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Disability Equality Centre

Disability Discrimination Act 1995 (DDA): Part II.

THE DUTIES ON EMPLOYERS

[This guidance note provides an overview of the employer's duties under the DDA. It is not intended as, nor should it be relied upon as, legal advice in respect of any particular case].

The DDA was extensively revised as from 1 October 2004. This guidance note describes the Act's employment provisions (contained in Part II DDA) as from that date. In addition, an accompanying, revised Code of Practice on Employment and Occupation (drafted by the Disability Rights Commission) was implemented as from 1 October: the Code is not law, but it provides good, practical guidance on the employment provisions of the Act and courts and tribunals are expected to take account of the Code when interpreting the DDA.

1) THE MEANING OF "DISABILITY":

1.1) In order to be protected from discrimination, a person must either currently have a disability or must have previously had a disability as defined in Part I of the DDA. According to Section 1 DDA, a person has a disability if s/he has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities, and that effect is:

substantial (that is, more than minor or trivial), *and*

adverse, *and*

long-term (that is, it must have lasted or be likely to last for at least a year or (if shorter) for the rest of the affected person's life).



Head Office:
Holyer House, 20-21 Red Lion Court, London, EC4 3EB.
Tel: 020 7822 8700
Fax: 020 7822 7001
E-mail: hdec@habinteg.org.uk
Website: www.habintegdec.org.uk



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All of the elements of the statutory definition must be satisfied and expert advice should always be sought from the EHS about an employee's disabled status.

1.2) It is important to remember that the DDA provides protection against discrimination in respect of a *past* disability, even if that person is no longer disabled. For example, it would be discriminatory to unjustifiably reject a job applicant because s/he had previously experienced a period of mental illness.

2) THE MEANING OF “DISCRIMINATION”:

2.1) The DDA makes it unlawful for an employer to discriminate against a disabled person in a number of ways:

2.1.1) Disability-related discrimination:

An employer discriminates against a disabled person (e.g. a job applicant or existing employee) if, for a reason which relates to the disabled person's disability, it unjustifiably treats him or her less favourably than it treats or would treat others to whom that reason does not or would not apply (Section 3A(1) DDA).

Treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and is substantial.

2.1.2) Failure to comply with the duty to make reasonable adjustments:

According to Section 3A(2) DDA, an employer also discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments imposed by Section 4A DDA (see paragraph 2.2 below).

Such a failure can no longer be justified: this is on the basis that an adjustment need only be made if it is reasonable in the first place.

2.1.3) Direct discrimination:



Head Office:
Holyer House, 20-21 Red Lion Court, London, EC4 3EB.
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Website: www.habintegdec.org.uk



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An employer directly discriminates against a disabled person if it treats the disabled person less favourably than it treats (or would treat) a person not having that particular disability and:

- the treatment is on the grounds of the disabled person's disability; and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person (Section 3A(5) DDA).

Direct discrimination can never be justified (Section 3A(4) DDA).

[N.B.: The Code of Practice explains that direct discrimination occurs when the reason for the less favourable treatment is the fact that the person is disabled, while disability-related discrimination occurs when the reason relates to the disability but is not the disability itself. See the examples in paragraph 2.3 below].

2.1.4) Harassment:

Harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:-

- (a) violating the disabled person's dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him (Section 3B(1) DDA).

If the conduct in question was undertaken with the intention that it should have had either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled person. In the absence of such an intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects. Regard must be had to all the circumstances in order to determine whether this is the case including, in particular, the perception of the disabled person.



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Holyer House, 20-21 Red Lion Court, London, EC4 3EB.
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2.1.5) **Victimisation:**

According to Section 55(1) and (2) DDA, it is unlawful for one person to treat another (“the victim”) less favourably than it treats or would treat other people in the same circumstances because the victim has:

- a) brought, or given evidence or information in connection with, proceedings under the DDA; or
- b) done anything else under or by reference to the DDA; or
- c) alleged that someone has contravened the DDA; or
- d) because the person believes or suspects that the victim has done or intends to do any of the above things.

However, it is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith. Unlike other forms of discrimination under the DDA, victimisation may be claimed by people who are not disabled as well as by those who are.

2.2) The Duty to make Reasonable Adjustments:

In practice, the majority of employment-related disability issues concern the duty to make reasonable adjustments and it is therefore worth considering this obligation in some detail.

2.2.1) The Duty: according to Section 4A(1) DDA, where:

- a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of the employer’s premises,



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places a disabled person at a substantial disadvantage as compared with non-disabled people, the employer must make reasonable adjustments to prevent that disadvantage.

'Provisions, criteria and practices' include arrangements such as selection and interview procedures, as well as job offers, contractual arrangements and working conditions.

'Physical features' includes steps, stairways, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or movable items.

A 'substantial disadvantage' is one which is not minor or trivial.

2.2.2) When does the duty arise? The duty to make reasonable adjustments applies in recruitment and during all stages of employment, including dismissal. It may also apply after employment has ended.

2.2.3) When is an adjustment 'reasonable'? Section 18B(1) DDA lists a number of factors which may, in particular, have a bearing on whether it will be reasonable for an employer to have to make a particular adjustment. These include:

- a) the effectiveness of the adjustment;
- b) how practicable it is to make the adjustment;
- c) the financial and other costs of the adjustment;
- d) the extent of any disruption caused to the employer's activities in making the adjustment;
- e) the extent of the employer's financial or other resources;



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f) the availability to the employer of financial or other assistance to help make an adjustment;

g) the nature of the employer's activities, and the size of its undertaking.

In addition, the Code of Practice sets out some other factors:-

the effect on other employees;

adjustments made for other disabled employees (if an employer has a number of staff with mobility problems then this may mean that it would be reasonable to make significant structural changes to the workplace);

the extent to which the disabled person is willing to co-operate.

2.2.4) Examples of reasonable adjustments: Section 18B(2) DDA sets out a non-exhaustive list of examples of possible adjustments:

a) making adjustments to premises;

b) allocating some of the disabled person's duties to another person;

c) transferring the disabled person to fill an existing vacancy;

d) altering his hours of working or training;

e) assigning the disabled person to a different place of work or training;

f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;



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- g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);
- h) acquiring or modifying equipment;
- i) modifying instructions or reference manuals;
- j) modifying procedures for testing or assessment;
- k) providing a reader or interpreter;
- l) providing supervision or other support.

In addition to the possible examples above, the Code of Practice lists:

conducting a proper assessment of what reasonable adjustments may be required;

permitting flexible working;

allowing a disabled employee to take a period of disability leave;

participating in supported employment schemes, such as Workstep;

employing a support worker to assist a disabled employee;

modifying disciplinary or grievance procedures;

adjusting redundancy selection criteria;

modifying performance-related pay arrangements

Any adjustments should be implemented in a timely fashion and it may be necessary for an employer to make more than one adjustment.



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2.2.5) The co-operation of other employees: in some cases a reasonable adjustment will not work without the co-operation of other employees. Subject to considerations about confidentiality, employers must ensure that such co-operation is given. It is unlikely to be a valid defence to a claim under the DDA that staff were obstructive or unhelpful: any employer would at least need to be able to show that it took such behaviour seriously and dealt with it appropriately.

2.2.6) Can a failure to make a reasonable adjustment ever be justified? An employer cannot justify a failure to make a reasonable adjustment: where the duty applies, it is the question of reasonableness which alone determines whether the adjustment has to be.

2.3) Comparing the different forms of discrimination in practice:

The way in which the different forms of unlawful discrimination operate in practice is demonstrated by the following examples:

2.3.1) A woman with arthritis applies for a secretarial job. There is a question on the application form about disability, and she indicates she has arthritis but that it does not affect her typing. The employer rejects her application because it nevertheless wrongly assumes that she will not be able to carry out the job due to her arthritis. This is unlawful direct discrimination which cannot be justified.

2.3.2) In the same situation, the woman instead declares on the application form that her arthritis does affect her ability to type. She is called for an interview and is told to take a typing test as part of the selection process. She tells the employer that she will need to use an adapted keyboard in order to take the test. However, this is not provided; the woman fails the test as a result; as a consequence, she is turned down for the job. This is not direct discrimination, as the reason for the rejection was not her disability but was instead the fact that she had failed the typing test. However, the employer did treat her less favourably for a reason relating to her disability (namely the fact that she failed the typing test): this will amount to disability-related discrimination unless the employer can justify its treatment (and this would not be possible if the employer had failed to make a necessary reasonable adjustment – see below).



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2.3.3) In the above example, there is a duty on the employer to make reasonable adjustments to its selection arrangements. It may be a reasonable adjustment for the employer to provide the necessary adapted keyboard or to allow the woman to use her own, thereby ensuring that she is not placed at a substantial disadvantage by the test. If this is the case, then the employer will be unlawfully discriminating against her by failing to make the adjustment.

2.3.4) Because of the way in which she has been treated, the disabled woman makes a claim against the employer under Part 2 of the DDA. Later, the same employer advertises a further secretarial vacancy. The woman applies again but the employer rejects her application because she has previously made a claim under the DDA. This is unlawful victimisation.

3) THE EMPLOYER'S DUTIES TOWARDS DISABLED JOB APPLICANTS AND EMPLOYEES:

The DDA makes it unlawful for an employer to discriminate against a disabled person in relation to the recruitment, employment or retention of staff.

3.1) Job Applicants:

3.1.1) According to Section 4(1) DDA, it is unlawful for an employer to discriminate against a disabled person:

- a) in the arrangements which it makes for the purpose of determining to whom it should offer employment;
- b) in the terms upon which it offers that person employment; or
- c) by refusing to offer, or deliberately not offering, that person employment.

3.1.2) Employers must therefore take care to avoid discriminating against disabled people throughout the recruitment process:



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a) Specifying / Advertising the job: don't include unnecessary or marginal requirements when specifying the role, such as the need for a driver's licence when driving could be avoided.

In addition, it's unlawful to publish (or cause to be published) an advert which indicates, or might reasonably be understood to indicate, that the success of a person's application for the job may depend to any extent upon his not having any disability, or any particular disability, and/ or that the person determining the application is reluctant to make reasonable adjustments;

b) Application forms and information: it is likely to be a reasonable adjustment to provide on request information about a job in alternative formats such as e-mail, large print, audio tape and computer disk. Likewise, it is likely to be a reasonable adjustment for an employer to accept applications in alternative, accessible formats.

c) Selection, assessment and interview arrangements: an employer is not required to make adjustments in anticipation of applications from disabled people in general (although it would obviously be good practice to do so). Instead, the duty only arises if the employer knows, or could reasonably be expected to know, that a particular disabled person is, or may be, applying for the job and is likely to be substantially disadvantaged by the employer's premises or arrangements.

The employer will need to consider whether it should make reasonable adjustments when short-listing for interview. Employers should also think ahead for interviews when considering the need for possible adjustments such as an accessible venue for an applicant who uses a wheelchair or the provision of a sign linguist for a hearing impaired candidate. Applicants should be given a prior opportunity to indicate any relevant effects of the disability and to suggest adjustments to help overcome any disadvantage which the disability may cause at interview.

The DDA does not prevent an employer carrying out aptitude or other tests although it may need to revise the tests, or the way that the test results are assessed, to take account of specific disabled candidates. Possible adjustments might include:



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allowing a disabled person extra time in which to complete the test;

permitting a disabled person the assistance of a reader or scribe during the test;

accepting a lower “pass rate” for a person whose disability inhibits performance in such a test.

The extent to which such adjustments may be required would depend upon how closely the test is related to the job in question and what adjustments the employer might have to make if the applicant were given the job. Employers may need to seek professional advice about potential adjustments.

d) Offers of Employment: terms and conditions of service should not discriminate against a disabled person. In general, an employer should not offer a job to a disabled person on terms which are less favourable than those which would be offered to other people.

3.2) Existing Employees:

3.2.1) It is unlawful for an employer to discriminate against a disabled employee:-

a) in the terms of employment which it affords him or her;

b) in the opportunities which it affords him or her for promotion, a transfer, training or receiving any other benefit;

c) by refusing to afford him or her, or by deliberately not affording him or her, any such opportunity; or

d) by dismissing him or her, or subjecting him or her to any other detriment (Section 4(2)DDA).

It is also unlawful for an employer to harass a disabled employee or job applicant (Section 4(3) DDA).



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3.1.2) Employers must therefore take care to avoid discriminating against disabled employees throughout their employment:

a) Terms and conditions of service: it might, for example, be a reasonable adjustment to change an individual's hours of work whose disability means that he has difficulty using public transport during rush hours;

b) Induction, training and development: employers may have to make adjustments to an induction programme or to selection criteria for a training course;

c) Benefits: employers must not discriminate in respect of the provision of benefits such as canteens, social clubs, dedicated car parking spaces, bonuses, health care, company cars and rights to special leave;

d) Promotion and transfer: employers must ensure that arrangements for promoting staff, or for transferring staff between jobs, do not discriminate against disabled people (both at the assessment stage and also in the practical arrangements necessary to enable a promotion or transfer to take place or, indeed, in the new job itself);

e) Retention of disabled employees: an employer must not discriminate against an employee who becomes disabled or who has a disability which worsens. For example, if, as a result of a disability, an employer's arrangements or a physical feature of its premises place a disabled employee at a substantial disadvantage in doing his existing job, the employer must consider any reasonable adjustment that would resolve the difficulty. Whilst the nature of such adjustments will depend on the circumstances of the case, the Code of Practice suggests that the following will always be relevant:-

the first consideration in making reasonable adjustments should be to enable the disabled employee to continue in his present job, if at all possible;

the employer should consult the disabled person at appropriate stages about his needs and, where the employee has a progressive condition, what effect the



Head Office:
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disability might have on future employment, so that reasonable adjustments may be planned;

in appropriate cases, the employer should also consider seeking expert advice on the extent of the disabled person's capabilities and what might be done to change premises or working arrangements;

where an employee has been off work, a phased return to work might be appropriate;

if there are no reasonable adjustments which would enable the disabled employee to continue with his present job, then the employer must consider whether there are suitable alternative positions to which he could be redeployed.

It may be possible to modify a job to accommodate an employer's changing needs, e.g. by:

rearranging working methods;

reallocating certain minor tasks to another employee;

providing practical aids or adaptations to premises or equipment;

allowing the disabled employee to work at different times or places from those with equivalent jobs;

allowing a reduction in working hours.

The issue of job retention might also arise where an employee has a stable impairment but the nature of his employment changes.



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f) **Termination of Employment:** where a disabled person is dismissed or is selected for redundancy or compulsory early retirement (including compulsory ill-health retirement), the employer must ensure that the employee is not being directly discriminated against. Even if the dismissal or selection is not directly discriminatory, the employer must show that it is justified if the dismissal or selection is made for a reason related to the disability and, in addition, would have to be able to show that this was a reason which could not be removed by any reasonable adjustment. For example, when establishing criteria for redundancy selection, employers should consider whether any proposed criteria would adversely impact upon a disabled employee. If so, it may be necessary to make reasonable adjustments such as discounting disability-related sickness absence when using past attendance as a redundancy selection criterion, or discounting how “flexible” an employee can be.

3.3) After the Termination of Employment:

3.3.1) Where a disabled person’s employment has come to an end, Section 16A(3) DDA explains that it will still be unlawful for his former employer to discriminate against the disabled person by subjecting him or her to a detriment or to subject him or her to harassment, provided that the discrimination or harassment arises out of the employment which has come to an end and is closely connected to it.

3.3.2) It is also unlawful to victimise a person (whether or not he is disabled) after his employment has come to an end.

3.3.3) An employer’s duty to make reasonable adjustments may also apply in respect of a former employee who is disabled, for example with regard to the provision of life-time membership of the Work’s Social Club.



Head Office:
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Fax: 020 7822 7001
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4) MISCELLANEOUS EMPLOYMENT-RELATED PROVISIONS:

4.1) Duties towards disabled persons other than employees:

4.1.1) Section 4B DDA makes it unlawful for a principal to discriminate against a disabled contract worker: in essence, the DDA treats the principal as if it were, or would be, the actual employer of the disabled contract worker and the same principles in relation to discrimination apply.

4.1.2) It is also unlawful for a placement provider to discriminate against a disabled person who is seeking or undertaking practical work experience (Section 14C DDA). A placement provider is any person who provides a work placement to a person whom he does not employ.

4.2) Occupational Pension Schemes

To the extent that an employer has control over matters relating to pension benefits afforded to employees, the usual principles about discrimination will apply under Part 2 DDA. In addition, Section 4G(3) DDA makes it unlawful for pension scheme trustees or managers to contravene the “non-discrimination rule” which is deemed to be included in every occupational pension scheme.

4.3) Employer’s Liability

Employers are responsible for the actions of their employees carried out in the course of their employment (subject to the statutory defence) and for the actions of their agents which are done with the employer’s express or implied authority (but see below).

4.4) Aiding Unlawful acts

A person who knowingly helps another to do something made unlawful by the DDA will also be treated as having done the same kind of unlawful act. Thus where an employer is vicariously liable for an unlawful act of its employee or agent, that employee or agent will be liable for aiding the



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Fax: 020 7822 7001
E-mail: hdec@habinteg.org.uk
Website: www.habintegdec.org.uk



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unlawful act by the employer. (Indeed, the employee will remain liable even if the employer successfully pleads the statutory defence).

If you require this information in an alternative format, please contact Habinteg at hdec@habinteg.org.uk.



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Tel: 020 7822 8700
Fax: 020 7822 7001
E-mail: hdec@habinteg.org.uk
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