



GUIDE TO DISABILITY DISCRIMINATION

The Disability Discrimination Act 1995 ("the DDA") as amended makes it unlawful for an employer to discriminate against a disabled person.

Who is a Disabled Person?

The DDA defines disability as "a physical or mental impairment which has a substantial and long term adverse effect on [the person's] ability to carry out normal day-to-day activities."

People with HIV, cancer and multiple sclerosis are now automatically classed as disabled from the point of diagnosis.

There are four elements to the definition of disability:

- The employee must have a physical or mental impairment. In the case of a mental impairment, an employee no longer has to prove that the impairment results from or consists of a clinically recognised mental illness.

- The impairment must affect the individual's ability to carry out normal day-to-day activities. This involves an assessment of a number of physical and mental attributes, such as mobility, manual dexterity, speech, hearing, eyesight and ability to concentrate, learn or understand.

If measures are being taken to treat or correct the impairment, it should be treated as having the effect it would have but for the treatment.



■ Failure to make reasonable adjustments occurs if a provision, criterion or practice applied by or on behalf of the employer or the physical features of the premises occupied by the employer place a disabled person at a substantial disadvantage in comparison with non-disabled persons and the employer fails to make such adjustments as are reasonable in the circumstances.

■ Harassment is where for a reason which relates to a person's disability another person engages in unwanted conduct which has the purpose or effect of violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive

environment for him.

■ Discrimination by victimisation is where an employer discriminates against another person by treating that person less favourably than it treats or would treat other persons whose circumstances are the same and does so by reason that the person has brought proceedings against the employer or any other person under the DDA; given evidence or information in connection with such proceedings brought by any person; otherwise done anything under or by reference to the Act in relation to the employer or any other person who has contravened the Act; or by reason that the employer believes or suspects that the person has done or

intends to do any of these things.

Is the Treatment Justified?

Direct discrimination can never be justified and the defence of justification has also been removed for a failure to make reasonable adjustments.

The defence is still available in relation to disability-related discrimination. The employer must show that the reason for the treatment in question was both material to the circumstances and substantial.

The burden of establishing the defence of justification is on the employer.



- The effect must be substantial, ie more than minor or trivial. The focus should be on what the employee cannot do, rather than what he can do. An employee who can do certain things perfectly well may still be substantially impaired from doing other things. It is also necessary to look at the things the employee can only do with difficulty. Just because he can carry out a certain activity does not mean that his ability to do so is not impaired. It should be borne in mind that disabled people often develop coping strategies and may have a tendency to play down the effects of their disability.

- The effect must be long term, ie it has lasted or is expected to last for at least 12 months; it is likely to last for the rest of the life of the person affected; or it is likely to recur. When assessing whether the effect is likely to last for 12 months, it is necessary to take into account the total period for which the effect exists, both before and after the date of the discrimination.

Has the Employee Been Discriminated Against?

There are five distinct forms of discrimination - direct, disability-related, failure to make reasonable adjustments, harassment and victimisation.

- Direct discrimination is treating a disabled person less favourably than a non-disabled person on the grounds of the disabled person's disability. Direct discrimination can never be justified.
- Disability-related discrimination is where a person discriminates against a disabled person if, for a reason relating to a disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason would not apply.



What are the Consequences of Discrimination?

A disabled person can bring a claim in the Employment Tribunals in respect of an employer's discrimination under the DDA within three months of the act complained of, or within such further period of time as the Tribunal considers just and equitable in all the circumstances.

A Tribunal can:

- Make a declaration of rights
- Make a recommendation as to specific actions
- Order the employer to pay potentially unlimited compensation, including loss of earnings and an award for injury to feelings.



How is the Law Due to Change?

From December 2006, all public authorities (such as Universities and Colleges) will have a positive duty to promote equality of opportunity for disabled people.

There will be a specific duty on public authorities to have a Disability Equality Scheme which monitors factors such as the number of disabled people employed and the training offered to them.

This is intended to be a general guide to disability discrimination and is not a substitute for taking advice before reaching a decision on your individual problems. If you would like any further information on this, or any other employment or pensions issue, please contact a member of the Employment & Pensions Group.



MARTINEAU JOHNSON

T: 44(0)870 763 2000 F: 44(0)870 763 2001

www.martineau-johnson.co.uk

Email: lawyers@martjohn.com