

Disability discrimination in the workplace

Your legal rights

Overview

The Equality Act 2010 (“the Act”) provides protection for people who have a disability, defined as ‘a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day to day activities’. But what exactly does this mean for you?



The meaning of ‘disability’ is fairly wide and covers a variety of people, some of whom might not traditionally be considered disabled, such as those with epilepsy or depression. Legal cases so far emphasise that the effect of the disability is the key, rather than the type of disability. Furthermore, if you suffer from a range of impairments, the focus should be on the overall effect of the impairments on your ability to function, rather than the separate effect of each individual impairment.

When considering whether you have a disability, the effect of any medication or treatment you receive for your condition must be discounted in considering the impact on your ability to carry out day to day activities. This is crucial. For example, medication, or the use of a hearing aid or walking stick, should be ignored.

The Meaning of Disability

Four-part definition of ‘disability’:

1. **Physical or mental impairment**– This is broadly interpreted and includes sensory impairments, autism, dyslexia and mental health conditions.
2. **A substantial adverse effect**– This requirement is meant to rule out minor or trivial impairments, so simply being under the weather will not be enough. Even if an individual can carry out a normal day to day activity, there may still be a substantial adverse effect on how those activities are carried out. The Tribunal should consider how the individual would carry out those activities without the impairment.
3. **A long-term effect**– A long-term effect means an impairment that has lasted 12 months or is likely to last 12 months, or for the rest of your life. If the impairment’s substantial adverse effect ceases, but the effect is likely to recur at some point in the future, then the substantial adverse effect is treated as continuing. The word ‘likely’ means ‘could well happen’.
4. **The ability to carry out normal day-to-day activities** – Examples of capacities that might be affected could include eating, walking, driving, normal social interaction. Also, activities that are only done at work may also be covered under the definition.

The Act also covers progressive conditions such as multiple sclerosis. Further, the Act provides that if you are diagnosed with cancer or as HIV positive you will automatically be protected by the Act, without having to fit the definition of ‘disability’.

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Perceived and Associative Discrimination

Protection has also been extended under the Act to cover direct discrimination and harassment (see below) suffered because of a disability of a person with whom you are associated, even if you are not yourself disabled. This would protect, for example, carers of disabled people from detrimental treatment or comments made because of their association with the disabled person. The concept of ‘associative discrimination’ does not, however, extend to other types of disability discrimination such as the duty to make reasonable adjustments or discrimination arising from disability (see below).

Further, individuals perceived to be disabled even if they are not disabled, should also be covered by the Act against acts of direct discrimination and harassment. In perception cases, it may not be necessary for an individual to fulfil the statutory definition of disability.

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Discrimination

Who is protected?

The Act makes it unlawful for a force to discriminate against individuals because of disability. In the police sphere, the Act applies to recruitment, service and vocational training. Pre-recruitment health questionnaires have also been prohibited under the Act – please see below. It is unlawful to discriminate against someone because of disability, from the initial job application process through to termination of service. The Act extends the definition of “employment” to cover the police.

What is prohibited?

The Act outlaws direct and indirect discrimination, discrimination arising from disability, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the force. The chief officer will usually be liable for any discriminatory acts carried out by police officers against other police officers. The chief officer may also be responsible for the acts of their agents, as well as the acts of officers working for the force.

Importantly, the Act also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a force provides a discriminatory reference, or refuses to provide a reference at all, because of a person’s disability, this could amount to unlawful discrimination.

Discrimination

There are six ways in which discrimination may arise.

1. Direct discrimination

It is unlawful to treat a person less favourably because of their disability. In order to bring a claim of direct discrimination, you must show:

- That you have been treated less favourably because of disability
- That you were subject to disadvantage or detriment as a result of that treatment.

The Act requires that ‘like must be compared with like’, so the less favourable treatment must be compared with that of someone who does not have your disability, but whose position is the same or not materially different to yours in all other respects, including abilities.

This ‘comparator’ can be an actual person or hypothetical. Where a disability carries stigma (for example, certain mental health conditions are still subject to stigma), then the misperception resulting from that stigma should not be carried over to the comparator.

Direct discrimination cannot be justified. For example, if you are subject to stereotypical comments because you have a disability where your colleagues are not, this could amount to direct discrimination.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious, or that the discriminatory reason was the sole reason for the treatment. Further, it does not matter if the discriminator shares the disability of the individual being discriminated against.

In most other cases under the Act, protection against direct discrimination applies equally to all persons. For example, women and men are equally protected against sex discrimination; black and white people are protected against race discrimination. However, there is a requirement that disabled persons may be treated “more favourably” in order to “level the playing field”. It is lawful, therefore, to treat a disabled person more favourably than a non-disabled person.

2. Discrimination arising from disability

A disabled person is entitled not to be treated unfavourably because of something arising in consequence of their disability. If they are treated unfavourably, then the discriminator must objectively justify that treatment. There is no need for a comparison of treatments afforded to a disabled and non-disabled persons to succeed in this claim.

There is no need to establish a direct link between the disability and the unfavourable treatment. The unfavourable treatment should have been caused by something arising from the disability, for example, being treated unfavourably because of sickness absence, or the need to be accompanied by a guide dog, or because of behavioural issues.

A discriminator will struggle to justify unfavourable treatment if they could have made a related reasonable adjustment (see below) but failed to do so.

3. Indirect discrimination

The Act provides that a person indirectly discriminates if an arrangement or feature relating to the service (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all officers, but:

- Puts people of a particular disability at a particular disadvantage when compared with people without that disability
- Puts the complainant at that disadvantage; and is not a proportionate means of achieving a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a police officer with dyslexia might be disadvantaged by the force’s requirement that all police officers should always proof read the final version of their written work to ensure accuracy. The force will need to justify the practice objectively and consider if there are more proportionate ways to achieve the aim of ensuring accurate written work, such as asking a colleague to proof read.

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4. The duty to make reasonable adjustments

Discrimination may also occur if the force fails to make reasonable adjustments in or around the workplace. If working practices or features of the premises put you at a substantial disadvantage, compared to your non-disabled colleagues, the force must make reasonable adjustments to remove or minimise the disadvantage. For example, if you suffer from depression you may need to be allowed to work part-time, or if you use a wheelchair and you have to travel to work using public transport, then changing start and finish times so that you can avoid rush hour traffic could be a reasonable adjustment.

There is no financial cap on the possible cost of a reasonable adjustment, but the size and funds of a force is likely to be taken into consideration when determining whether the adjustment is reasonable or not.

5. Victimisation

The law protects people who seek to enforce their rights under the Act. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under the Act. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the DDA. This would include raising a grievance of disability discrimination.

So for example, if you have made a complaint about disability discrimination and are later treated unfavourably for doing so, you should be covered by the Act. A protected act must be done in good faith.

6. Harassment

Harassment related to disability is a form of discrimination. It is defined as being:

- Unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone having a particular disability, or if someone is perceived to have a particular disability.

Exceptions

Discrimination in employment is generally prohibited. However, in certain circumstances, the Force may have a defence to an act of discrimination that is otherwise unlawful.

- The general occupational requirement exception. This is available where, having regard to the nature or context of the work, being of a particular disability is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.
- There are two positive action provisions which apply to the other strands of discrimination, which is otherwise generally prohibited. However, it is important to note that there is no prohibition on treating disabled people more favourably than non-disabled people.
- National security. A discriminatory act will not be unlawful if it is done for the purpose of safeguarding national security, and it was proportionate for that purpose.



Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that the claimant is required to establish clear facts which could enable the tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-disability based explanation from the force, the tribunal must draw an inference of discrimination.

Where a force has failed to comply with relevant statutory Codes of Practice, the tribunal may also draw inferences from this failure.

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Pre-employment health questionnaires

The Act makes it unlawful for a force to ask an applicant about his/her health before making an offer of a job. Forces contravening this provision can be investigated by the Equality and Human Rights Commission. Further, individuals can bring claims of direct discrimination as a result of not being offered a post following disclosures in a pre-employment questionnaire.

Forces can make health enquiries in certain circumstances but a tribunal can treat such action as a fact that would shift the burden of proof to the force to explain why a job was not offered following the use of such a questionnaire.

Knowledge of disability

For all disability claims under the Act to succeed (save for indirect disability discrimination), the discriminator must know about the disability or be reasonably expected to know of it. Disclosure of a disability is, therefore, essential for protection under the Act.

Questionnaires

You can serve a questionnaire on the force to obtain useful information relating to your complaint. ACAS have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk.

Time limits

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about. This time limit applies even if you are going through the force's internal grievance procedure. Where that treatment amounts to a continuing course of conduct by the force, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the employment tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. Calculating the date from which the three month time limit starts to run from in reasonable adjustment claims is potentially very complex and advice should be sought urgently if a failure to make reasonable adjustments is being alleged.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, the tribunal may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties;
- A recommendation that the force take a particular course of action; and
- Re-engagement or reinstatement if the individual's service has been terminated; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial work, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by the force's discrimination as found by the tribunal.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk

Employment Tribunal Fees

You have to pay a fee when you file your claim in the employment tribunal. Fees are payable when you issue your claim and prior to a final hearing. A fee remission scheme is in place - see the employment tribunal website at www.employmenttribunals.service.gov.uk for further details. The booklet on the website "EX160A Court and Tribunal fees - do I have to pay them?" Provides details for claiming a remission of fees.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.slatergordon.co.uk/policeLaw

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