistics confirm that, despite the outlawing of discrimination with the introduction of the Disability Discrimination Act in 1995, disabled people in general and disabled people of working age in particular continue to face enormous barriers in securing their right to equal access and equal treatment. A number of reasons explain why this is the situation, but the largest barrier remains discrimination. Significant progress *has* been made in improving the understanding of employers and workers alike that disability discrimination is wrong

both legally and morally, but it is essential to continue to press the case for disability equality if the progress is not to be halted or reversed.

The welfare reform agenda initiated under the Labour Government has been made even tougher under the coalition government elected in 2010. The trade unions had shared with government the underlying objective of encouraging disabled people on benefits into work, but rejected the punitive steps that have in fact been introduced, aimed more at saving money than really assisting people overcome the barriers to employment – chief among them the reluctance of employers to recruit them.

The reality is that social attitudes remain an enormous barrier to equality. At least people have been made aware of the horrendous examples of hate crime committed against disabled people for no other reason than their impairment, but there is much less awareness that these extreme cases start with the low-level abuse and contempt that too many disabled people face every day.

The TUC endorses the social model of disability, in which the interaction of an individual's impairment(s) with the barriers they face is the disability, not the individual's impairment. But the law remains rooted in a medical model, in which the problem is the impairment. Nonetheless, as a result of some good legal judgements interpreting the Disability Discrimination Act, and the replacement of the DDA by the all-embracing Equality Act 2010, there is now more



scope than existed at the time the DDA was introduced to use the law as a lever to improve employers' practices.

The public sector equality duty introduced in the revised DDA 2005 was rightly seen both by unions and by disabled people in general as a critical opportunity to make significant progress towards equality in employment and in service provision. This duty has been merged into a single duty covering all areas of equality in the Equality Act 2010. Once the new, simplified, duty is in force (April 2011), it is certain that unions will have to take an even more assertive role in the public sector if the gains previously made are to be sustained and spread. The law has also changed at an international level, with the ratification by the UK of the ground-breaking UN Convention on the Rights of People with Disabilities.

Trade unions and disabled workers therefore face a new reality. New laws, a new economic situation, and new government policies between them make it vital that union officers and workplace representatives are in a position to challenge discrimination within the workplace and to promote equality. Unions will need to listen carefully to the voices of their disabled members.

In part two of this booklet, the relevant law is set out. Part three examines common workplace issues for disabled workers from the viewpoint of good practice. Part four considers good practice on monitoring disability. The final section lists resources for unions to use.

# PART TWO

## THE LAW ON DISABILITY DISCRIMINATION

### IMPORTANT NOTE

Nothing in this booklet should be considered a definitive statement of the law, which is presented as it appears at December 2010.

### A new legal framework

Underpinning the whole approach of the Equality Act to discrimination against disabled people is the explicit understanding that, because of the additional barriers they face, the law requires that disabled people can be treated MORE favourably than their non-disabled colleagues. Understanding this, and the reasons for it, is crucial to removing the barriers that continue to deny disabled people equality of outcome in work and more broadly.

The Disability Discrimination Act has been replaced in its entirety by the Equality Act 2010, the main provisions of which came into force in October 2010, and the new equality duty from April 2011 (the previous disability equality duty remained in force between October 2010 and April 2011). The Equality Act has made a number of changes to the law on disability discrimination, the most significant being that it:

- extends the coverage to people who were not previously protected against disability discrimination
- modifies the definition of direct discrimination, and creates a new form of discrimination altogether, discrimination arising from disability.

This has been done to remedy the consequences of the 2008 House of Lords ruling in the case of *Malcolm*, which had effectively eliminated the category of 'disability related discrimination' that had existed in the DDA

- creates a new category of indirect disability discrimination, and extends the duty to make reasonable adjustments
- adds a separate category of disability harassment for the first time and extends the protection against victimisation
- outlaws the asking of questions about health or disability except in specific and narrowly defined circumstances – which is potentially of great importance in dealing with discrimination in the recruitment process
- creates the category of combined discrimination.

The UN Convention on the Rights of People with Disabilities provides a framework against which UK law can be tested. Parliament ratified the Convention on the understanding that British law was compliant with it, after taking into account specific reservations and exemptions that the government had put in place, against the wishes of disabled people's organisations and the TUC. Although it can be cited in legal proceedings, the Convention is unlikely to have much direct impact in the field of disabled people's rights in employment.

Union representatives and negotiators will not want to resort to legal remedies unless absolutely necessary, but it is important that they understand what the law requires of the employer, in order that they can use it to maximum effect as a negotiating tool.

### **Code of Practice and Guidance**

The separate Codes of Practice issued by the former Disability Rights Commission, which offered clear guidance on many aspects of disability discrimination law, have been withdrawn and can no longer be used. In their place there is now a single Code of Practice on employment prepared by the Equality and Human Rights Commission (EHRC), which has statutory force (that is, it can be cited in legal proceedings). This Code is a detailed interpretation of the law and is not easily accessible to lay people. The TUC recommends instead that union officers and representatives download copies of the EHRC's *Guidance for Employers*, and its *Guidance for workers*, which present a clear account of what the law means in practice. There are seven separate guides for employers and six for workers available from [www.equalityhumanrights.com](http://www.equalityhumanrights.com). The titles cover the application of the Equality Act in:

- recruitment
- working hours
- pay and benefits
- training and development and promotion

- managing workers
- dismissal, redundancy and retirement
- good equality practice. This last is not provided in the set for workers.

This guidance does not constitute a definitive statement of the law, but it lays out clearly what the law means in many practical situations.

### **Coverage of the law**

It has long been a complaint that the DDA did not extend to cover many people who should be seen as disabled, while it did cover others who did not regard themselves as disabled, and were therefore unaware of the protection available. Although the Equality Act maintains the medical model definition of disability that unions regard as the wrong approach, it is essential that officers and representatives understand who is, and who is not, protected against disability discrimination, as many employment tribunal cases continue to turn on the employer disputing that the worker is disabled.

All employers of whatever size are covered by the Equality Act and workers are protected by it everywhere except in the armed forces. This includes workers outside the UK (provided the employment is connected to the UK), contract workers, office holders, partners in firms, police officers, barristers, and people undertaking work experience for the purpose of vocational training. The law also covers firefighters, prison officers, employees on

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ships, planes and hovercraft registered in the UK, and workers on UK-owned oil rigs.

The Equality Act has extended protection from discrimination and harassment to people who are wrongly perceived as being disabled, and to those who may be treated less favourably because of a link (association) with a disabled person. This extension arose from a legal case (*Coleman v. Attridge Law*) in which, following a European Court ruling, UK law was reinterpreted to apply where someone faced discrimination or harassment *by reason of the disability of another person*. Therefore, an employer who discriminates against or harasses a worker because of their association with a disabled person (for example, because of their caring responsibilities to a child or other relative) might be guilty of disability discrimination.

### Definition of disability

The definition of a disabled person is otherwise little changed. It continues to be based on the formula of someone with a *physical or mental impairment that has a substantial adverse impact* on their ability to carry out 'normal' day-to-day activities. A key feature is that the impact must be *long-term*, that is, it has lasted, or will last, at least 12 months. The DDA list of 'capacities' that might be affected by an impairment has been removed from the law, but this, while welcome, is not likely to have much impact.

It is important, especially in cases of (for example) mental illness, that an individual who has been disabled in the past is still protected against disability discrimination even though they no longer have the condition.

Where the consequences of an impairment (but not the impairment itself) are alleviated by some form of treatment, then the treatment is ignored for the purposes of the law. The only exception is wearing glasses or contact lenses.

Some conditions are specifically included. These include chronic conditions such as diabetes and asthma, and fluctuating but progressive conditions such as rheumatoid arthritis or motor neurone disease. People with cancer, multiple sclerosis and HIV/AIDS are automatically covered from the point of diagnosis. Anyone certified as blind or sight impaired is also automatically covered.

People with 'severe disfigurements' (but not tattoos) are protected, without having to demonstrate any adverse effect.

A few conditions are specifically excluded: these include addiction to alcohol or nicotine, hay fever, and the tendencies to set fires, steal, abuse others, exhibitionism or voyeurism.

Mental impairments are listed as developmental conditions such as autistic spectrum disorders, dyslexia and dyspraxia, and mental health conditions such as depression, schizophrenia, bipolar affective disorders, and obsessive compulsive disorders.

### Case law and the definition of disability

When employers reject the notion that a worker is disabled because their condition does not match the law's definition of long term, there is existing case law that can assist the union to demonstrate otherwise.

In the case of *Patel v. (1) Oldham Metropolitan Borough Council and (2) governing body of Ruschcroft Primary School*, the Employment Appeal Tribunal (EAT) ruled that it was fair to add together the effects of two separate impairments where the second had developed because of the first, even though they were different conditions and the former had not lasted 12 months.

The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* issued by the

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Office for Disability Issues confirms that, if an impairment has a substantial adverse impact on someone's ability to carry out normal day-to-day activities, it is to be treated as continuing "if it is likely to recur. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act in respect of the meaning of 'long-term'."

However, the same guidance uses an example of someone who has two separate episodes of depression within one year, with different causes and no evidence of there being an underlying condition of depression, who would not meet the 12-month rule and would therefore not be protected by the Act.

A common problem faced by workers seeking the protection of the Act in the past has been where they have a fluctuating condition that has not lasted for a single period of 12 months or has recurred but after more than a 12-month interval. In these and other circumstances, the success of a claim for disability discrimination will depend crucially on there being medical evidence of an underlying condition, and of the likelihood of recurrence. The Equality Act has clarified that the meaning of 'likely' for this purpose is 'may well happen', and this is a broader definition that is easier to meet than the previous definition.

The courts have also had to clarify what counts as a 'normal day-to-day activity'. In the case of *Pearson v. Metropolitan Police Commissioner*, the EAT ruled that night shift working could count as a normal day-to-day activity.

The ODI *Guidance ... relating to the definition of disability* helpfully states that "many types of work... may involve normal day-to-day activities... sitting down, standing up, walking... writing, using everyday objects such as a keyboard, and lifting, moving or carrying everyday objects such as chairs."

Representatives should therefore consider carefully the 'ordinariness' of the activities their member faces difficulty in doing, if the employer refuses to accept that they are disabled in the terms of the Equality Act.

The most important step that a union representative can take if there is any dispute with the employer over whether a member is disabled is to ensure that they obtain clear medical evidence. In some cases (for example, mental health conditions) this may need to be from a mental health specialist rather than just a GP.

## Prohibited discrimination

The Act outlaws direct discrimination, indirect discrimination, discrimination arising from disability, and harassment. It is unlawful for an employer to discriminate against a disabled person

- in recruitment
- in terms of employment
- in opportunities for promotion, transfer, training or any other benefit
- by dismissal or any other detriment
- by discrimination after the employment has ended.

It is unlikely that unions will encounter direct discrimination in most workplaces, unless faced with a particularly ignorant or foolish manager or employer. Direct discrimination occurs where a disabled person receives worse treatment than a non-disabled person because of their disability. It is incapable of being justified in legal proceedings.

Indirect disability discrimination is new. In line with indirect discrimination in other areas of equality, it applies where a provision, criterion or practice applying to everyone has particular

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disadvantages for people with particular disabilities compared with people who do not have that disability, and where the provision, criterion or practice cannot be justified as meeting a legitimate objective. It is not anticipated that this provision will be much used, because almost every situation that can be envisaged would trigger the duty on the employer to consider making a 'reasonable adjustment'.

Discrimination arising from disability is another new provision, introduced to reverse the House of Lords ruling in the *Malcolm v. London Borough of Lewisham* case in 2008. The provision refers to situations where a disabled person is treated less favourably because of something connected with their disability, and where the treatment cannot be justified. It applies only where the employer knows, and could reasonably be expected to know, that the person is disabled. Unlike the provision of the DDA that it replaces, it is not necessary to have a comparator to prove a case. The reinstatement of this protection is likely to be of considerable use to unions in arguing against the use of employer practices that fail to take into account a member's disability: for example, disciplinary action against a member for poor time-keeping that is a result of their disability and which could be remedied by the making of adjustments to working hours (see next section).

The specific outlawing of harassment – unwanted behaviour related to disability that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment – is also carried over into the Equality Act from the DDA. While unions have welcomed this, the reality is that almost all cases of disability harassment would anyway have been dealt with under the direct discrimination provisions.

The new category of combined discrimination makes it possible to claim a breach of the Act

on the grounds of two relevant protected characteristics. The protected characteristics are:

- age
- disability
- gender reassignment
- race
- religion or belief
- sex
- sexual orientation.

The positive impact of this measure is that a complainant does not have to demonstrate that the discrimination has taken place on each of the alleged grounds taken separately. However, the only form of prohibited conduct covered by this clause is direct discrimination, so it is unlikely to be used much.

### Reasonable adjustments

This was the lynchpin of the DDA, and the most significant element of the Equality Act for trade unions and disabled workers continues to be the duty on employers to make reasonable adjustments where a disabled worker would be at a substantial disadvantage compared with their non-disabled colleagues. It covers 'provisions, criteria and practices', 'physical features' and 'provision of auxiliary aids'. Failure to make the relevant adjustments is a breach of the law and cannot be justified.

The reference in the Act to physical features of the premises specifies that this includes:

- "removing it;
- altering it; or
- providing a reasonable means of avoiding it."

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The law forbids the employer making the disabled worker in question pay for the adjustment.

The previous criteria continue to apply in deciding whether the proposed adjustment is 'reasonable'. The reasonableness of an adjustment is determined by:

- whether it is effective
- whether it is practical
- what it costs
- the resources of the organisation
- the availability of financial support (for example, the Access to Work scheme).

## Reasonableness

The adjustment has to remedy the disadvantage. Case law has confirmed that even where this turns out not to be the outcome, the employer is obliged to have investigated what adjustments might work.

In the case of *Wilson v. Secretary of State for Work and Pensions*, (2010), however, the EAT decided that it was not a reasonable adjustment for the employer to allow the worker, who was agoraphobic, to work from home as a result of the closure of their previous workplace, because the particular job required supervision: therefore the proposed adjustment did not meet the first criterion.

The issue of resources is not one that any large employer will be able to argue. The extent of resources will be determined by the size of the whole organisation, not only those of the immediate department. Where the organisation is small, the availability of financial support from agencies such as the Access to Work scheme will also be relevant (see page 29).

## Types of adjustments – and their limits

The EHRC *Guidance for Employers: when you recruit someone to work for you*, sets out many practical examples of reasonable

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adjustments that employers would be expected to make.

The list of possible adjustments provided in Codes of Practice for the DDA has been removed but the same examples are given in the EHRC guidance. They cover such possibilities as:

- making physical changes to the premises (such as widening doors, providing ramps, relocating switches and handles, changing the decor for visually impaired people)
- altering the disabled person's duties by reallocating some of these to colleagues, or moving them to a different location
- transferring the disabled person to a vacant position (see the *Archibald* case below)
- altering the person's hours of work or training
- allowing the person to be absent during working hours for rehabilitation, assessment or treatment
- giving or arranging mentoring (including for people other than the disabled person)

### Example

A Unite rep negotiated with management in the finance sector in the North West for a member with a learning disability to have access to a mentor on a monthly basis (achieved at the final stage of a grievance hearing).

- acquiring or modifying equipment (such as adapted keyboards, large screens, adapted telephones)

### Example

A trade union disability champion sourced a grant for a new keyboard, screen and hand-held magnifier for a partially sighted member in the motor components industry. The union brought the grant to the attention of the employer, who agreed the adjustments.

- modifying instructions or reference manuals
- modifying procedures for testing or assessment (for example, an oral rather than written test for someone with limited manual dexterity)
- providing a reader or interpreter (for someone with a visual impairment)
- allowing a disabled worker to take a period of disability leave (see next section)
- employing a support worker
- modifying disciplinary or grievance procedures
- adjusting redundancy selection criteria (see next section)
- modifying performance-related pay arrangements (see next section)
- a combination of any of the above according to the individual circumstances.

### Example

A Unite rep in the not-for-profit sector in the East Midlands negotiated that a member could work at home when their condition (fibroids and menopausal complications) became particularly difficult at work.

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All of these are spelled out in the EHRC guidance as examples of reasonable adjustments. Unions may need to draw them directly to the attention of employers to point out that failure to consider them may constitute a breach of their duty to make reasonable adjustments, a failure that does not allow for being justified in legal proceedings.

A large part of case law on disability discrimination concerns the extent of the duty of reasonable adjustment. A number of major cases have set important precedents.

The ruling of the House of Lords in 2004 (*Archibald v. Fife Council*) that it was a reasonable adjustment for a large employer to offer a higher-grade vacant office post to a worker who had become unable, through an impairment, to continue doing their original (manual) job was a crucial decision in confirming the extent of the reasonable adjustment duty, and that it was right to treat a disabled worker more favourably in order to comply with the legal duty. This ruling remains in force.

The EAT ruled in the case of *Southampton City College v. Randall* (2006) that the law did not preclude an employer creating a post specifically for a disabled employee to substitute for the job that the disabled person could no longer do, depending on the facts of the particular case, which in this case were that the employer was undergoing a substantial reorganisation and this option was clearly available to them.

A similar line of reasoning was followed by the same tribunal in the case of *Chief Constable of South Yorkshire Police v. Jelic* (2010) where it was judged that it would have been reasonable for an officer with chronic anxiety syndrome either to swap jobs with another officer, or to take medical retirement and then be re-employed into a civilian support role.

The EAT in *Walters v. Fareham College Corporation* (2009) confirmed that it was not essential to produce a comparator to prove a claim of failure to make reasonable adjustments when the facts of a case spoke for themselves: it was necessary only to show that someone who did not have a disability would have been treated differently.

The issue of whether the employer knew, or could be expected to have known, that the worker was disabled, was dealt with in the case of *Secretary of State for Work and Pensions v. Alam*, where the EAT decided that the duty to make reasonable adjustments did not arise if the employer neither knew, nor ought to have known, that the worker was disabled and required adjustments.

The courts have been markedly less helpful in claims of a failure to make reasonable adjustments in cases where disabled people have been disciplined for sickness absence, and have ruled out altogether the possibility of disabled staff claiming sick pay above or for longer than allowed to non-disabled staff (see next section).

## Time limits

The three-month time limit for submitting claims to an employment tribunal can cause problems when considering when to submit a claim for a failure to make a reasonable adjustment. If having pointed out to the employer the need for a reasonable adjustment, the adjustment is not carried out within the three-month period, it will be safest to issue proceedings before the expiry of that time limit to avoid the risk of being struck out, as there are conflicting legal rulings on when the time limit runs from. Where the impairment was mental health, however, the EAT ruled in *Carter v. London Underground Ltd and Transport for London* (2009) that it was reasonable to extend the time limit on the basis that the claimant's depression affected his ability to take such decisions.

## **Key points for union representatives about reasonable adjustments**

Remember that discussion with the disabled worker is the only way to establish what adjustments are needed.

Remember that the adjustment asked for must be able to remove the disadvantage.

Remember that most adjustments cost little or nothing – and that Access to Work funding may be available if needed (see page 29).

Remember that the law allows an employer to treat a disabled worker more favourably if this is necessary to remove the disadvantage.

Remember, if the employer delays making the adjustment, there is a three-month period in which to issue proceedings before an employment tribunal.

## **Disability and health-related questions in recruitment**

The Equality Act contains a new provision that has been lobbied for by disabled people's organisations and unions for many years: it is now illegal for an employer to ask questions about health or disability until an offer of the job has already been made, or the candidate has been included in a pool to be offered employment (for example, when a new workplace is about to be opened). This includes questions relating to previous sickness absence. It is also illegal to have these questions asked by another: for example, sending candidates to an occupational health practitioner before the offer of a job is made.

Once a job has been offered, the employer can carry out checks to ensure the candidate

is able to do the job, while remembering the legal obligation to consider reasonable adjustments if necessary.

It is permissible to ask the questions in limited circumstances:

- when asking if the candidate needs reasonable adjustments for the interview
- to establish whether a candidate is able to take part in particular aspects of the recruitment process
- where monitoring of applicants is taking place to check diversity (and where the information is kept separately from the people doing the recruitment)
- where the employer has a guaranteed interview scheme for disabled applicants (the Two Ticks scheme – see page 20)
- where having an impairment is an occupational requirement for the job
- where the ability to carry out a particular function is fundamental to the job (the EHRC guidance gives the example of scaffolders).

Breaches of this provision have to be dealt with by the EHRC. However, if an individual was asked questions and then had the offer of a job withdrawn, they would be able to bring a claim for disability discrimination.

The relevance to unions of this welcome strengthening of the law may be limited, but it is important that negotiators who are able to discuss recruitment policies and procedures with the employer ensure that these procedures have been modified to take account of the new prohibition.

## **Occupational pensions**

The Equality Act covers occupational pension schemes and group insurance schemes, as part of a general prohibition of discrimination

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against disabled employees regarding employee benefits.

It is unlawful for a pension scheme to refuse membership or offer less favourable terms of membership to a disabled person, for example in the situation where an applicant to join the scheme was known to have an impairment that might lead to them taking early retirement.

The duty of reasonable adjustment also applies. The EHRC guidance offers the example of a final salary pension scheme that bases the pension on the final year's salary. In the example, a worker with long service develops a condition leading them to reduce their hours in the years before retirement. The scheme's rules would mean that their pension was calculated on these part-time earnings. It would be a reasonable adjustment for the trustees to recalculate the final salary by amalgamating the part-time years to achieve a full-time salary level, but over a reduced total number of years.

The duty also covers the way in which information is provided – communications may need to be in Braille, on CD or tape or through interpreters at meetings. Where the scheme rules are in conflict with the law, the rules need to be changed to become compliant.

## The equality duty

The disability equality duty introduced in 2006 is merged through the Equality Act with a single equality duty embracing all equality areas from April 2011. Disabled people's organisations and the trade unions were deeply disappointed that some of the most useful features of the 2006 duty have been lost as a result of the merger, and as a result of the political decision to limit the 'burdens' placed on public bodies by having the duty to promote equality. In light of these retreats, it is all the more important for union negotiators to become aware of the main



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features of the new duty and how these can best be used to encourage public bodies to become champions of equality for their workers and their communities.

The new duty states that a public body – and any other person or body exercising a

Where, in response to the previous disability equality duty a public body has put in place measures such as a reviewable equality scheme and systems for involving disabled people in their plans, unions should press the organisation to maintain these structures even though they will no longer be obligatory under the single equality duty.

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public function – must, in the exercise of its functions, have *due regard* to the need to:

*eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it;*

*foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

In doing this, the public body is required to “remove or minimise” disadvantages, “take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it”, and encourage them to participate in public life.

The duty recognises “the steps involved in meeting the needs of disabled people that are different from the needs of persons who are not disabled, in particular, steps to take account of disabled persons’ disabilities”. In addition, the law recognises that “compliance with the duties... may involve treating some persons more favourably than others”.

### Who is covered

Public bodies or those carrying out public functions are covered by the general duty. The law then lists which public bodies are also liable to the specific duties, a list that can be amended by ministers through secondary legislation (regulations). The current list includes government departments (except the security services), armed forces, the NHS, local government including fire and rescue services, passenger transport executives (including Transport for London), local education authorities and higher education governing bodies, and the police. The same coverage is extended to Wales and Scotland.



John Birdsall / PA

The provisions for enforcement are the same as before: breaches of the general duty can be challenged by judicial review, while enforcement action against a public body on the specific duties can be taken only by the EHRC.

### What is missing

The equality duty established by the DDA 2005 had requirements that were additional to the ‘general duties’ such as those now reproduced in the Equality Act, and these were spelled out in the form of ‘specific duties’. These included provisions to ensure that public bodies made a genuine commitment to achieving the objectives set out in the general duties by taking steps known from experience to produce real change.

Central to these were the duties to undertake an assessment of the impact of proposed changes in policy (etc) on disabled people, to prepare concrete action plans, and to

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actively involve disabled people both in the preparation of such plans and in monitoring progress.

The Equality Act permits ministers to impose 'specific duties' by secondary legislation (regulation). The new specific duties strip away the previous obligations. In their place, public bodies will be left to decide for themselves whether to engage with citizens, but will be obliged to publish data on "information relating to its performance" (of the equality duty) annually, including data on its employees (although only for organisations employing more than 150 people – therefore many schools, for example, will not be required to monitor their workforce), assessments of the impacts of its policies, and what information was used to arrive at these assessments, including any engagement with interested (e.g. disabled) persons. Starting in 2012, public bodies are obliged to publish "one or more" equality objectives (that it believes to be reasonable), which must be specific and measurable, then repeat this every four years.

The new approach is based on freeing organisations from 'bureaucratic', nationally imposed processes, and focusing on making them accountable at a local level. It is very likely that many public bodies that have already put these structures in place to comply with the previous duties will be pleased to drop them. However limited the new specific duties, the requirement to make the data available to the public does allow trade unions to analyse the reports and to seek to hold the public body to account for any weaknesses disclosed.

## The union is covered too

Trade unions count as 'trade associations' under the law and need to know that they are also covered by the Equality Act. A union's duty to its members mirrors the duties placed on employers and service providers. It would

The most important lever for trade unions and community organisations is to remember that, however much the previous obligations placed on public bodies by the specific duties have been reduced, such organisations still have to comply with the general duties. They will not have done so if they cannot demonstrate the fact with evidence.

be illegal to discriminate against members or applicants on the grounds of disability, and all union services must be provided without discrimination. This includes:

- access to training, conferences and other events
- providing union publications in whatever format a member requires
- the same level of representation as is provided to a non-disabled member
- access to the same benefits as a non-disabled member
- the same access to union meetings
- the same ability to participate in union elections (including, for example, adjusting election procedures for visually impaired members).

In practice, these obligations require the union to ensure that meetings are in accessible venues and that there are suitable parking and toilet facilities.

Training in equality law is essential for officers and staff – and the union is legally responsible for the actions of anyone acting in its name, including lay representatives.

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## DISABLED PEOPLE AT WORK: GOOD PRACTICE

Part two of this booklet summarised the law on disability discrimination as it affects people at work. Union representatives always seek to secure agreement with the employer rather than submit to the stress and uncertainty of resorting to an employment tribunal. However, being familiar with the key responsibilities placed by the Equality Act 2010 on every employer gives the union several useful negotiating tools.

The most important obligation on every employer, from the viewpoint of every workplace, is that they are required to consider making adjustments to remove the disadvantage that disabled workers may face in doing their job, in comparison with non-disabled colleagues. The legal obligation applies to both physical and material barriers facing the worker, and to the way in which company policies and procedures are carried out. It is impossible to generalise about what may be a reasonable adjustment because every situation will be different, whichever of these two broad areas is concerned. But it is possible to outline the general points that representatives need to bear in mind.

The first of these elements requires an employer to adjust the physical workplace itself. This includes adaptations to equipment, and it will often be a relatively straightforward negotiation to obtain new software or a larger computer screen, or to change the layout of an office or workshop, if this is what is needed to remove the disadvantage. Commonsense solutions will often provide the answer. As the examples that are used to

illustrate the EHRC's guidance suggest, if a small employer cannot afford to install a lift to enable a worker with mobility difficulties to reach upper floors, it could be a reasonable adjustment to relocate the job to the ground floor.

The second element has an even greater potential as it deals with employer procedures that may – perhaps unintentionally – disadvantage disabled workers, such as the way sickness absence is dealt with and how redundancy decisions are made. Unless the employer understands its duty of reasonable adjustment when it comes to such procedures, it is possible that it will be in breach of the law: and it is incumbent on the union to know this as well, so as best to protect its disabled members.

The underpinning principle of disability discrimination law is the understanding that, unlike all the other strands of equality law, disability discrimination law does not work on the basis of treating everyone the same. On the contrary, it relies on grasping the understanding that, because of the numerous barriers faced by so many disabled people, the only way to achieve an equal outcome may be to treat disabled people *more favourably*.

It may be hard to persuade workplace representatives, who have been brought up on the principle that trade unionism involves treating all their members the same, to understand that (some) disabled members may require to be treated better than their colleagues, if an equal outcome is to be

secured. That's why when training in equality law is provided for workplace representatives, it is strongly recommended that the different way in which the law treats disability is clearly explained.

It may be even harder to persuade the employer – especially as represented at line management level, where key decisions are made, and where there is less likelihood of training having been provided on this subject. There is plenty of good practice advice available to employers – it should be necessary only to draw this to their attention (see the resources at the back of this booklet).

This section will look in greater detail at practical workplace solutions under the following headings:

- Recruitment procedures
- Performance-related pay and bonuses
- Sickness absence and disability
- Redundancy and redeployment
- Occupational health
- Health and safety
- The Access to Work scheme
- Mental health
- Neurodiversity
- Training



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## Recruitment procedures

Unions can help make a positive difference to the continuing exclusion of disabled people from employment in a far greater proportion than non-disabled people by urging employers to review their policies or procedures on recruitment.

This is particularly vital for public sector employers, where the disability equality duty introduced in 2006 has been carried forward in the single equality duty in the Equality Act 2010 (see previous section). But even without this explicit duty, all employers are legally obliged not to discriminate in recruitment.

A new provision in the Equality Act introduces, for the first time, a ban on employers asking questions about health or disability (except in the circumstances described on pages 14-15). For the first time, employers are obliged to decide on appointments on the basis of selecting the best person for the job without knowing

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whether the applicant may have an impairment, and the consequence in the long term might be a substantial improvement in the access of disabled people to work.

Employers must change their policies and practices so that they do not ask about health or disability except in the circumstances permitted – in general, that means after they have decided on making a job offer. It may be necessary to remind them that they should base their questions only on the ability of the candidate to do the job (a decision that involves making reasonable adjustments). If they allow themselves to be influenced by preconceptions or prejudices about what people with particular impairments cannot do, they may well break the law.

### Audits and positive action

Employers should be pressed to consider doing an audit of their workforce to identify the proportion of workers identifying as disabled – for more information on monitoring, see part four. It may appear that disabled people are very few – and if people who are disabled are refusing to identify as disabled on the survey then this is also evidence that there is a problem. Public sector bodies have a legal obligation to encourage employment of disabled people. Private sector employers might need to be convinced of the business case for employing disabled people (see below). The law allows positive action when disabled people (and the same applies to other groups covered by the Equality Act) are under-represented or are disadvantaged or have different needs. Remember that it is not discrimination if a disabled person is treated *more* favourably than a non-disabled person if this is required to remove a barrier arising from the disability.

### Two Ticks

Many employers have been using targeted recruitment for many years, through joining

the Two Ticks scheme. The scheme requires that employers granted use of the symbol promise to interview all disabled applicants meeting the minimum requirement of the job, make the necessary adjustments, and support the disabled person in the job once appointed.

The Department of Work and Pensions (DWP) carries out a periodical review of employers using the Two Ticks symbol to confirm that their compliance is continuing. Unions might therefore encourage employers to join the scheme: it puts the organisation in a good light as well as broadening the catchment of people applying for any of its vacancies.

### The business case

Many employers do care about their image, because a poor image is bad for business. Joining and operating the Two Ticks scheme is an obvious way to acquire the kudos of being seen to be positive about employing disabled people.

The other reason for employing disabled people relates more directly to the 'bottom line'. Governments have spent years trying to convince business that there are good business reasons for recruiting disabled people, or retaining people who become disabled while at work. The arguments stressed by organisations such as the Employers Forum on Disability are:

- Disabled people are not less productive or reliable than non-disabled people.
- Disabled people often stay longer with an employer (are more loyal) and – contrary to popular misconceptions – have less time off.
- Disabled people and their families constitute a significant potential market and employing them may help target this potential audience.

- Having an effective diversity policy is good for staff morale as well as for the reputation of the organisation.

Unions will judge whether such arguments will carry weight with their employer. Evidence from some large companies that have won awards for their disability policies suggests that the positive effects are not felt equally across the organisation and that there continue to be obstacles to turning policy into practice further down the management chain – or that discriminatory practices continue through different channels because, although the policy has changed, the culture has not.

In summary, all employers may need to be informed of the outlawing of questions on health and disability and the need to revise recruitment policies.

Employers subject to the public sector duty have a legal obligation anyway to ensure not only that they are not discriminating against disabled people, but also that they are looking positively to ensure that disabled people are proportionately represented at all levels of the workforce.

Private sector employers can be encouraged to grasp the benefits of employing disabled people, or reminded of the cost of breaking the law.

## Performance-related pay and bonuses

Where pay is related to productivity and where bonuses are paid on the same basis, a disabled person with an impairment that requires them to take time off work, or to work more slowly than their non-disabled colleagues, is going to lose out.

Unions need to know that if this happens, the employer may in fact be breaching equality law by failing to make a reasonable adjustment. The EHRC guidance uses this

scenario as an example of where a reasonable adjustment is required to the scheme to prevent discrimination against a disabled person through paying them less for a reason connected with their disability.

It may be necessary to investigate whether an adjustment could be made (for example, to equipment) that would remedy the productivity gap, or failing that, the disabled person continues to be paid the same average pay as their colleagues where there is a clear link between the drop in productivity and the worker's impairment.

Once again, the principle to remember is that in order to compensate for the many barriers that some disabled workers face, it is sometimes necessary to treat the disabled worker more favourably.



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### Sickness absence and disability

At a time when employers are using sickness absence as a factor in determining redundancies, the continued misuse and confusion of sickness absence and disability-related absence represents a big challenge to unions.

The starting point for unions must be that it is a reasonable adjustment for the employer (a) to count disability-related absence separately from sickness absence, and (b) to adopt a disability leave policy.

Many sickness absence policies contain trigger points for losing entitlement to pay, for holding capability meetings, and for dismissal or pressure to take ill-health or early retirement.

As a result, every year many disabled people whose impairment(s) requires them to take time off work, but who are still capable of returning to work (perhaps with adjustments), find themselves dismissed through sickness absence procedures that make no allowance for disability-related absence.

At a time when government has been striving to reduce the numbers of people on disability benefits, it is particularly perverse to be adding to the number by a failure by employers to grasp that sickness and disability are not the same thing.

However, although case law under the Disability Discrimination Act has often been favourable to the worker in terms of extending the definition of disability or of pushing the boundary of 'reasonable' adjustments, one area where it has proved instead to be restrictive is in the extension of this approach to sickness absence. This follows a case in 2006 (*Royal Liverpool Children's NHS Trust v. Dunsby*) where the EAT overturned previously favourable employment tribunal cases by stating that the employer did not have an absolute obligation not to sack someone whose absence was down to

ill-health due to disability, but required only that the dismissal was justified. Similarly for the question of sick pay; the current authority is the Court of Appeal ruling in the case of *O'Hanlon v. The Commissioners for HM Revenue and Customs* that there was no entitlement to continued sick pay for disability-related absences after the exhaustion of the time laid down in the employer's procedures on sickness.

As the case law is unhelpful, it is strongly recommended that on this aspect of disability discrimination, unions do everything possible to avoid using the ultimate resort of taking the matter to an employment tribunal.

This reduces the options to the following:

- Arguing for the creation of a separate category of disability-related absence. The reasonable adjustment case can be deployed with this one, and, with public sector employers, their equality duty.
- Having a good disability leave policy, also as a reasonable adjustment.

The EHRC Code of Practice can be cited in support of both arguments, although the fact that it does not have legal force weakens the case where the employer sticks to the case law or is governed by their own prejudices.

### What the EHRC Guidance says

The guidance gives as an example of a reasonable adjustment:

*Allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment.*

and

*Allowing a disabled worker to take a period of disability leave. For example: a worker who has cancer needs to undergo treatment and rehabilitation. Their employer allows a period of disability leave and permits them to*

*return to their job at the end of the period.*

This is as far as the guidance goes. It may be sufficient to convince some employers to do the right thing.

### **A pre-condition: being open about the impairment**

Both options also entail a number of practical difficulties, primary among them being that the disabled worker feels sufficiently secure to be open about their impairment – not an easy challenge to overcome where it might concern mental health, for example. Unless they are willing to have both employer and union aware of the impairment, however, it will not be possible to identify a solution.

### **Counting disability absence separately**

In order to be able to argue that their member's absence is down to disability rather than sickness, the representative will need to understand the difference and to be able to explain it to management. Sometimes the continuing stigma attached to the word 'disabled' may prevent a worker accepting this. If the employer already has a policy commitment to equality and to being 'disability-friendly', this will be much easier to achieve. If they have not, the representative may have to argue the legal obligation to make reasonable adjustments, citing the EHRC guidance in support.

### **Key steps**

To secure agreement to count disability-related absence separately, there will need to be an agreed definition of disability. It is



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very unlikely that many employers would be willing to adopt anything other than the legal definition set out in the Equality Act.

The next question, therefore, is whether the worker is disabled. Where there is any doubt, an employer may rely on advice from their occupational health (OH) adviser, including advice on the likely length of the absence. Having this advice also provides the employer with some protection against future legal proceedings (but not entirely – responsibility for the final decision still belongs with the employer, not the medical adviser). It is therefore important that the representative ensures that they work with the employer in making the referral, including having an input into what questions are put to OH. If there is doubt whether OH is neutral, or whether it has the expertise to report on particular impairments (which may particularly be the case with mental health conditions), it may be necessary to get an independent medical report. Given the cost, it will be better to persuade the employer to commission this, on the grounds that having such a report will provide them with a reliable basis for decision-making that is less likely to lead to a tribunal challenge for disability discrimination.

It is unlikely that an employer will agree to allow a separate counting of disability-related absence for an indefinite period. An agreement that stipulates a period of time, but with discretion to extend through negotiation on a case-by-case basis, may be the safest option. Where the duration of the likely absence is not known, agreeing to a review before a period of paid absence comes to an end may be the best option. In these situations, getting reliable medical evidence becomes of crucial importance.

In some cases, the link between the absence and the impairment may emerge after the start of the period of absence. It is important that the policy allows for retrospection, so that if the link is established, absence already



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taken as sick leave is redefined as disability-related absence.

### **Disability Leave (also known as Rehabilitation Leave)**

The concept of Disability Leave (DL) has been around a long time, but very few employers have adopted DL policies, although this has begun to change in the public sector.

Although DL is recognised as an example of a reasonable adjustment in the Equality Act non-statutory guidance, this can be used only to argue the case for it to apply to an individual. The employer's agreement to establish a new policy can be secured only by negotiation; there is no legal obligation. But it makes much good sense to have such a policy, and reduces the risk of legal challenges for disability discrimination through a failure to make a reasonable adjustment.

In negotiating a policy, there are some key principles to agree, if the resulting policy is to be effective.

As in the argument for treating disability-related absence separately from sickness absence, an employer is likely to insist on a

definition of who is covered, and most likely to agree to the Equality Act definition of disability. This will raise questions in particular about people with fluctuating conditions, or those where a condition has not lasted 12 months. Representatives will have to become familiar with the case law interpretation of these questions (see pages 8-9).

The other question about the coverage of the policy is what kind of absence it covers: for example, does it include sickness that may be directly related to the impairment, but is not treatment (etc.) of the impairment itself? Civil Service DL agreements do not. Unions will want a DL agreement to cover as many workers as possible, so the wording here will be crucial.

Employers will normally insist on a time limit for the total period of DL. Civil Service agreements have a limit of three months in any 12-month period. Unions will argue for the maximum period that can be won.

Another approach is to try to win agreement to a flexible approach, related to the circumstances of the individual case. As every individual case will be different, this approach makes sense if the intention is to encourage individuals to return to work at the completion of the period of DL, during which time they can have completed the recuperation, rehabilitation or therapy that led to the request for the DL in the first place. This approach is contained in the policy negotiated by the NUT and UNISON with Somerset County Council (see Appendix).

Retrospective applications should be allowed. In some cases, absence may have begun before it is identified as disability related, and in such cases it should be established that the absence can be redefined as DL.

It will also be important to identify as wide as possible a range of possibilities for taking the DL: appointments, treatment, therapy, recuperation, training or retraining,

assessments, waiting for an employer to carry out adjustments – with (importantly) some provision for flexibility. The PCS civil service agreements cover alternative therapies (where recommended by a medical professional), counselling and time to adjust to new medication. It might also cover a phased return to work or part-time working during the return, in order to ensure continued entitlement to full pay.

Finally, unions will want to ensure that periods of DL are counted as continuous service.

## **Redundancy and redeployment**

When employers are making workers redundant, disabled people have historically come off worse, by being the first to be selected for redundancy, or got rid of through other means such as ill-health retirement.

Very often, employers will have been able to claim that they have acted reasonably because they applied the same criteria in making their decision equally to everyone.

To make a disabled person redundant without having considered reasonable adjustments – including to the redundancy criteria and procedures themselves – may be unlawful. Unions will need to ensure both that the employer's procedures are non-discriminatory and that the actual practice that follows also does not discriminate on grounds of disability.

Of course, other laws apply to redundancy situations as well and an employer must comply with them all.

## **Selection pool**

If the employer is not closing down an entire operation, but is reducing the total number of people working in it, it would be easy to discriminate directly or indirectly on grounds of disability (or, for example, sex) if the pool were to be restricted only to people

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assumed (for example) to be less productive, if their lower productivity was the result of an impairment, or who work part-time also for reasons of disability. Applying such judgements might lead to the pool being comprised only of such people, and may well be discriminatory. The best way to avoid the risk of discrimination is for the employer to place everyone in the unit in the pool.

The union will naturally seek to minimise the number of jobs to be lost but must be aware of not themselves prejudicing the position of disabled members by agreeing to selection pools where the criteria for deciding who is, and who is not, in the pool are potentially or actually discriminatory.

## Matrix factors and scores

The EHRC guidance for employers on dismissal, redundancy and retirement

recommends that, in order to avoid illegal discrimination, employers should:

- use not just one but a variety of separate criteria in a matrix of selection criteria
- consult the trade union
- make sure that whoever scores people against the criteria has been trained on avoiding unlawful discrimination.

The EHRC guidance offers specific advice on three particular criteria that might be used. They are included here so that representatives can draw their existence to the attention of employers:

## Length of service

A criterion based on length of service risks discriminating on grounds of age (i.e. in this case, young people), sex (women, who are



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more likely to have had interrupted careers) and disability (for the same reasons).

*The TUC would recommend checking whether a disabled worker might be affected by two of the three characteristics (age, gender, disability), thus entailing the possibility of dual discrimination (see page 10 'combined discrimination'), now that this legal concept has been introduced by the Equality Act. In this case, the union should argue that adjustments should be made to the criteria to discount any time differences attributable to disability, as a reasonable adjustment.*

## Absence record and working hours

These factors risk discriminating against particular groups of people:

- disabled people taking time off because of their impairment, which might represent a case of discrimination arising from disability
- those taking time off to care for a disabled relative, which might represent a case of discrimination by association
- a disabled woman whose time off for pregnancy was taken into account might be able to claim direct discrimination.

The EHRC guidance gives an example:

*An employer... selects employees from the pool on the basis of absence over the past two years. The disabled person has taken a lot of time off in relation to their disability (... "something connected to their disability"). If the employer cannot objectively justify this decision, it is likely to be discrimination arising from disability. A better approach would be to exclude disability-related absence from the absence which is used to score employees against that criterion...*

There are two important points to note:

1. It is necessary for the employer to know that the worker is disabled for this argument to be applied. Therefore it is vital that the worker is open about the impairment.
2. If an employee in a redundancy pool is a disabled person, and the employer does know this, the employer is obliged to make reasonable adjustments to remove barriers that a non-disabled person would not face. The argument would then become whether this adjustment was reasonable.

Reasonable adjustments in a redundancy situation could include redeployment of a disabled worker into another position not at threat of redundancy. The case law about the scope of reasonable adjustments (the *Archibald* case, see page 13) confirms that it is reasonable for the employer to move a disabled worker to a vacant position, even if it is at a higher grade and requires retraining of the worker. It should be noted, however, that this case related to a large employer, and what was reasonable for it might well not be for a much smaller employer.

Nonetheless, the option of redeployment into another position has been well established in case law, and should be pressed by union representatives where there is any possibility of preserving the employment of a disabled worker.

### Case study

Unite reps negotiated with an employer in the manufacturing sector in the South West to redeploy disabled members within the workplace as a reasonable adjustment to avoid redundancy. Without these adjustments, the disabled workers were threatened with redundancy.

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## Performance criteria

Simply to make a disabled person redundant because of poor performance, without having made adjustments to remedy the disabled person's disadvantage that had caused the lower performance, was found unlawful by the EAT in the case of *Wheeler v. Sungard Systems Group Ltd* (2004), where a sales representative had performed poorly as a result of medication taken for depression.

## Summary

In summary, the union needs to ensure that the criteria proposed by the employer for selecting people for redundancy take into account all appropriate 'reasonable adjustments', many of which will mean modifying the criteria being used to select for redundancy so that a disabled person does not face a 'substantial disadvantage' in the process.

- If using absence, then absence connected to disability should be discounted.
- If using length of service, care should be taken to avoid discrimination arising from an individual disabled person's disability-related employment history.
- If using performance, it is essential that any reasonable adjustments to the job have been put in place first, including recognition (and discounting) of productivity or performance levels below those of non-disabled colleagues that derive from the disability.

## Occupational health

In many circumstances that affect the lives of disabled workers, employers rely on the recommendations of an in-house occupational health service. Unions have reported situations where these recommendations fit too easily with the employer's pre-judged conclusions about

the fitness of the worker for continued employment, or that they may (through ignorance) fail to recognise that reasonable adjustments could be put in place to remedy the problem.

Existing case law confirms that final decisions rest with the employer, but also support the view that where the employer has relied on an OH report to justify their action, it will be very hard to challenge it successfully in an employment tribunal. It is crucial, therefore, that where the employer has decided to seek medical evidence to decide what to do with a worker whose performance has deteriorated as a result of a health condition or impairment, the union should seek to ensure two key points:

1. That the medical report is prepared by a professional qualified to deal with the particular conditions in question, including where appropriate commissioning an external expert.
2. That the worker has been involved in the discussion of what they can or cannot do at work. Case law confirms that such consultation is required, and this should be pointed out to the employer.

Given the weight that medical evidence can play in justifying an employer's decision to dismiss a sick or disabled worker, it is essential to ensure (1) that the medical report is from a properly qualified expert; and (2) that the disabled worker is involved in discussion about possible reasonable adjustments to enable them to continue in or return to work.

## Health and safety

In no case should it be possible for an employer to argue that their obligations under the Health and Safety at Work Act (HSW) outweigh their obligations not to



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discriminate against, or make reasonable adjustments for, a disabled worker.

Individuals with particular impairments may be the subject of a risk assessment that is specific to them – although the law says that the request to undertake a risk assessment must itself be reasonable (that is, consistent with the tasks required of the job, and not resulting from irrelevant considerations based on preconceptions of the individual's impairment).

Failure to carry out an appropriate risk assessment while deciding on actions that treat a disabled worker less favourably risks a finding of discrimination without the justification that might be provided if the employer argues that health and safety concerns were the reason for the discrimination.

Any kind of blanket ban on all people with a particular impairment is likely to constitute direct disability discrimination, which is incapable of being justified. An example would be a ban on anyone with diabetes from a driving job. Such a policy is likely to be unlawful: representatives faced with this situation should check the detailed advice provided by Diabetes UK at:

[www.diabetes.org.uk](http://www.diabetes.org.uk)

The approach taken by union representatives should be that disability and health and safety work together, not in opposition, to create a safer and healthier workplace for all. In many cases, reasonable adjustments can be made that will eliminate or, as the law itself requires, minimise the risk.

- For workers with mobility impairments, a simple 'buddy' system where someone else agrees to assist the disabled person to evacuate the building may overcome any problem.
- Flashing lights alongside sound alarms would serve to alert workers with hearing impairments.
- Where hazardous substances are in use, it may be necessary to reconsider the limit level for the concentration in the air of a hazardous substance (as is already required by regulations).

An issue often raised is that of workers lifting people, for example disabled people in a care home. Withdrawal of the service, which has happened, need not be the outcome, and there is guidance from the H&S Executive (HSG 225, Handling Home Care) to resolve problems.

### **The Access to Work scheme (ATW)**

Access to Work (administered by the DWP) offers funding for adjustments to enable disabled people to start a job, and to remain in work.

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Current details of eligibility, who to contact, the application process and what the fund will pay for are online at:

[www.direct-gov.uk/en/disabledpeople/employmentsupport/](http://www.direct-gov.uk/en/disabledpeople/employmentsupport/)

Changes are made to the scheme from time to time; this section explains the position at January 2011.

ATW offers help for disabled people who are:

- in a paid job
- unemployed and about to start work
- unemployed and about to start a work trial
- self-employed.

ATW will currently pay 100 per cent of the cost of support for those unemployed and about to start work or in a job within the first six weeks of employment, as well as special equipment if needed (but see more below) and adaptations to the premises. Employers are asked to contribute according to a sliding scale determined by their size – for example, those employing fewer than 10 people will contribute nothing, but those employing 250 or more people will pay the first £1,000 and 20 per cent of the costs up to £10,000. The level of support is reviewed by ATW between one and three years after the grant is made.

The largest number of awards granted in 2009/10 went on special aids and equipment, costs of support workers, travel to work costs, and the costs of the ATW assessment itself.

From October 2010, the DWP reduced funding previously provided for a large number of pieces of equipment, arguing that it is the responsibility of employers to provide reasonable adjustments under the Equality Act.

If a representative is concerned that an employer will resist the making of an adjustment on grounds of cost, awareness of ATW may provide a solution and should be drawn to the employer's attention. It is important to understand, however, that no large employer is likely to be able to argue cost as a reason not to comply with their legal obligation to consider an adjustment unless the adjustment concerned is extraordinarily costly – and most ATW grants are modest.

## Mental health

An enormous number of workers who have or have had a mental health problem are not in work, and are denied the opportunity to return to work, for two primary reasons:

- the absence of a joined-up approach to dealing with mental ill health as both an employment and a health issue
- the stigma associated with mental health that ensures that around 80 per cent of people affected are not in work.

A new cross-departmental approach to ensure that health and employment services work together was introduced by government early in 2010. Tackling the second barrier is a much stiffer challenge, and unions need to play their part.

The TUC has produced detailed guidance, *Representing and supporting members with mental health problems at work*, which can be downloaded from the disability pages of the TUC website, [www.tuc.org.uk](http://www.tuc.org.uk). The advice was written in collaboration with the Sainsbury Centre for Mental Health, Mindful Employer, and was endorsed by the EHRC.

These are some of the key messages that union representatives need to remember when supporting workers with mental health issues:

- Mental health issues are one of the most common impairments recognised by the law: statistics suggest that around one in five women and one in ten men will face depression at some point in their lives; research has identified that the sectors with highest rates of mental-health-related illness were public administration, education and health.
- For many obvious reasons, workers who are depressed (or have another mental health problem) may not see their condition as a disability, and may be very reluctant to discuss it with someone else, in particular their employer. But unless the employer is aware of the situation, they cannot be asked to provide the kind of reasonable adjustment needed to deal with it.
- Union representatives themselves may feel unable to deal effectively with members in this situation. It is recommended that wherever possible, (some) reps in a workplace or officers in an area undertake training on mental health so as to feel confident to advise and represent in these cases.
- A range of the reasonable adjustments listed in the EHRC guidance for the Equality Act may be the right solution to making it possible for a worker with a mental health issue to stay in their job: adjusting working hours to allow for the effects of medication, allowing more frequent breaks, providing a workplace 'buddy', changing work duties or redeployment (for example, away from aspects of the job that are causing stress), and altering supervision or appraisal methods.

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### *Talbot v. WAGN Railways*

The EAT ruled that it was a reasonable adjustment to redeploy a railway worker into a non-public-facing position following a suicide that had led him to develop post-traumatic stress disorder.

- The adjustments to sickness absence procedures discussed above and the establishment of Disability Leave procedures are likely to be particularly helpful in enabling someone with a mental health condition to undergo treatment and to make a return to work without their absence triggering dismissal through sickness absence policies.
- Once someone who has been off work for reasons of mental ill health returns to work, it may be essential to manage that return to work very carefully to prevent a recurrence.

### **Neurodiversity**

Workers with a wide range of conditions grouped under the title of neurodiversity (ND) – such as dyslexia, dyspraxia and attention deficit hyperactivity disorder (ADHD) – face a number of barriers in most workplaces.

The starting point for representatives is to know that ND people are covered by the disability discrimination provisions of the Equality Act, and that employers have the same duty of reasonable adjustment for ND workers as for any other disabled person.

The starting point for employers needs to be recognition that neurodiverse people bring a distinct range of skills to their work that can be of positive benefit to an organisation – for example, lateral and innovative thinking and creativity.



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Some of the relevant adjustments will be the same as for someone with a mental health issue, others may be different.

- The priority given in many working environments to literacy, numeracy and strict time management can be a serious barrier for many neurodiverse people, and call for adjustments such as dyslexia skills training, assistive technology such as dictation software, more time for written tests, and swapping of duties.
- It may be necessary to carry out an assessment to determine whether the worker is ND. Assessments, however, will have to be paid for by the employer, but might be necessary to confirm that a duty of reasonable adjustment applies.
- Training for managers in dealing with widespread conditions such as dyslexia will remove much of the stress for

individuals, who may be disciplined for weaknesses in their work that are caused by (for example) their dyslexia. There is case law confirming that a failure to make adjustments appropriate to a ND person falls foul of disability discrimination law.

- As relevant, general practitioner (GP), psychiatrist and/or psychologist support and the provision of treatment such as cognitive behavioural therapy or coaching can reduce periods of time off work, and the use of disability leave to cover such would be entirely appropriate.
- Specific resources and support organisations of ND people are listed in the appendix.

## Training

### For managers

Time and again, unions have reported that, even in organisations with excellent policy on disability, there is insufficient (or no) understanding of the employer's obligations, and an unthinking sharing of popular prejudices, at the level of the line managers responsible for day-to-day operations.

In organisations liable to the public sector equality duty it should be easier to press the argument for the importance of managers being trained in equality law, and in particular to appreciate that the law requires employers to treat disabled people not the same as, but more favourably than, non-disabled people, if that is necessary to overcome the barriers they face.

If the business case does not convince employers in the private sector (see pages 20-21), then the risk of expensive employment tribunal proceedings combined with a negative impact on the image of the company may lead the employer to recognise

the benefits of ensuring that at least key staff receive relevant training.

Where the argument has been won, employers can be directed to bodies such as the Employers' Forum on Disability (EFD) for further advice and information. For trainers, there are many choices: unions should recommend that preference be given to those offering *disability equality* rather than *disability awareness* training. The former will often be provided by disabled people themselves, from a social model perspective. The benefit will be that the participants come away with a better grasp of the social context of disability discrimination, which will very often be lacking from courses in disability awareness.

### For disability champions, equality reps and union representatives

To be able to assist an employer to reach the right decisions, union negotiators must themselves be trained in disability discrimination law and good practice.

The training of disability champions, begun by Amicus, has been open to unions since 2004. This fully accredited scheme is delivered from approved TUC training centres and provides participants with a thorough understanding of the issues highlighted in this booklet, within a social model of disability. It offers a practical plan designed to assist workplace representatives to negotiate reasonable adjustments, carry out access audits, and generally encourage understanding of disability issues. Further details can be found on the TUC unionlearn website.

Thousands of trade unionists have benefited from training as equality representatives. Even though these reps have not gained statutory rights to facility time, where they are present in a workplace, or at a local or regional trade union office, they offer expertise in tackling equality issues and should be consulted on any disability-related issues.

# PART FOUR

## MONITORING DISABILITY

How can an organisation know whether its equality policies are working without reviewing and monitoring them? Under the public sector duty contained in the Equality Act, all public bodies are obliged to place in the public domain data that will enable citizens to hold them to account for the success (or otherwise) of their equality policies. Private and voluntary sector bodies do not have this duty, but good practice means they should follow the same path.

It will be very hard to produce such data unless the different equality groups are monitored. Many organisations have carried out disability monitoring for a number of years, and have encountered problems in obtaining reliable information from the exercises. There are some basic ground rules that need to be observed if a monitoring exercise is to be authoritative.

- Don't ask people about their impairments – not only is this information useless, it almost guarantees that people with 'hidden impairments' won't respond, especially (but not only) if they relate to mental health.
  - Do have a plan. What will be done with the collected data? How will the organisation modify its operations in light of the findings?
  - Do make sure that every member of staff receives a briefing explaining what the equality plans are, and that they have the chance to ask questions.
- Do make sure monitoring is anonymous and confidential. Access to data needs to be closely controlled, and no individual should be identifiable from the responses. If the data is not anonymous, then the protections afforded by the Data Protection Act must be respected.

The TUC strongly recommends that monitoring starts with a social model approach. The purpose of the exercise should be, at least, to identify whether the proportion of people identifying as disabled within the workplace is representative of society as a whole.

Identifying what barriers people continue to face will make a survey even more useful. However, it will be difficult to merge the two into a single survey, and the TUC recommends that a separate mechanism is put in place asking people to report barriers they face, and in a different way so as to encourage the maximum response rate. For example, it may be very difficult to maintain anonymity in such a survey.

Even with the best-planned monitoring exercise, many people are likely not to respond to a question about disability. If confidence grows that the data are being used to change the organisation for the better, then rates of return will increase with each repeat exercise.

Many people who count as disabled using the Equality Act definition do not define themselves as disabled. And some people who are disabled are not covered by the Act, because of the definition. As a result,

no monitoring exercise can possibly produce a fully accurate picture: however, without a monitoring exercise, there will be no benchmark against which an organisation can measure progress with its equality policies.

Whether or not a social model approach is adopted, there will remain the question of what definition of disability is used to present the monitoring exercise. Most employers will naturally follow the definition in the Equality Act, and it may be helpful if this definition is provided with the monitoring form.

Some organisations ask people to identify themselves against a list of impairments. This approach is wrong; not only will many people find it offensive, but it also fails to provide useful information. The employer does not need to know that this many of its employees have this many conditions – but it does need to know whether it is treating disabled workers properly, and what barriers remain to be tackled, and responses showing what impairments people have do not contribute to dealing with these questions.

Very occasionally there might be circumstances where an organisation may use data collected from a survey based on individual impairments – such as, for example, if a large employer was concerned that there was a particular group of disabled people who were *not* represented in the workforce, so that they could then plan a targeted recruitment operation. But this situation will not apply in the great majority of circumstances, and other methods might produce the information more efficiently anyway.

The TUC recommends that the only monitoring question asked should be “Do you consider yourself to be disabled?”, with a “yes” or “no” answer.

### **Using the results**

If monitoring suggests a disproportionately low number of disabled workers, then the organisation is permitted by law to target recruitment efforts at this group. If the monitoring shows that disabled people figure disproportionately among lower grades, the organisation should investigate what barriers there are to career progression.

If the survey does not allow for that kind of analysis, the union should be pressing for monitoring of internal processes such as promotions, training and development activities, and grievance and disciplinary processes in order to check whether disabled people are disproportionately absent or present. The union can offer a constructive role in presenting evidence to the employer and acting as a conduit for members’ views and experiences of the barriers that exist.

### **Summary**

The TUC recommends that unions encourage employers to monitor their workforce for two reasons: to check that disabled people are represented in the right proportions; and to (separately) check progress in removing the barriers they face. To achieve a useful outcome requires careful planning, briefing all managers and staff, and a commitment to act on the findings.

# PART FIVE

## RESOURCES

All telephone numbers and web addresses are correct as of November 2010.

### **ACAS**

Offers advice for individuals and organisations, and guidance and training for employers, in addition to its role as a conciliator.

Helpline 0845 747 4747

Textphone 0845 706 1600

[www.acas.org.uk](http://www.acas.org.uk)

### **Access to Work**

AtW is contacted through JobCentre Plus offices. For information about the scheme, including current rules on eligibility, search for Access to Work on the DWP website:

[www.direct.gov.uk/disabledpeople](http://www.direct.gov.uk/disabledpeople) (under the heading 'employment support').

### **Department for Work and Pensions**

The DWP is responsible for government work schemes and benefits. Its website contains up-to-date information on current schemes:

[www.dwp.gov.uk](http://www.dwp.gov.uk)

### **Disability Equality Training**

A growing number of independent consultants are now offering disability equality training courses. There is no central means of accreditation (as at November 2010) to confirm whether a given organisation is qualified to deliver accurate or effective training. TUC advice is to give preference to organisations offering DET through disabled trainers, but in each case to check and follow up references.

### **Employers' Forum on Disability**

The TUC recommends that employers wishing to adopt a positive approach to the employment of disabled people take advantage of the expert advice provided by this organisation.

Nutmeg House, 60 Gainsford Street,  
London SE1 2NY

[www.employers-forum.co.uk](http://www.employers-forum.co.uk)

### **Equality and Human Rights Commission**

The EHRC publishes guidance on the Equality Act 2010 and on the public sector equality duty. These can be downloaded from:

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

It also publishes the Codes of Practice associated with the Equality Act; these can also be accessed through its website.

The EHRC operates a helpline with the following numbers:

England	Tel:	0845 604 6610
	Textphone:	0845 604 6620
Scotland	Tel:	0845 604 5510
	Textphone	0845 604 5520
Wales	Tel:	0845 604 8810
	Textphone:	0845 604 8820

### **Government Equalities Office**

The GEO has taken on greater responsibility for work on equality and has published guidance on the Equality Act 2010.

[www.equalities.gov.uk](http://www.equalities.gov.uk)

### **Health and Safety Commission**

The Health and Safety Commission website includes information about the relationship between disability and health and safety law, advice and good practice.

[www.hse.gov.uk/disability](http://www.hse.gov.uk/disability)

### **Mental health advice**

For advice specifically on mental health, refer to the guidance written for the TUC by Michelle Valentine, *Representing and supporting members with mental health problems at work*, available free from the TUC website (see below).

### **MIND**

The TUC has also established links with MIND, the leading mental health charity for England and Wales, over its employment campaign and advice: for access to its resources, visit:

[www.MIND.org.uk/work](http://www.MIND.org.uk/work)

### **Office for Disability Issues**

The ODI exists to coordinate work on disability across government. Its functions include administering an expert advisory group of disabled people, Equality2025.

[www.officefordisability.gov.uk](http://www.officefordisability.gov.uk)

### **Trades Union Congress**

The TUC publishes a range of advice on all issues relating to employment and equality. This includes material on different aspects of disability, some of which is available free of charge for downloading from:

[www.tuc.org.uk](http://www.tuc.org.uk)

For advice on workplace issues generally, the TUC hosts the Know Your Rights helpline on 0870 600 4882, or visit:

[www.worksmart.org.uk](http://www.worksmart.org.uk)

The TUC website also contains a section listing disability access resources used by unions to ensure equal access for their members.

# APPENDIX

## EXAMPLE OF A DISABILITY LEAVE POLICY

The following agreement has been made between a major local government employer and UNISON and the NUT.

### **What is Disability Leave?**

Where the effect of an employee's disability results in an employee requiring leave which is directly associated with their disability, this will need to be accommodated as far as reasonable within the terms of the DDA.

Managers should always consider whether it is possible to reduce the extent of disability related absence through reasonable adjustments. Section 6 of the DDA specifically identifies the provision of leave as a reasonable adjustment where a disabled person needs to be absent from work for "rehabilitation, assessment or treatment" (e.g. the routine assessment of hearing aids, hospital or specialist check-ups including monitoring of related equipment or treatment).

Disability Leave does not apply to absence through sickness, whether it is related to a disability or not, which is determined by either self-declaration or self or medical certification.

### **Who does Disability Leave apply to?**

Disability leave is not a right, as such each case will be considered on its merits.

It will apply to employees who have completed the Equalities Monitoring Form and declared that they have a disability. Otherwise the Council would not be obliged to consider making adjustments and adaptations. The HR service will be able to advise managers whether an employee is eligible.

Employees who have had a disability in the past but no longer have that disability will be able to apply for disability leave for follow up appointments related to their disability (e.g. check ups or ongoing assessments to ensure that treatment has been effective).

## What are legitimate reasons for requesting Disability Leave?

An employee requesting disability leave is not ill but needs to have time off for a disability related reason. The following are *some examples* of disability related reasons but is not an *exhaustive* list. All of these must be related directly to the employee's disability:

- specialist hearing or sight examinations
- assessment for diabetes, HIV, dyspraxia
- training with a guide, hearing or companion dog
- training in the use of specialist pieces of equipment
- training in the use of Braille, Moon, signing, lip reading, deaf/blind manual
- counselling or therapeutic treatment e.g. relating to a mental illness
- recovery time after a blood transfusion or dialysis
- physiotherapy either sessional or residential
- to allow time for adjustments or adaptations to be made.

## How does an employee request Disability Leave?

If an employee wishes to take disability leave they should in the first instance seek approval from their manager.

Leave can be requested for a single day or a series of individual days depending on the circumstances.

If the manager requires clarification they should arrange to meet with the employee to discuss the request.

The manager may seek advice prior to responding from their Directorate HR team and the Equality Employment Officer.

In normal circumstances, a manager will be expected to grant the request for disability leave, unless there are objective operational reasons for refusing the request.

If their request is refused, the employee can refer the matter to a representative of the Network for Employees with a Disability or the HR Manager, Disability Employment Lead.

This booklet is designed to be dyslexia-friendly, in line with British Dyslexia Association guidelines. It is also available in Braille, large print and on audio tape.

To order further copies, call 020 7467 1294.

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