



Disability Discrimination in the Workplace

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Introduction

The Equality Act 2017 makes it unlawful for an employer to discriminate against employees because of disability. The Act does not require any minimum length of continuous employment, or any employment at all in the case of a job applicant, for a discrimination claim to be made. It makes discrimination unlawful at all stages - from when a role is advertised and interviewed for, through to the last day of employment and beyond, including any job references.

What is disability discrimination?

Understanding what 'disability' means

It is necessary to understand what disability means under the Equality Act. The main definition is:

A person is disabled if they have 'a physical or mental impairment' which has 'a substantial and long-term adverse effect' on their 'ability to carry out normal day-to-day activities'.

Impairment - may be a physical or mental impairment, or both. It is not necessary to establish the cause of the impairment and it does not have to be the result of an illness. It is not always possible, or necessary, to categorise whether an impairment is either physical or mental – as there might be impairments which are both physical and mental. And while impairments which are visible can be easy to identify, there can be others which are not obvious – for example, some mental health conditions. There is more on impairment further into this guide.

Long-term - lasting at least a year, or likely to be for the rest of the person's life or to recur

Substantial adverse effect - more than minor, but it may fluctuate or change, and may not be present all the time

Normal day-to-day activities - not defined by the Act, but in and out of the workplace they are taken to be common things for most people. For example, in employment, they might include interacting with colleagues, using a computer, writing, following instructions, keeping to a timetable, sitting down, standing up, driving, lifting and carrying everyday objects.

Exceptions to the main definition of disability

There are exceptions to the main definition of disability and this can be a complicated area. Key exceptions are:

1. A person is treated as disabled and entitled to protection without having to show their condition has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities in the following situations:
 - where someone has **cancer, HIV** infection or **multiple sclerosis**.

The Act specifically says a person who has one of these conditions is a disabled person from the point of diagnosis

- where a consultant ophthalmologist has certified someone as **blind, severely sight-impaired, sight-impaired or partially-sighted**.

The Act regards them as disabled.

2. Where a person has a '**progressive condition**', initially the effect on their ability to carry out normal day-to-day activities may not be sufficiently serious to amount to a substantial adverse effect. Nevertheless, they are treated as disabled if their condition is likely to have a substantial adverse effect on their day-to-day activities in the future. This means a person with a 'progressive condition' may qualify for protection as a disabled person before the adverse effects of their condition become serious. 'Progressive conditions' increase in severity over time and, for example, include dementia, muscular dystrophy and motor neurone disease.

Discrimination because of a past disability

The Act protects employees and job applicants who are no longer disabled, but who had a disability in the past. So, it would be unlawful to discriminate against them because of their past impairment, or because of debilitating effects resulting from treatment for the past impairment.

Is obesity a disability?

Obesity itself is not a disability. But, it may cause an impairment - for example, mobility problems, depression or diabetes - which could be a disability. The impact

would have to be substantially adverse and long-term on day-to-day activities. And it will depend on the particular circumstances of the individual case.

Where the impairment is a disability, an employer must consider and make 'reasonable adjustments'. Examples might include providing a special desk and chair, a parking space near the office, or modifying the employee's duties.

Also, employers need to ensure obese employees are not subjected to offensive comments or behaviour because of their weight and that obese job applicants are not discriminated against because of their weight.

If it is unclear whether or not an employee is disabled, it would be up to an Employment and Equality Tribunal to rule whether or not the employee was disabled.

Understanding what 'impairment' means

Impairments can be physical, mental or both. And impairments and their effects can fluctuate and may not be apparent all the time.

For a person to show the impairment is a disability under the Act, it generally needs to meet the key terms in the Act's main definition:

- that the condition is an impairment
- that the impairment is long-term
- that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

Also, whether an impairment is a disability will depend on all the facts and circumstances of the individual case.

Usually, there will not be disagreement in the workplace over whether an employee has a disability. However, in other circumstances, there may be differences of opinion over the impairment's effects on the individual generally, in and outside of work, and whether they fall within the definition of disability.

In such instances, it would be advisable, as soon as the employer becomes aware of the matter, for it to seek expert evidence to establish whether the employee has an impairment and how it affects the way they function day to day. For example, the advice might be from an occupational health advisor, a consultant and/or the employee's GP.

This can be a complex legal area, so it may be helpful for employers and employees to bear in mind that:

- in most cases an employee will develop a condition rather than be born with it, so at some point an employer is likely to have a member of staff who becomes disabled while working for it
- an employee's disability can affect their work because of the way the workplace is set up and/or because of some work practices or expectations – this is where 'reasonable adjustments' can come in
- if an employer disagrees that an impairment is a disability and the case goes to an Employment and Equality Tribunal, the tribunal will assess the matter discounting the medication and/or treatment the employee has to help with their condition
- the not-for-profit Business Disability Forum, which is based in the UK and helps firms employ disabled people, advises employers against wrestling with whether the effects of an impairment amount to a disability under the Act. Instead, it encourages them to focus on making 'reasonable adjustments'. It has its own range of guidance at www.businessdisabilityforum.org.uk and MIRS considers the guidance to be good practice on the Isle of Man.

Impairments can include: conditions which can range from myalgic encephalomyelitis (ME), diabetes and arthritis to depression, schizophrenia, phobias, personality disorders, autism, dyslexia, learning disabilities and injury to the brain; those affecting body organs such as asthma and heart disease; what medicine calls musculoskeletal conditions – injury, damage and disorders which affect bones, muscles, joints, ligaments, tendons and nerves; and conditions/effects produced by injury to the body.

Impairment – other considerations:

An exception to the general rule is that a severe disfigurement or deformity of the body is usually regarded as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities. There is no need for them to show the effect.

Regarding disfigurement, it may be necessary to take into account factors such as whether it is permanent, its size and where it is. For example, is it large or small, clearly visible or hidden under clothing, as opposed to being on their face? Such factors may affect whether or not a disfigurement is severe – if it is severe, it is usually a disability.

Tattoos and decorative body piercings themselves are not severe disfigurements under the Act. However, for example, serious scarring left by the removal of a tattoo might be regarded as a severe disfigurement.

An impairment may not have a substantial adverse effect on separate tasks. However, the impairment may have lesser effects on more than one activity. These together could amount to an overall substantial adverse effect.

For example, Tom has breathing difficulties, so he can be slower moving around, lack energy during the working day and have problems sleeping at night. Taken individually, these effects might not be substantially adverse. But taken together, they could amount to a substantial adverse effect.

An employee or job applicant may have more than one impairment where each on its own would not have a substantial adverse effect. However, the impacts of the impairments taken together may amount to a substantial adverse effect.

How disability discrimination can happen

There are four main types of discrimination within the protected characteristic of Disability under the Equality Act 2017:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation

There are two additional types which apply solely to this protected characteristic:

- Discrimination arising from disability
- Failure to make 'reasonable adjustments'

Employers should be aware that successfully dealing with a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination might be prevented.

Direct discrimination

This breaks down into three different types of direct discrimination where someone is treated less favourably than others because of:

- their disability – this is ordinary **direct discrimination**
- the disability of someone they are associated with, such as a friend, family member or colleague – this is **direct discrimination by association**
- how they are perceived - that they are believed to have a disability. Regardless of whether this perception is correct or not, this would be **direct discrimination by perception**.

Direct discrimination in all its forms could, for example, involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of disability. In almost all circumstances, it cannot be justified and would be unlawful. However, the Act does, in very limited circumstances, allow for what are known as 'occupational requirements' under this protected characteristic. These are explained later in this guide.

For example... ordinary direct discrimination

Jack works for a branch of a finance firm and applies for a role at his employer's head office. He proves to be one of the front-runners for the job, but at the final hurdle loses out to another candidate whose track record and qualifications are not as good as Jack's.

The decisive factor was a conversation between Jack's current manager, Cynthia, and Andrew, who would have been his new boss. They talked about how Jack overcame cancer two years ago and Andrew's worry that the cancer

could come back and that Jack would be off sick again. This is likely to be ordinary direct discrimination because Jack had a disability.

For example... direct discrimination by association

Alana, an assistant manager at an IT company, asks for time off to care for her husband because his rheumatoid arthritis has flared up badly. Her employer agrees to the time off – some paid, some unpaid, but adds that her absence will cause difficulties in running the business. When her husband's condition settles down, Alana returns to work and finds her fixed-term contract will not

be renewed because the employer feels her role as a carer makes her unreliable in her job.

While there is no legal obligation for Alana's employer to make 'reasonable adjustments' because Alana herself is not disabled, she must not be treated less favourably because of her caring responsibility. So, she lodges a grievance against the employer while still in her post. She claims she has suffered direct discrimination by association in not having her contract renewed because of her caring responsibilities for her disabled husband. Depending on the outcome of the grievance, she is also considering a claim to an Employment and Equality Tribunal.

Rather than complain to Alana about her absence, her employer could have looked for options to help overcome the difficulties while she was away. And on Alana's return, her employer should have talked to her about its concerns to try and agree a way forward. Her employer should also have kept in mind that Alana may be entitled to ask for flexible working in any event.

For example... direct discrimination by perception

Raja is a lecturer at a college where some colleagues complain her behaviour can be very unpredictable. Rumours that she has a serious mental illness mount. She notices she is not invited to social gatherings or some college meetings, and neither has she been offered any training or career development opportunities for more than 18 months.

She has said sorry to colleagues for her outbursts, explaining she feels under pressure sometimes because of a private matter outside work. However, she suspects that her apologies have made no difference, and that the college is trying to 'get her to leave'.

This is likely to be direct discrimination because she is perceived to have a mental health disability.

Indirect discrimination

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice is applied equally to a group of employees/job applicants, but has (or will have) the effect of putting those who share a certain protected characteristic at a particular disadvantage when compared to others in the group, and the employer is unable to justify it.

An employee or job applicant claiming indirect discrimination must show how they have been personally disadvantaged, as well as how the discrimination has or would disadvantage other employees or job candidates with the same protected characteristic.

The Equality Act does not define a 'provision, criterion or practice'. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include recruitment selection criteria, contractual benefits, a redundancy scoring matrix or any other work practice.

In some limited circumstances, indirect discrimination may be objectively justified if the employer can prove it is 'a proportionate means of achieving a legitimate aim'. However, employers should note this can be a difficult process.

In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient **and**
- the actions are proportionate, appropriate and necessary.

Both points apply in justifying 'a proportionate means of achieving a legitimate aim', not just one of them.

An employer should also consider if there is another way to achieve the same aim which would be less discriminatory, and be able to show that it has been fair and reasonable, and looked for a less discriminatory alternative.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the employee and group of employees with the protected characteristic – in this case, disability. Employers should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified. For example, is there another way of achieving the same aim which would be less discriminatory?

It is important to stress that employers should monitor carefully their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce.

For more on monitoring, see the companion guide, Prevent discrimination: support equality.

For example... preventing indirect discrimination

Abdul is a sales assistant at a store where it is policy that sales assistants work the shop floor for a set number of hours a day to be available for customers. However, Abdul has Crohn's disease and flare-ups can mean he spends less time on the shop floor.

He asks his employer to allow him more time for toilet breaks on the days his Crohn's disease flares up, and also to make allowances as it can make him very tired. The employer is sympathetic and makes 'reasonable adjustments' so Abdul can spend less time on the shop floor during flare-ups and a deputy sales manager will cover for him.

Had the employer insisted Abdul adhere to the policy on hours this may have been indirect discrimination, unless it could justify the policy as "a proportionate means of achieving a legitimate aim". Sticking to the policy may also have been a "failure to make reasonable adjustments"

Harassment

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic – in this case, disability. It must also have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This can include bullying, nicknames, threats, intrusive or inappropriate questions, excluding someone (ignoring, not inviting someone to meetings or events etc) or insults. It can be verbal, written or physical. Also, unwanted jokes and/or gossip which the employee finds offensive can be harassment, and to say they were 'banter' is no defence.

For example... harassment

Bob works in a warehouse, but has been off with a mental health condition of anxiety linked to his disability – Asperger syndrome, where he struggles in mixing and communicating with people. On Bob's return to work, a colleague hands him copies of emails left overnight on an office printer. The emails are between Bob's manager and a senior manager – they are dismissive and derogatory about why he has been off work and his disability. They also say they should turn up the pressure on Bob so he makes up for the time he has

been off.

This is likely to be harassment because of his disability. Bob could lodge a grievance against the two managers who might then be disciplined. If Bob is not satisfied with the outcome of his employer's handling of the matter, he could decide to make an Employment and Equality Tribunal claim if within the time limit.

Also, it is possible for an employee to make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or the working environment. The employee making a complaint of harassment in this situation would not need to have the same disability as the colleague who is being harassed, or any disability.

For more general information on harassment, see the companion guide, Equality and discrimination: understand the basics.

Victimisation

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes damage, harm, or loss – because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act 2017.

Victimisation can also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so in the future.

A 'detriment', for example, might include being labelled a 'troublemaker', being left out and ignored, or being denied training.

An employee is protected under the Equality Act if they make, or support, an allegation of victimisation in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence in bad faith – in other words, maliciously.

For example... victimisation

Marie is back at work after her rheumatoid arthritis flared up. But, she needs a course of hydrotherapy at the local hospital to help her improve. Her manager, Seth, though, is being sarcastic and refusing to commit to giving her time off for the treatment.

Marie is upset by Seth's attitude and asks her trade union rep for help. He contacts the employer's HR department which assures him it will sort out the matter. It tells Seth he has to give Marie time off for her hydrotherapy, as it is important in helping her cope with her condition.

Seth gets angrier, thinking Marie has 'gone behind his back'. He books her time off, but from then on starts picking on her in front of other staff, being particularly critical of her work. Also, he cancels only her place on a training course, saying she's not ready for it.

Seth's treatment of Marie – singling her out for criticism in front of staff and cancelling only her training because she made an allegation of harassment against him – is likely to be victimisation.

Discrimination arising from disability

The Equality Act also protects an employee from what the law terms 'discrimination arising from disability' – this is where they are treated **unfavourably**, not because of the disability itself, but because of something linked with their disability. The disabled person claiming this type of discrimination **does not** have to compare their treatment to how someone else is treated.

Difference between 'unfavourably' and 'less favourably'

In disability discrimination law, the different terms 'unfavourably' and 'less favourably' are used carefully. For example, 'less favourably' is used in circumstances where someone claiming one of the types of direct discrimination would have to compare their treatment to someone else who is not disabled. But, 'unfavourably' is used where the person claiming discrimination arising from disability suffers what the law terms a 'disadvantage', but does not have to make a comparison with someone else.

Examples of something connected with a disability might include:

- absence from work because of illness

- problems with movement
- difficulties with reading, writing, talking, listening or understanding.

So, examples of 'discrimination arising from disability' might include being treated unfavourably because of:

- their employer including sickness related to their disability in their absence record – which results in them not getting a bonus
- having involuntary, jerky bodily movements as a result of cerebral palsy – which results in them being overlooked for promotion because senior managers think the movements would make it difficult for them to be taken seriously in a team leader role
- a tendency to make spelling mistakes arising from dyslexia – which results in them being selected for redundancy instead of others in the admin team.

At an Employment and Equality Tribunal, a claim of discrimination arising from disability is likely to succeed if the employer (or, for example, the manager or another employee against whom the allegation is made) is unable to objectively justify the unfavourable treatment. To objectively justify it, the employer would need to have acted on a valid and non-discriminatory reason.

In law, this means the unfavourable treatment would have to be justified as 'a proportionate means of achieving a legitimate aim'. For more on this, see the earlier section, Indirect discrimination. However, unlike in indirect discrimination, the claimant does not have to show that a group with the same protected characteristic is disadvantaged, just themselves. Further, it is very unlikely an employer would be able to justify discrimination arising from disability if the unfavourable treatment could have been prevented by a 'reasonable adjustment'.

Discrimination arising from disability is also sometimes referred to as Section 16 disability discrimination.

For example... discrimination arising from disability

Michael is partially sighted. His employer made 'reasonable adjustments' providing equipment and support from colleagues for a few tasks in his admin support job. However, Michael's eyes deteriorate. He explains to his employer that he has successfully applied for an Assistance Dog, but his employer says he won't have pets in the office.

Michael explains to his employer that an Assistance Dog is not a pet, but a working animal trained to sit quietly at his owner's feet and not bother other people, including in business premises. But the employer answers that the office is no place for a dog and that Michael will have to manage without his Assistance Dog at work.

This is likely to be discrimination arising from disability because Michael is being treated unfavourably by his employer because of something linked with his disability – through the employer's refusal to let Michael bring the Assistance Dog he needs into the office.

Failure to make 'reasonable adjustments'

Failure to make 'reasonable adjustments' is one of the most common types of disability discrimination.

A 'reasonable adjustment' is a change or adaptation to the working environment that has the effect of removing or minimising the impact of the individual's impairment in the workplace so they are able to undertake their job duties, or apply for a job, without being at a disadvantage.

An employer can lawfully treat employees and job applicants who are disabled more favourably than non-disabled employees or applicants through making 'reasonable adjustments'. But, employees or applicants who are not disabled are unable to claim discrimination on the grounds they have been treated less favourably because of the 'reasonable adjustments' made for a disabled colleague/applicant.

For example... failure to make 'reasonable adjustments'

Abigail's multiple sclerosis has worsened. She has an adapted car, so can still drive, but now finds it difficult walking from the nearest public car park to the head office where she works. She asks her employer if she can park in one of the company car park places underneath the office.

Her employer turns down her request. It says the spaces are exclusively for managers and the Board, all are allocated and giving her a space would be outside the car park policy. It suggests she should consider getting a wheelchair. Abigail responds that she still tries to walk as far she can, but the distance from the public car park to the office has become too much. She adds that she is not yet ready for a wheelchair, as this would only further weaken her muscles.

The employer's refusal to give or find her a space is likely to be a failure to make a 'reasonable adjustment'.

Making 'reasonable adjustments' during recruitment

An employer should ask whether a job applicant needs any 'reasonable adjustments', sometimes called 'access requirements', for any part of the recruitment process. But, employers should bear firmly in mind that this is not the same as asking an applicant if they are disabled. An employer can only ask health-related questions, before making a job offer, in very limited circumstances - see the section, Asking questions about health.

Key points in considering and making 'reasonable adjustments' at this stage include:

1. If a job candidate has indicated a disability in their application, or the employer becomes aware of it, or the candidate asks for 'reasonable adjustments', the employer must consider and make 'reasonable adjustments' to the recruitment process.

2. Before offering a job, an employer must only ask a disabled applicant what 'reasonable adjustments' are needed:

- for any part of the recruitment process and, once those are in place, whether they are suitable, and/or
- to determine whether the applicant could carry out a function essential to role with the 'reasonable adjustments' in place.

3. Otherwise, **only after offering the job,** should an employer ask the successful applicant what adjustments they will need to do the job and progress at work.

4. If adjustments are 'reasonable', the employer must make them to ensure that workplace requirements or practices do not disadvantage a disabled applicant. An employer should be ready to discuss with the applicant what 'reasonable adjustment(s)' should be put in place.

Making 'reasonable adjustments'

An employer must consider making 'reasonable adjustments', involving the disabled employee or successful job applicant in the discussion about what can be done to support them and the decision, if:

- it becomes aware of their disability
- it could reasonably be expected to know they have a disability
- they ask for adjustments to be made
- the disabled employee is having difficulty with any part of their job
- either the employee's sickness record, or delay in returning to work, is linked to their disability.

The three main questions an employer should consider in assessing what 'reasonable adjustments' might need to be made are:

- 1. Does it need to change how things are done?**
- 2. Does it need to physically change the workplace?**
- 3. Does it need to provide extra equipment or get someone to assist the disabled employee in some way?**

Adjustments can often be simple and inexpensive, and sometimes cost nothing. In law, adjustments need not be excessive; they only have to be 'reasonable'. An employer is not required to change the basic nature of a job, but, where there is a 'reasonable adjustments' cost, it is responsible for paying. However, depending on circumstances, there may be some assistance towards costs from either Government or charitable bodies.

Examples of a 'reasonable adjustment' might include:

- changing a disabled employee's terms and conditions of employment or working arrangements – maybe their hours, shift pattern or a move to flexible working
- making alterations to the business premises – maybe changes to some of the layout of the furniture and/or the ways in and out of the building

- providing additional equipment – maybe a computer at home so they can work from there when they need to. Or, employing a support worker – maybe to accompany them on business out of the office.

Employers are responsible for deciding what (if any) adjustments will be made. In many situations, it is good practice for employers to seek medical advice in coming to this decision - for example, possible sources include an independent occupational health specialist or the employee's GP. The focus must be based on the employee's ability to function on a day-to-day basis rather than on a medical diagnosis.

While an employer has a legal duty to make 'reasonable adjustments', there may be times when suggested changes are unreasonable and it can lawfully refuse to make them. Whether any suggested adjustments are actually reasonable depends on an assessment of factors including:

- are they practical for the employer to make?
- does the employer have the resources to pay for them?
- will they be effective in overcoming or reducing the 'disadvantage' in the workplace?
- will they have an adverse impact on the health and safety of others?

An Employment and Equality Tribunal may expect more from a large organisation than a small one because it may have greater means, and/or if an organisation has access to other funding.

Key areas of employment where it can happen

There are many areas where workplace disability discrimination can occur, but there are seven in particular:

- recruitment
- pay, and terms and conditions of employment
- sickness absence
- promotion opportunities
- training opportunities

- when an employee is dismissed
- redundancy.

Recruitment

An employer must:

- make sure disabled people will be able to apply...
- ...this includes asking disabled applicants whether they need any 'reasonable adjustments', often called 'access requirements', for any part of the recruitment process. For more on 'reasonable adjustments', see this guide's sections, Failure to make 'reasonable adjustments', and Making 'reasonable adjustments'.

An employer must not:

- reject a disabled applicant because it would have to make 'reasonable adjustments
- include wording in the job advertisement, or job description and person specification documents which would discourage or exclude a disabled person from applying.

There is an exception to this, where an essential requirement for the job could not be met by making adjustments to the jobholder's work environment or responsibilities - for example, a particular and essential physical ability or level of physical fitness.

An employer considering this exception may benefit from taking legal advice on the matter and should bear firmly in mind that:

- it would have to be able to show that requested adjustments were unreasonable
- it does not have to change the essence or core functions of the job
- that every individual case hinges on its own particular facts and circumstances
- if adjustments are reasonable, they must be made; then, with the adjustments in place, the person should be capable of doing the job.

To try to prevent disability discrimination in recruitment, an **employer should** generally:

- be careful when writing an advertisement for a job vacancy. Stay clear of any wording it is unsure about or thinks might be open to legal challenge. Such wording can also dissuade disabled people from applying. For example, such wording would include any reference to mental and physical health, or fitness which might relate to a disability, or one of the other protected characteristics. However, there can be rare exceptions – see the 'Occupational requirements' section further into this guide
- avoid advertising solely in one kind of place or media - for example, by advertising only in a specialist lifestyle magazine, or on a website targeted at the non-disabled. Use at least two different channels so as not to end up with candidates from too narrow an audience
- be aware that a job application form could inadvertently be discriminatory. For example, to insist on the form being filled out 'in your own handwriting' may inadvertently discriminate against those whose disability may affect their writing ability
- only ask candidates to complete tests if they are relevant to the job, and where they are, make sure they can be accessed by people with a disability.

And where possible an employer should:

- give the details about a vacancy in an alternative format, if requested by the candidate – this could include, in large print, Braille or audio format
- accept applications in alternative formats, and ensure that online application processes can be accessed by people with a disability. However, there may be cases where providing alternative format and online accessibility for the disabled may prove difficult or impracticable for some small employers.

Interviewers should not ask personal questions, which may be perceived as intrusive, not relevant to the job and imply potential discrimination. Where such information is volunteered, interviewers or others involved in the selection process should take particular care not to be influenced by that information.

Health issues should be treated with particular care, as it is generally unlawful for an employer to ask questions about a job applicant's health, absences from work or disability before offering them employment. Under the Equality Act, if an employer

believes it is necessary to ask health-related questions before making a job offer, it can do so only for four specific and limited reasons. To find out more, see the section, Asking questions about health.

Outside of these limited reasons, even in a situation where information is volunteered by the candidate about their health or disability, an interviewer or employer **must not** respond by asking questions about the candidate's health or disability.

Some employers encourage disabled candidates to apply, guaranteeing an interview for those who meet the minimum requirements of the job. This is lawful and falls under what is termed 'Positive action'.

For example... discrimination in recruitment

Wojciech sees a job advertisement for a special educational needs adviser with the borough council. He currently works in special educational needs and is looking to step up into an adviser role. However, he notices that the ad says applicants need to have a driving licence. He thinks this is unfair as the role is in an urban area with good public transport links used regularly by other employees he knows at the council.

Wojciech is no longer allowed to drive because he has become partially sighted. He believes the driving licence requirement by the council is indirect discrimination as it bars him and others with this condition and other conditions from applying for the job. He also thinks it would be difficult for the council to justify the requirement, unless driving to remote locations not served by public transport was a core part of the job.

Pay, and terms and conditions of employment

It is important to ensure there are no terms and conditions (including contractual benefits) that disadvantage or exclude people because of their disability, perceived disability, association with someone with a disability, or something linked to their disability. For example, this might include pay, sick pay, a bonus, death in service benefits, parental leave or compassionate leave.

In particular, an employer should be careful how it manages its sick pay policy regarding an employee absent for a disability-related reason. Depending on the particular circumstances of the individual case, it may be advisable to consider and make 'reasonable adjustments' to the policy so the employee is not at a disadvantage because of their disability. However, this can be a complex legal area.

An employee absent because of disability-related sickness must be paid no less than their contractual sick pay, if the employer provides it in the terms of employment. But an employer does not have to automatically extend contractual sick pay beyond the usual entitlement. If the reason for the extended absence is because of the employer's delay in implementing a 'reasonable adjustment' so the employee can return to work, maintaining full pay is likely to be a further 'reasonable adjustment'

For example... discrimination in terms of employment

Zoe has worked on a company production line for some years when she is diagnosed with ME. She meets with her manager who says he is very sorry to hear about Zoe's chronic fatigue condition. The manager adds that they will have to look at the impact it will have on Zoe's job.

The manager says he will have to adjust how Zoe is paid, paying her for each unit she produces rather than the hourly rate paid to non-disabled colleagues. He says this is because Zoe is now likely to be slower than her colleagues and make fewer items per hour. Zoe is very upset by her manager's decision which could be discriminatory – for example, possibly direct discrimination because Zoe is now disabled, discrimination arising from disability because Zoe now works slower, or a failure to make a 'reasonable adjustment' because the employer is doing nothing to help Zoe overcome being disadvantaged by her disability.

However, if the employer makes 'reasonable adjustments' and Zoe is still producing less units than she should, it could then consider whether she is capable of doing the job and address the matter using its capability procedure.

Sickness absence

Managing sickness absence so employers do not discriminate against disabled employees is a contentious area where legal opinions can differ. This is particularly so over 'absence triggers'. These are the number of days' absence when managers consider warnings, and possibly dismissal, unless attendance at work improves.

An Employment and Equality Tribunal may expect an employer to have modified its 'absence triggers', if that would have been a 'reasonable adjustment' in the particular circumstances of the individual case. What is 'reasonable' can depend on the alteration being sought by the disabled employee for an illness linked to their disability.

An employer is not expected to make unreasonable adjustments to its sickness absence policy and 'absence triggers' for a disabled employee. However, employers should bear in mind that disputes over sickness absence linked to disability might be considered under another type of discrimination claim – discrimination arising from disability.

There is a key difference regarding these two types of discrimination:

- a 'reasonable adjustment' in the management of sickness absence would be to proportionately modify policies or absence triggers so a disabled employee is not at a disadvantage compared to a non-disabled employee
- discrimination arising from disability does not require a disabled employee to compare their treatment to how some else is treated.

Nevertheless, an employer should bear firmly in mind that it must consider and make adjustments which are 'reasonable' in the circumstances of an individual case.

For example... potentially reasonable adjustments

- Allowing 'disability leave' – for instance, for medical treatment, recuperation or rehabilitation, with a time limit agreed between employer and employee, and possibly allowing managers some discretionary flexibility.
- Recording disability-related sickness absence separately from other illness absence for a time limit agreed between employer and employee, and possibly allowing managers some discretionary flexibility.
- Discussing changes with the employee, and possibly an expert advisor, so they can return to work – for instance, this might mean a phased return, working from home on some days, going part-time or moving to another role.

Assessing whether adjustments would be reasonable should include taking into account not only the impact on the employee, but also on others in their team regarding workload and resources. And a 'reasonable adjustment' should include:

- making clear, taking into account the employee's disability, the level of

attendance they are expected to meet, and

- removing uncertainty about taking time off, within an agreed time limit, because of their disability.

Some employers have policies separating disability-related sickness absence from other illness absence. And some have a policy allowing 'disability leave'. They are not legal requirements for employers, but are good practice according to the UK's Equality and Human Rights Commission's Employment Statutory Code of Practice and would also be seen as good practice in the Isle of Man.

Such policies are more common in the public sector, and in private or voluntary organisations carrying out work for a public sector employer. This is because of what is called the 'public sector equality duty' where these employers have a legal duty to prevent and eliminate discrimination. To find out more about the duty, see the companion guide, *Equality and discrimination: understand the basics*. Also, see this guide's sections, *Disability and capability*, and *Life-threatening conditions*.

Promotion

In promotion opportunities, employees should not be discriminated against because of their disability, perceived disability, association with someone with a disability or something linked to their disability.

For example, it would be discriminatory to:

- apart from in very limited circumstances (for example - because of an essential requirement of the job which could not be met by making adjustments to the jobholder's work environment or responsibilities), advertise a job inferring that candidates must not have a disability
- not promote an employee who is the best person for the job because it is believed they would not fit in because of their disability or something linked to their disability; or because 'reasonable adjustments' would be needed; or because it is assumed, without asking, that they would find the more senior role too stressful because of their disability
- decide not to promote someone because of their past disability
- have an unwritten rule that candidates for a role above a certain level should not be disabled.

For example... discrimination in promotion

Paul has had spells of depression affecting his mood, confidence and decision-work. However, with the help of a course of anti-depressants from his GP, taking up regular exercise and giving up alcohol, he has turned his life around.

He applies for promotion to senior management. He is now pleased with his job performance and had an excellent end-of-year review, yet does not get an interview for the post. He has been passed over, as the two senior managers sifting applications decided he would be unable to cope with the role's additional responsibilities and pressures – and that his depression would probably come back.

The way the two senior managers blocked Paul's application is likely to be discriminatory, even though they might have had genuine concerns about the pressures and the possible impact on Paul's wellbeing.

The concerns might have been addressed more fairly by meeting with each job candidate to clarify job pressures and by assessing all candidates using the same criteria. It would also have been advisable to have kept some evidence showing that all candidates were questioned and assessed consistently – for example, written notes.

Training

Withholding training from an employee because of their disability, perceived disability, association with someone with a disability or something linked to their disability would be discriminatory.

Also, an employer must make 'reasonable adjustments' to training, if required, including possibly the way it is delivered, so an employee with a disability can undertake the training and not be disadvantaged.

In particular, an employer should not assume that an employee with a learning disability cannot benefit from training. A learning disability can stem from a host of reasons including other disabilities such as autism, epilepsy and cerebral palsy. People with a learning disability tend to learn differently, so may sometimes need 'reasonable adjustments' – for example, being given extra time.

Learning disability charity Mencap advises that many people with a learning disability learn new skills best 'on the job' rather than in a classroom environment. This means

training them in the same building, surrounded by the same people, and using the same equipment as they would when working. To find out more, See Mencap's guide, You can work it out! Best practice in employment for people with a learning disability, on www.mencap.org.uk/node/5859

For example... preventing discrimination in training

Sabine's colleagues attended a residential IT course to gain a qualification. She was off work with fatigue after treatment for breast cancer, and was not well enough to attend the course.

On her return to work, Sabine's employer explains to her that it cannot afford to pay for another residential course. However, it will find the training from another source so she can get the qualification. And they will talk again when the options become clearer. Sabine says she is happy with this way forward.

Had the employer not tried to support another way for Sabine to get the qualification – considering and making a 'reasonable adjustment' – this would almost certainly have been discriminatory.

Dismissal

An employer should make sure it has taken all helpful steps it reasonably can before considering dismissing a disabled employee.

It is likely to be unlawful for an employer to dismiss an employee because:

- it has failed to make 'reasonable adjustments' so the disabled employee is not at a disadvantage
- it would have to make 'reasonable adjustments'
- of their behaviour if it is connected to their disability, and the employer has failed to make 'reasonable adjustments' so they can carry on in their role.

Also, unless the employer has considered and made all possible 'reasonable adjustments', it is likely to be unlawful for an employer to dismiss an employee because:

- of disability – whether this is their actual or perceived disability, or the disability of someone they are associated with

of something connected to their disability – for example, a symptom of their condition

- they are off work ill because of their disability.

For example... discrimination in dismissal

Alice successfully applies for a job tending plants in a garden centre. She is autistic and her condition includes getting very stressed and anxious if in an unfamiliar situation. She tells her employer about her condition, but says she will enjoy working in the quiet of the greenhouses.

Alice proves to be so knowledgeable about plants her employer tells her that he wants her to host 'meet the expert' sessions with customers. He tells her they will start in one month and gives her dates for ten sessions he has already set up. Alice tells him she will not be able to cope talking to a lot of people she's never met before, but the employer tells her not to worry because he knows she will be brilliant.

However, the prospect of the sessions makes Alice stressed and anxious, and triggers other symptoms of her condition, including now lacking concentration in her work, easily losing patience with herself and those around her, and being off ill with stomach upsets including on the dates of the first two sessions. The employer tells Alice her employment is not working out and that he will have to 'let her go'.

Alice's dismissal is likely to be discriminatory because the employer put her in a situation she told him she would be unable to cope with because of her autism. The employer ignored her warning and inconsiderately instructed her she would be hosting the sessions.

Managing the potential conflict between possible disability discrimination and an organisation's capability (or performance) procedure can be a very difficult area for an employer. Also, it will hinge on all the particular facts and circumstances of an individual case.

However, an employer might be able to justify dismissing a disabled employee if it can show the relevant following points in an individual case:

- it has made all possible 'reasonable adjustments' – and there are no more it can reasonably make – and it can show that the disabled employee is no longer capable of doing their job

- there are no other lighter duties or different job it can offer them as a 'reasonable adjustment'
- it can show what the law terms 'a proportionate means of achieving a legitimate aim'
- the employee is on long-term absence, they have exceeded an agreed time limit on disability-related absence (where the employer has such an allowance), and the employer can show occupational health/medical evidence that there is no prospect of a return to work within a reasonable period of time and that the on-going absence is causing difficulties for the business.
- it has followed a fair capability procedure, and can provide evidence that it has carefully considered and discussed the disability/capability issue – for example, notes of meetings, conversations and phone calls, emails, the occupational health report, the investigation of the matter, the disciplinary or capability procedure meetings, and any appeal – to show its actions were justified.

Employment and Equality Tribunals may take into consideration whether an employer is a small firm, where the impact of a lack of capability and long-term absence can be more acute on the business and other staff. But, employers should keep firmly in mind that this can be a complex area and it may be advisable to take legal advice.

In addition, see earlier sections in this guide on Failure to make 'reasonable adjustments', Making 'reasonable adjustments' and Sickness absence.

Redundancy

To avoid the risk of being discriminatory, an employer must consider making 'reasonable adjustments' so employees are not at a disadvantage in a redundancy process because of disability.

Risk of discrimination tends to be in two key areas:

- the criteria an employer uses to select employees for redundancy
- how an employer manages the redundancy process.

An employer should **check the redundancy selection criteria** it is intending to use including:

- **absence** - consider whether it might be a 'reasonable adjustment' to disregard some or all of an employee's disability-related absence, or use another period of time. Failure to do so might be discriminatory
- **working hours** - avoid simply selecting part-time staff or those with other flexible working arrangements. They could include employees who work part-time or flexibly because of their disability or because they care for someone with a disability. Also, do not alter scores through making assumptions about their performance or output because of these arrangements
- **job performance** - scoring of this factor might need a 'reasonable adjustment' to take into account an employee's disability. For example, an employee's stroke has slowed the speed at which they work, and their score may need to be adjusted upwards

This can be a legally complicated area. An employer should ensure it scores comparable periods, and can clearly show that adjusting a score upwards is proportionate, appropriate and necessary so an employee is not at a disadvantage because of disability

- **skills, experience and qualifications** - for example, an employee may have had time off related to their disability and missed important exams for a qualification to help further their career – a 'reasonable adjustment' to their score here should be considered

However, this too can be a complicated area, particularly where the qualification is critical to the success of the business. Ultimately, it might come down to an employer being able to convince an Employment and Equality Tribunal what adjustment here was reasonable or unreasonable.

Care is also needed in other circumstances. For example, an employee with autism may score lower, because of their disability, on their face-to-face people skills in interacting with other teams. But, there may be an adjustment in their current role that they only have to liaise face-to-face with their manager. In such cases, it would be advisable for the scoring to cover all the different methods of communication required in their role.

An employer should be careful in **managing a redundancy process** in areas including:

- **communication** - make sure a disabled employee is not disadvantaged in getting or understanding information about the redundancy process. For example, they may be on long-term sickness absence and unable to attend meetings or assessments. It may be suitable to see them at their home if

they are agreeable to a home visit. Or the employee's disability may mean they need information in Braille, an audio format or Easy Read, or have the process explained to them verbally

- **tests for alternative roles** - make 'reasonable adjustments' to suitable alternative roles so disabled employees feel they can apply, and to an interview or assessment process for disabled employees applying for an alternative role in a restructuring of the organisation

In some circumstances in the UK it has been ruled by a court to be reasonable for an employer to transfer a disabled employee to a suitable vacancy at the same level, a lower position or slightly higher position, if the employee can show they are capable and qualified for the job

Subsequent case law, though, has indicated that an employer does not always have to redeploy employees who are or become disabled. Neither does it have to give them favourable treatment in promoting them to jobs beyond their qualifications or experience.

Whilst the cases referred to above are not binding on the Employment and Equality Tribunal in the Isle of Man they are likely to be influential in assisting the Tribunal to reach its judgement in similar circumstances.

However, what is reasonable will always depend on all the circumstances of an individual case:

- **offering an alternative role** - make sure the new role does not include tasks the employee could not do, or would struggle with, because of their disability – unless a 'reasonable adjustment' would remove a disadvantage. However, an employer does not have to create a vacancy for a disabled employee.

For example... discrimination in redundancy

Ramla worked in a company's admin team. She was made redundant, partly based on her job performance. For Ramla and colleagues in the pool at risk of losing their jobs, this included assessment of their computer skills, and speed and accuracy in dealing with documents.

Partially-sighted Ramla claimed the assessment of her performance was unfair because her employer had refused to make 'reasonable adjustments' so she was not at a disadvantage in doing her job. She had asked for screen magnification and voice-to-text software, and a large print keyboard. Her employer insisted they were too expensive.

Depending on the employer's resources and possible help from external sources, an Employment and Equality Tribunal might decide the company discriminated against Ramla in failing to make 'reasonable adjustments'. If so, it might also decide that making her redundant was unfair.

Considerations for everyone

Employers, senior managers, line managers, HR personnel, employees and their employee and trade union representatives should make sure they understand what disability discrimination is and how it can happen, their rights and responsibilities, the employer's policy for preventing discrimination, and what behaviour and actions are unacceptable.

Also, employers and employees should be very careful regarding questions related to an individual's protected characteristics as this might be or become discriminatory, particularly if handled insensitively.

An employer should provide training for all employees in constructively developing their awareness and understanding of each other, and building a culture in the organisation of promoting equality and diversity. To find out more, see the companion guide, Prevent discrimination: support equality.

Flexible working

There are many different forms of flexible working. For example, flexibility over where the employee works – maybe part of the week at home and part in the office. Or, flexibility over when they work – maybe in a job-share or changing the time of day they work.

Flexible working might be a 'reasonable adjustment' for an employee with a disability. However, the UK's Court of Appeal confirmed in the 2014 case of *Hainsworth v the Ministry of Defence* that there is no legal requirement to make 'reasonable adjustments' for a non-disabled employee who cares for someone with a disability. As outlined above, UK caselaw is not binding on the Employment and Equality Tribunal in the Isle of Man but it is likely to be influential in assisting the Tribunal to reach its judgement in similar circumstances.

However, employers still need to be careful when considering flexible working requests to make sure they handle them consistently and do not discriminate, including concerning requests to change working arrangements because, away from work, an employee is also a carer.

Flexible working also has to be balanced with the employer's business needs. In addition, all employees who have worked for their employer continuously for 26 weeks have the right to ask if they can work flexibly for a personal reason. Under these rules, an employer must agree to flexible working where business can accommodate such a request.

While, generally, it can turn down requests on certain business grounds – it could not do so if the request amounted to a 'reasonable adjustment' regarding disability. Also, a disabled employee would not have to wait until they have worked for their employer continuously for 26 weeks before asking for a 'reasonable adjustment' which amounted to flexible working.

Asking questions about health

For all job interviews and recruitment processes, an employer should ask whether a job applicant needs any 'reasonable adjustments' for any part of the recruitment process.

Otherwise, under the Equality Act, if an employer believes it is necessary to ask health-related questions before making a job offer, it can do so only in the following circumstances:

- 1.** To determine whether an applicant can carry out a **function essential to the role**
- 2.** To take '**positive action**' to assist disabled people – see the section on Taking 'Positive action'
- 3.** To **monitor**, without revealing the candidate's identity, whether they are disabled – for more on monitoring, see the companion guide, Prevent discrimination: support equality
- 4.** To check that a candidate has a disability where this is a **genuine requirement** of the job– see the section on Matching core 'Occupational requirements' of the job.

These limited circumstances apply to all stages of the recruitment process prior to a job offer. This includes application forms, health questionnaires, interviews and any other assessment and selection methods.

If an employer does ask unlawful questions about a job applicant's health, and the employer does not subsequently employ them, the applicant may have grounds to bring a claim of discrimination against the employer.

However, once an employer has offered a candidate a job, whether unconditionally or conditionally, it is then permitted to ask appropriate health-related questions, although it must still be careful not to be discriminatory.

Also, an employer must ensure that a health check itself does not discriminate. For example, singling out disabled people for health checks or discouraging them from applying are likely to be discriminatory.

Employers making conditional offers are advised to keep a full record of why an offer is withdrawn for health reasons, in case the matter leads to a claim of discrimination.

Disability stereotypes

Employers and employees should avoid making assumptions about people with a disability. For example, this might include assumptions about their capabilities, or the type of work they should/shouldn't do. Making such assumptions and uninformed decisions are likely to be discriminatory.

Also, employers and employees should not make assumptions about colleagues or job applicants who care outside of the workplace for a disabled person – maybe a child, someone else in the family or a partner. For example, this might include assumptions about how much of their job an employee may/may not get through when they also have caring responsibilities outside of work. Whether intended or not, stereotyping often has negative connotations and repercussions.

To find out more about the origins of stereotyping see the companion guide, Prevent discrimination: support equality.

Unacceptable terminology and behaviour

Some particular words and phrases regarding disability are clearly unacceptable. It is important for employers and employees to remember that certain words can cause offence and it is necessary to think how such words might be perceived by others. With discrimination, it is often how the recipient perceives words and actions rather than the intention of the person delivering them.

However, what terminology is acceptable or unacceptable regarding disability can be difficult to pin down in some areas. Disabled people, too, can have different opinions.

A good rule of thumb is to avoid words or phrases that carry a negative connotation. For example, avoid 'suffering from' as this infers that the disability is a burden. Another example is to avoid referring to employees without a disability as 'able-bodied', as this suggests all disabilities are physical and that disabled employees or job applicants are not capable. Instead, if it is really necessary to make the distinction, use the term 'non-disabled'.

Regarding behaviour, the charity Compass Disability Services offers a guide to disability etiquette – ten simple rules when communicating with a disabled employee – for example, talk directly to the disabled employee, not their companion or support worker. The charity also offers a quick guide on how to say the right thing. To find out more about these Compass Disability Services guides, search for Simple Disability Etiquette on www.compassdisability.org.uk

An employer should provide equality training to make clear to employees what terminology is acceptable and unacceptable where there is a genuine need to refer to someone's disability.

If it is deemed necessary or relevant to refer to someone's disability and there is uncertainty around what terminology they would find acceptable, an employer would be best placed approaching the individual to tactfully ask how they would wish their condition to be described. This should be handled in a discreet and professional way. Also, employers and employees need to take into account that the acceptability or unacceptability of terms can change over time, and sometimes quite quickly.

Disabilities which may be life-threatening

Some disabilities such as cancer and HIV may be life-threatening. The law covering sickness absence for these conditions is the same as for other disabilities – see the

section, Sickness absence. However, employers might bear in mind that the more severe the impairment the more likely it may be that an adjustment, if it reduces the disadvantage, will be seen as reasonable. But it also needs to be reasonable in all the circumstances of the individual case.

Other considerations may include:

- managers being trained in how to practically and sensitively handle circumstances where an employee has a potential or actual life-threatening condition
- the employee wanting to carry on working, if in line with medical and health and safety advice

- employer and employee agreeing how to keep in touch during spells when the employee is off work
- employer and employee agreeing that colleagues can be told some limited information so they understand the situation – also, see the next section, Employee's wish for confidentiality
- the employee needing time off for treatment and/or counselling
- the employer supporting the colleagues, too, because of any emotional impact and extra work they may take on
- taking on a temporary replacement to cover for the employee while they are off
- at an appropriate stage, employer and employee together planning the start of a return to work when the employee is ready – and making necessary 'reasonable adjustments'
- understanding that on a return to work, it may take the employee weeks or months to get back full-time – for example, maybe because of on-going treatment or the nature of their job
- that there may be circumstances where the employee does not return to work
- that there may be circumstances where the employee does not survive their condition.

Employee's wish for confidentiality

As with any personal staff information, an employee's disability should be kept confidential by the employer unless the employee has made it clear they are happy for the information to be shared. If they are, the employer should:

- talk to them about what they want and don't want their colleagues to know, and
- who will be told and who will do the telling.

These must be the employee's decisions, without any pressure from the employer. If this does not happen, disabled employees can feel uncomfortable if put in a position where they feel they have to explain their disability to colleagues.

Also, both employers and employees can find it helpful to keep a written record of what they have agreed about confidentiality or the sharing of information about the disability.

However, there can be circumstances where there are indicators that an employee has or may have a disability. For example, they may have lost a limb, be in a wheelchair or use a long cane when walking. In such circumstances, it would be impossible for the employer to keep the disability completely confidential.

Also, there can be other disabilities and circumstances where the amount of confidentiality possible may be limited. For example, a disabled employee may need support from colleagues, there may be health and safety reasons, or colleagues may need to be aware.

There are advantages for an employee in being open about their disability with their employer – for example:

- it can be a weight off the employee's mind – and with that sense of well-being their productivity can improve, too
- the employee can ask for 'reasonable adjustments' if the employer knows about their disability.

The employer does not have a legal duty to consider and make 'reasonable adjustments' if it does not know about the employee's disability. However, the UK Equality and Human Rights Commission's Employment Statutory Code of Practice says an employer is expected to do 'all it can reasonably' to find out if an employee is disabled. If someone working for the employer – for example, an employee, occupational health adviser or recruitment agency – knows of a job applicant or employee's disability, the employer will not usually be able to claim it did not know.

Some disabled job applicants and employees decide they do not need adjustments and prefer to keep information about their disability private. The EHRC's Employment Statutory Code of Practice says the Equality Act does not prevent a disabled person keeping a disability confidential from an employer.

But, a job applicant or employee should bear in mind that:

- health and safety legislation applies to everyone and the employer must include the employee in any relevant health and safety information and training. They may therefore need to understand any effects a disability may have on workplace health and safety, and how to minimise risks

- before making a job offer, an employer can ask health-related questions in very limited circumstances. See the section, Asking questions about health.

Managing mental health at work

There can still be reluctance for a job applicant or employee to tell an employer that they have a disability. They may worry that even though it is unlawful, an employer may find their disability, and consequently them, a problem.

This can be particularly the case with mental health impairments which can be difficult to spot and identify. An employer may not realise a job applicant or employee has a condition unless they tell the employer.

There can also be a reluctance to manage mental health in the workplace because people can feel uncomfortable talking about it – it can still be something of a taboo among some employers, although in others it is beginning to be broken down.

Matching core 'Occupational requirements' of the job

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an 'occupational requirement'. For example, an employer might specify that job applicants must have a particular disability for a role in giving advice about the condition to others.

However, it is not enough for an employer to simply decide they would prefer to employ someone who has a particular disability. Any such requirement must:

- be crucial to the post, and not just one of several important factors,

and

- relate to the nature of the job, and
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section, Indirect discrimination. An occupational requirement must be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances

may have changed, meaning the occupational requirement may no longer be applicable.

An employer should think very carefully, and consider seeking specialist legal advice, before claiming an occupational requirement, as it can be difficult to justify and will be rare. Also, a job applicant might challenge at an Employment and Equality Tribunal an occupational requirement which appears unjustified.

Further, an occupational requirement can only be used in a defence against claims of ordinary direct discrimination (but not for by association or by perception). It cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

Taking 'Positive action'

Under the Equality Act, an employer can take what the law terms 'positive action' to help employees or job applicants it thinks:

- are at a disadvantage because of their disability, and/or;
- are under-represented in the organisation, or whose participation in the organisation is disproportionately low, because of their disability and/or;
- have specific needs connected to their disability.

An employer must be able to show evidence that any positive action is reasonably considered and will not discriminate against others. If it can, it may legally:

- take proportionate steps to remove any barriers or disadvantages;
- provide support, training and encouragement to increase the participation of people with a disability.

This means 'positive action' can be used to encourage applicants and develop the organisation's talent pool. However, it is not considered good practice to select disabled applicants over non-disabled applicants just because they have a disability – doing so can have a damaging impact on workplace morale when there are ways to select the best candidate solely on merit.

However, there is an exception in the Act which allows a charity to lawfully only employ disabled people under what the law terms 'supported employment'.

While an employer can use 'positive action' to encourage people with a particular impairment, generally it may be unlawful for an employer to prefer one disability over another. This is a complex area and it may be advisable to take legal advice.

There is no legal necessity for an employer to take - or consider taking - positive action if it does not wish to do so.

How employees should raise complaints

There are two ways a complaint of alleged discrimination may be handled.

Informally or formally

Some complaints may be dealt with informally, where the employer has a quiet word with those involved to reach a resolution which has the desired effect and to which they can all agree. Dealing with a complaint this way can prevent it escalating and possibly ending as an Employment and Equality Tribunal claim.

It is not uncommon for complaints of alleged discrimination to evoke strong feelings for both the person who has made the complaint and the person that the complaint has been made against. Such a complaint is very likely to go through the formal approach, using the organisation's formal grievance procedure, and possibly its disciplinary procedure, too. All employers should have discipline and grievance procedures and each employee's contract of employment should include information on where the details can be easily found.

How employees should raise complaints is covered in more detail in the companion guide, *Discrimination: what to do if it happens*. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

When an employee experiences discrimination

When an employee makes a complaint that they have been a direct target of discrimination, an employer should be mindful that the employee may feel they have been personally attacked. Handling the situation with sensitivity is essential, whether this is being done informally or formally.

For example... How an informal complaint can work

Mervyn takes medication for epilepsy. Side-effects include drowsiness and lack of energy which mean he struggles to get up in the morning. His manager has agreed that when this happens he can start later.

Mervyn's five team colleagues know of his epilepsy and the agreement, but four of them cannot resist sometimes making what they think are wisecracks such as 'Afternoon, dozy' and 'Get wasted again?' The jibes get worse and upset him. He asks them to stop, but they just laugh. He complains to his manager who was unaware of the remarks. Mervyn says he would prefer that his colleagues did not get into a lot of trouble, but he wants the comments to stop.

The manager tells the team: that derogatory comments about Mervyn's condition are unacceptable and must stop immediately; the comments amount to harassment under equality law; and that Mervyn's epilepsy is a disability. He adds that because of Mervyn's wishes no formal action will be taken this time against those who have made the comments, although the matter will be recorded. Should the comments happen again, the employer will take formal action.

The four colleagues say they are very sorry for making the comments – they were just trying to 'make light' of the situation; it was meant to be boisterous fun – they did not mean to insult or upset Mervyn. Also, they admit they are unsure about when 'banter' becomes discrimination.

The manager responds that it would be beneficial for the whole team to attend refresher training to make sure everyone understands the importance of equality and diversity in the workplace, and preventing discrimination.

For example... How a formal approach can work

Russell is diagnosed with asthma after time off work with breathing difficulties.

At his return to work interview, he tells his line manager that the asthma hit him hard – for example, he can struggle to walk upstairs. Also, cold air and dust can bring on an attack. Russell works for a small chain of builders' merchants and asks if he could be moved, because of his asthma, to work indoors in the tools or electrical sections where he has worked before, rather than outside in the building supplies yard.

However, the line manager now sees Russell as a 'problem employee' because of his condition. Also, he keeps Russell working in the yard where he gets a severe asthma attack and is then off ill for three days. When Russell gets back to work, the line manager tells him he will have to let him go as he is no longer up to the job. Russell again asks why he could not be moved indoors, but the manager says that is not an option.

Russell sends a formal written grievance to the firm's senior general manager who supports his complaint, saying Russell must be moved indoors, as a 'reasonable adjustment', to one of the sections where he has worked before. The line manager is disciplined for his conduct and sent on full refresher training about equality and discrimination.

When an employee observes discrimination

It is also unacceptable for employees to be placed in situations where they observe discrimination taking place. What has been witnessed should be taken seriously by the employee who has seen it and by the employer who receives a complaint about it from the witness. The main issue is that discrimination is allegedly taking place. Also, the employer should be mindful that the witness feels strongly enough to make a complaint. As with a complaint from an employee alleging discrimination aimed at them, a complaint about discrimination which has been observed should be handled just as sensitively.

For example... How an informal approach can work

An independent health club advertises for abled-bodied enthusiasts interested in fitness to apply to join its team of personal trainers. Daniel, one of the club's trainers, points out the ad to a friend, Habibi, a qualified personal trainer with a prosthetic leg. But Habibi says he is put off from applying because of the use of the phrase 'able-bodied'.

Back at work, Daniel raises the wording with the club's manager who says it must change as soon as possible. He asks Daniel to say sorry to his friend for the wording, that the mistake will be removed, and to tell Habibi his application would be welcomed. He also says he is willing to write to Habibi to apologise for the wording.

For example... How a formal approach can work

Josh, a supervisor from another department, overhears two staff criticising one of their team, Marlene, who has a hearing impairment. They complain that they don't understand why she was given a job – she speaks too loudly, does not always understand what is said and cannot hear when the office gets noisy. They also complain that Marlene gets too many adjustments including extra time for projects. They say this adds up to money that could have been used instead to give them a pay rise. They agree to find ways to encourage Marlene to leave.

Josh is shocked and reports the matter to Marlene's manager who says it appears serious. He asks a senior HR manager to investigate. Evidence from the investigation – including a written statement from Josh – suggests further action is needed. Senior management decide to use the company's disciplinary procedure.

The pair are each given a final written warning to last 12 months and told that any further misconduct could lead to their dismissal.

How employers should handle discrimination complaints

When an employer receives a complaint about disability discrimination, it should take the matter very seriously, and listen carefully and with empathy to what the employee says.

A complaint – or grievance as it is also known – might be handled in an organisation informally or formally depending on the nature of the particular complaint, its seriousness, the possible action that may need to be taken, or the outcome desired by the person making the complaint, as explained in the previous section, How employees should raise complaints.

However, if an employer becomes aware that discrimination, harassment or victimisation is taking place because of someone's disability, it is important that they do not wait until a complaint or grievance is raised. The sooner action is taken the more easily it can be resolved and it is less likely that the employer would be liable for the discriminatory actions of the employee/s involved.

An employer should discuss with the employee raising the concern whether they wish to have the matter dealt with informally or formally. They should also come to an agreement on this.

It is for an employer to decide whether to pursue disciplinary measures against an employee. However, it should ensure it investigates complaints thoroughly and follows disciplinary procedures where warranted. Any inaction by the employer could damage staff morale in general and possibly culminate in the employee who made the complaint submitting a claim to an Employment and Equality Tribunal.

How employers should handle a complaint of alleged discrimination is covered in more detail in the companion guide, *Discrimination: what to do if it happens*. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

To help give a better understanding of when to use an informal approach or a formal one concerning alleged disability discrimination, both employers and employees should assess the following examples.

When to consider an informal response

It is likely an employer will use an informal response for what appear to be relatively less serious complaints of discrimination. Such a response will be largely based on having conversations with the parties concerned to investigate the situation in the hope of resolving the matter, without using the organisation's formal grievance procedure.

If the matter turns out to be relatively straightforward, the informal approach can have the advantage of resolving the matter sooner, with less stress and at less cost than if the matter went through the formal grievance route. Also, it can make it easier for work relationships to be rebuilt.

When considering whether an informal response is appropriate, an employer should be mindful of the outcome the person is seeking and the outcome that might be necessary from the employer's point of view.

However, using the informal approach can be a risk. In using it, a manager might be accused of not taking a complaint seriously enough. Or, the conversations might reveal that the complaint is much more serious than it first appeared.

But, if the matter appears relatively straightforward, it can be worth trying an informal approach first. If it doesn't work, the matter could still be dealt with formally. Also, an employer can explain to an employee that an informal approach still means the complaint is being treated seriously and, in the circumstances, is potentially the best way to try for the most desirable outcome for all concerned.

For example... Informal response to informal complaint

Joe has an anxiety disorder, but tries to overcome his symptoms. His manager is aware of his mental health condition, which can include panic attacks with bodily shaking and chest pains. Joe's manager has agreed he can work from home when he thinks the hubbub of their open plan office is starting to get too much for him.

Joe's colleagues all admire how he battles on, but five others in another team have been overheard making facetious remarks about his mental health, such as 'Is Joe out... of his mind?' The remarks are reported to their manager who

makes it clear to them their comments are both inappropriate and unacceptable. The comments were not heard by Joe, but by another employee who found them offensive.

The five apologise and say nothing like that will happen again. They all agree they would benefit from refresher training about equality, diversity and discrimination. The manager updates the complainant who says she thinks the matter is being handled in the best way.

When to consider a formal response

The formal response, usually using the employer's formal grievance procedure including a hearing, is very likely to be the way forward when the allegation of discrimination is particularly serious. It is even more likely if the complaint could also lead to a disciplinary investigation.

However, there can be other circumstances where the need for a formal response can arise, as highlighted in the final example, Formal response to informal complaint.

For example... A formal grievance

Lorraine sends a written grievance to the head of her department because her manager, Gary, has cut her company sick pay by half. Her GP has signed her off for another two weeks because her bulimia has led to problems with her heart and kidneys, and depression. The department head asks another manager, Simon, to investigate.

Simon speaks to the company's pay section and Gary, and finds that Gary has told them to cut her sick pay because she has now been off for more than three months. But not all of Lorraine's sickness absence has been related to her disability – she was off work for eight weeks with a broken ankle before her bulimia flare-up.

After the grievance hearing, where Lorraine is accompanied by a colleague, the department head decides to uphold her complaint. He writes to her to say she will go back on full contractual sick pay and any deductions will be paid to her, too. He says that in this case Gary should not have counted her absences related to her bulimia as part of her overall sickness record. This was because she was within the time off limit agreed with her employer for recording disability-related sickness absence separately from other illness absence. He adds that Gary will be retrained about the company's sickness policies.

For example... Formal response to informal complaint

Roger asks his supervisor at the bus depot where he works to have a word with a group of three other drivers making jokes about his HIV. He asks him to do this 'off the record' and wants the remarks to stop.

However, when the supervisor starts asking questions he finds there is other unacceptable behaviour from the trio, including leaving threatening messages in the cab of the bus Roger will be driving, breaking things in his locker and regularly kicking him when he walks by.

The supervisor meets with Roger again to say that the situation is far more serious than Roger indicated, and the bus company must look into the matter thoroughly. The depot's manager investigates, speaks to the three drivers, Roger agrees to write a statement about what has happened to him, and witnesses write statements, too. The manager explains to Roger that the matter is so serious it has to be dealt with through the company's disciplinary procedure. The three drivers are invited to a disciplinary hearing, and the outcome is that they are dismissed for gross misconduct.

Acknowledgement

This guide is based on the Acas publication “Disability discrimination : key points for the workplace” and has been adapted for the Isle of Man. MIRS acknowledges, and thanks Acas for, their consent to use their source material.

Manx Industrial Relations Service

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the MIRS website www.mirs.org.im

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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