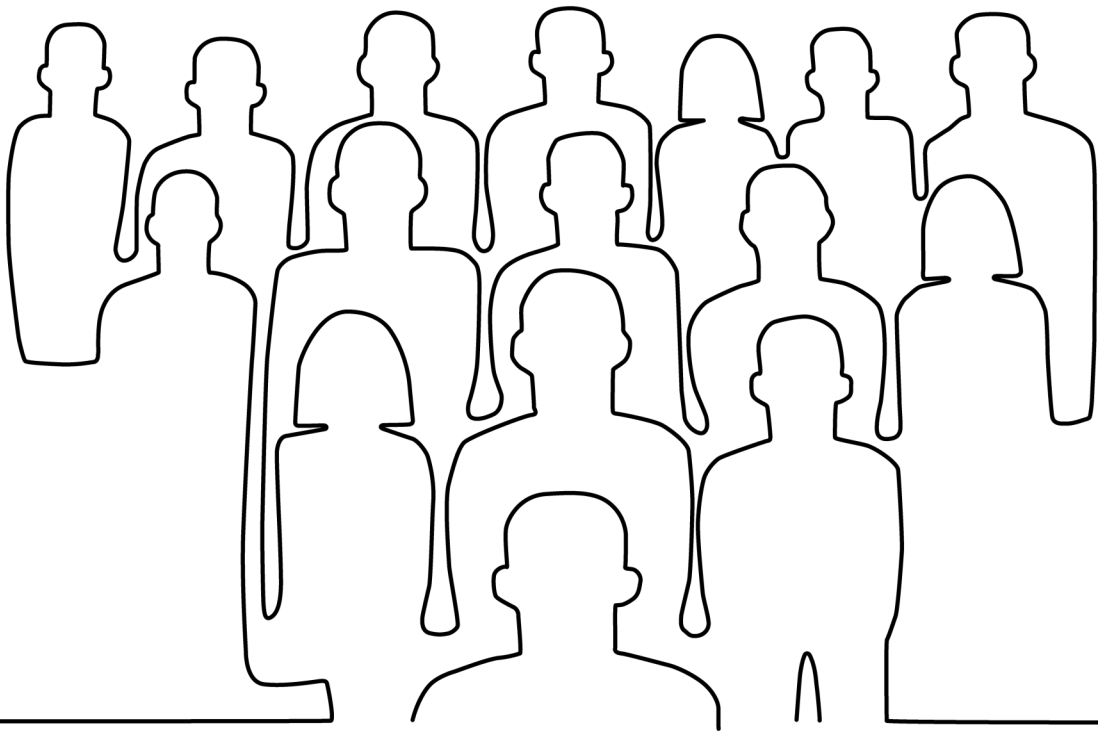


# SUMMARY OF THE LAW ON DISABILITY DISCRIMINATION



## **THIS LEAFLET**

Please note, if you are receiving this leaflet along with a letter engaging you as a client of this firm, this leaflet forms part of our advice to you about your case. You should read it carefully and raise any questions you have with your appointed adviser. If you are reading this leaflet and you are not a client of this firm, then the information that follows does not constitute legal advice. You should always seek formal advice on your case before deciding what to do next.

## **WHAT DOES THE ACT COVER?**

The Equality Act 2010 covers all forms of discrimination in the workplace, including recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of disability. Discrimination can be “direct” or “indirect”. Later in this leaflet we explore what these terms mean.

## **WHO IS PROTECTED?**

The employee's problem with his or her health has to satisfy the legal definition of “disability”. This is defined as “a physical or mental impairment which has a substantial and long term adverse effect on (your) ability to carry out normal day to day activities”. That is discussed in more detail below. The protection covers all employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work. The protection can extend to a perceived disability and/or the employee's association to someone who is disabled (for instance the employee is a carer for a family member who is disabled). However, claims for associative discrimination can only be raised under certain sections of the Act which will be discussed in further detail below. It is important to remember that an employer would in broad terms be entitled to dismiss someone who dishonestly asserts that they are unfit for work through illness or injury, as this would amount to a fundamental breach of the trust and confidence which lie at the heart of any employment relationship.

## **WHO IS LIABLE?**

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable, for example if they have subjected a colleague to harassment related to disability.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

## WHAT TIME LIMITS APPLY?

A claim for disability discrimination must be lodged in the Employment Tribunal no later than 3 months less one day from the act giving rise to the claim. Prior to lodging your claim in the Employment Tribunal, you require to engage in the ACAS Early Conciliation scheme. A claim will not be accepted by the Tribunal until the Early Conciliation process is completed and ACAS has issued a Certificate to this effect. Although it is possible that this may extend the time limit for lodging a claim in the Tribunal, we would recommend that you engage in Early Conciliation as early as possible so that you can complete this process and lodge your claim in the Tribunal within the normal 3 month time limit.

## GUIDANCE AVAILABLE TO EMPLOYERS

This guide is intended to provide advice and guidance to employees. It was worth noting that employers do have a wide range of readily available guidance of how to comply with their obligations including free guides from the independent conciliation service ACAS who have published guides on equality:-

- \* Equality and Discrimination: Understand the basics
- \* Prevent Discrimination: Support equality
- \* Discrimination: What to do if it happens

## WHAT IS THE PUBLIC SECTOR EQUALITY DUTY?

Public bodies in Scotland such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties (which apply to most public authorities) are designed to help public bodies comply with the general duty. Broadly, for Scottish Public Authorities these require specified public bodies to publish information on how the general duty is being met, set equality objectives and engage with others such as employees and unions when setting the objectives.

Whilst the specific duty to publish and report for Scottish public bodies such as local authorities is wider than for UK based public bodies operating in Scotland otherwise broadly the public sector equality is comparable.

## FIT FOR WORK

The Government has set up a scheme called Fit for Work which aims to provide advice to employees and in certain circumstances to provide a referral to an occupational health service. Once you have reached, or in the opinion of your GP, are expected to reach, four weeks of sickness absence, you can be referred by your GP for an assessment by Fit for Work.

The purpose of the assessment service is said to be to give you, your employer and your GP advice and recommendations to assist your return to work more quickly and to ensure you can keep working.

The scheme is voluntary. It may be that your employer has its own rules and occupational health service which it prefers to use.

- Although employees will normally be referred by their GP, employers can also make a free referral after 4 weeks of absence.
- To be eligible for referral by the employer, the employee must:
  - i) have 4 weeks absence from work;
  - ii) have a reasonable likelihood of making at least a phased return to work;
  - iii) not have been referred for a FFW assessment within the last 12 months;and
  - iv) give consent.
- The Fit to Work assessment will consider the issues preventing the employee from attending work and may make recommendations which would assist in a return to work and can include a "Return to Work Plan".
- While the scheme does not affect an employee's entitlement to Statutory Sick Pay and an employer cannot refuse to pay this if the employee does not consent to attend an assessment, refusal to consent may have wider implications for an employee. Appropriate advice should always be sought prior to making any decision.
- The Report will be provided to the employer, subject to the consent of the employee.
- Once a Return to Work Plan has been issued this can be used in place of a fit note. GPs are not obliged to issue a fit note in these circumstances. However where the employee does not consent to the Return to Work Plan being shared with the employer, or the employer does not accept a Return to Work Plan as sufficient evidence of incapacity to work, it may be necessary for the employee's GP to provide him/her with a fit note. The GP should use their professional judgement to decide whether a fit note is required.
- It is useful for the employee to identify what any Fit For Work report issued to the employer says to ensure that recommendations are acted on or otherwise that any reasons for not acting on recommendations are appropriately considered. The recommendations of a Return to Work plan are not mandatory but they may be significant evidence in the event of a dispute.

The employee can withdraw consent at any point during the process. The employee can also request that specific parts of the Return to Work Plan be removed before it is shared with the GP or the employer. If an employee withdraws consent to a Return to Work Plan being shared with the employer or the employee withdraws from Fit for Work altogether, the employer will normally still require the employee to provide reasonable medical evidence of fitness to work if he/she does not return to work. The employer may tell you what evidence they require in these circumstances.

Return to Work Plans can be accepted in place of a fit note for benefit purposes. Detailed advice about entitlement to benefits should be obtained if the employee has any question about that issue.

There is detailed guidance on the scheme available from the government.

## **WHAT IS POSITIVE ACTION?**

As well as the duty to make reasonable adjustments for disabled people, the Act allows employers to treat someone with a protected characteristic more favourably than those who are not disabled during the process of recruitment and promotion.

If employers "reasonably" think the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the characteristic provided that:

- The person is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

Any action taken by an employer must be proportionate to these aims. Examples include the provision of training and encouraging applications for posts but the types of positive action measures employers can take are not limited to these two examples.

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.

## WHO IS DISABLED UNDER THE ACT?

To be protected under the Act, workers have to show that 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”. People do not lose their right to protection against discrimination because they have been able to control or correct their disability - for example by medical treatment or the use of aids. So the effect of the treatment must be disregarded when assessing whether or not someone is disabled. This provision does not apply to someone who wears glasses or contact lenses.

People who have had a disability in the past are covered under the Act, as are people with progressive conditions and anyone deemed to have a disability such as those who have been diagnosed with HIV infection, cancer and multiple sclerosis.

Babies and children under the age of six who have an impairment are also covered. This is significant for the purposes of associative discrimination so that the parent of a child with an impairment will be protected even if the child's condition does not yet have a substantial adverse effect on the child's ability to carry out normal day-to-day activities, but may do in the future.

## HOW LONG IS LONG-TERM?

To satisfy the definition in the Act, the disability must:

- Have lasted at least 12 months, or
- Be likely to last at least 12 months, or
- Be likely to last for the rest of the person's lifetime (if less than 12 months).

The Act also covers people whose condition may involve periods of remission. Although the impairment may no longer have an adverse effect, it will still be deemed to have that effect if it is “likely to recur”.

## WHAT ARE NORMAL DAY-TO-DAY ACTIVITIES?

The phrase “normal day-to-day activities” means those activities that are “normal” for most people in their everyday lives, such as walking, driving, doing housework, shopping and forming social relationships. The law in this area continues to evolve and a case has suggested that this can extend to activities such as manually lifting and moving of items such cases in warehouse of up to 25 kg. There is no definition in the Act of ‘normal day-to-day activities’. Therefore, each case will have to be assessed on its facts and in relation to the nature of a person’s disability.

## WHAT DOES THE LAW ACT OUTLAW?

### Direct discrimination

Direct discrimination is when someone is treated less favourably because of disability.

In order to determine whether someone is directly discriminated against a comparison has to be made with someone without that disability but whose abilities and circumstances are the same or are not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to have a disability or because they are associated with someone who has a disability.

Examples of direct discrimination include:

- Someone who is not promoted because they are a wheelchair user.
- Someone who is refused flexible working to look after their disabled child although it has been granted to other workers who do not have a disabled child.
- Someone who is prevented from attending a training session because they are thought to have bi-polar disorder.

Someone who is not disabled cannot claim direct discrimination with a disabled person who has been treated more favourably because the employer has made a reasonable adjustment. It is important to remember that the Act protects people who are disabled but not those who are not disabled.

## Indirect discrimination

Indirect discrimination arises when an employer applies a provision, criterion or practice (PCP) which puts those who share a disability at a particular disadvantage compared to those who do not share it and which the employer cannot justify. An example of a PCP could be the requirement to work in the office 5 days per week.

Employers can only justify indirect discrimination if they can show that it was "a proportionate means of achieving a legitimate aim". For example, an employer may be entitled in some instances, to reject an application from someone with a severe back complaint where heavy manual lifting is an essential part of the job although the employer should always consider whether a reasonable adjustment to the role is available and this may extend to considering whether they can accommodate an employee whose speed in such a role is less than other employees,

## DISCRIMINATION ARISING FROM DISABILITY

This occurs when an employer treats a disabled person unfavourably "because of something arising in consequence of" the disabled person's disability.

What equates to 'unfavourable treatment' has been considered in a variety of cases. It has been determined that this means placing a hurdle in front of, creating a particular difficulty for, or disadvantaging a person. The threshold is quite low for employees to prove that they have suffered unfavourable treatment, for example, failure to warn an employee of their potential dismissal is possibly unfavourable treatment.

As with indirect discrimination, employers can justify the treatment if it can be shown to be a proportionate means of achieving a legitimate aim.

Similarly an employer can defend a claim on the ground that they did not know, or could not be reasonably expected to know, that the person has a disability.

## DUTY TO MAKE ADJUSTMENTS

When an employer knows or reasonably ought to know of the disabled person's disability, they are under a duty to make a reasonable adjustment if it is possible.

The duty arises when a PCP or physical feature of the premises places a disabled person at a substantial disadvantage in comparison to those who are not disabled.

The duty also applies when a disabled person would be put at a substantial disadvantage because an auxiliary aid was not provided. In that case the employer must take reasonable steps to provide the auxiliary aid.

The duty on the employer is to take such steps as it is reasonable to have to take to avoid the disadvantage. What is reasonable may depend on whether the step would remove the disadvantage, the cost and whether there was any financial assistance available, for instance from the government-run Access to Work scheme. An employer cannot require a disabled worker to pay for the cost of any reasonable adjustment.

Examples of reasonable adjustments include:

- Altering working hours.
- Allowing time off for rehabilitation or treatment.
- Allocating some of the disabled person's duties to someone else.
- Transferring the disabled person to a vacancy or another place of work.
- Giving or arranging training for the disabled person or others.
- Providing a reader or interpreter.
- Acquiring or modifying equipment or reference manuals.
- Adjusting the premises.
- Providing supervision or other support.
- Providing information in accessible formats.

An employer who fails to comply with the duty to make a reasonable adjustment will be discriminating against a disabled worker. An employer cannot argue that they were justified in not making the reasonable adjustment where the duty arises. This is particularly important where adjustments have been recommended by a healthcare professional, such as in an Occupational Health Report

## TOP ISSUES FOR MAKING REASONABLE ADJUSTMENTS TO DEAL WITH WORK-PLACE ABSENCES AND DISABILITY DISCRIMINATION

Remember the duty is on the employer and they are the ones who make the adjustment.

However, it helps to be able to identify adjustments to an employer so they cannot say later than these were not raised with them. It is recommended that employees request an Occupational Health report to have such requests in writing.

Employees should make sure that adjustments are practical and effective, addressing the effect of your disability and removing your disadvantage at work.

For example, having disability awareness training is a laudable aim but if it doesn't remove the disadvantage to the disabled person then it's not of itself a reasonable adjustment.

Employees should produce and keep evidence to support the argument that adjustments can be made. For example, if asking for alternative employment, keep job adverts and vacancy lists that show that viable alternative roles exist.

In order to remain in your substantive role, you can request changes to working patterns or practices, additional support from other staff and additional equipment. If there is nothing that would allow an employee to retain their job then ask the employer to look at alternatives as they have a duty to do this.

Alternative employment is not just jobs of similar nature or on same grade but can include jobs on higher grade or ones which involve different duties.

If training is needed for member to do a different job then this is part of the adjustment.

It's not enough for employer to place member on redeployment register or allow them to apply for alternative roles.

The duty is to make adjustments and this can require that the employer provides a job and not just the chance to apply for one.

## HARASSMENT

This occurs when one person subjects someone else to unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's disability. So, for example, an employee who is subjected to offensive comments about their disabled daughter will be protected under the Act.

Unwanted conduct includes the spoken or written word, jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

## VICTIMISATION

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- Bringing proceedings under the Act, or previous discrimination legislation.
- Making allegations of a breach of the Act or previous discrimination legislation.
- Giving evidence or information in connection with proceedings that someone else has brought.
- Doing anything else such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they have a disability in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. An allegation of discrimination which the person making knew to be false will not amount to a protected act.

## WHAT HEALTH-RELATED ENQUIRIES CAN EMPLOYERS MAKE?

An employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful applicants.

However, this is not a blanket ban and an employer can ask questions about whether a person has a disability before offering a job to an applicant if it will help them to:

- Make a reasonable adjustment to the selection process.
- Decide whether an applicant can carry out a function that is essential to the job.
- Monitor diversity among applicants.
- Take positive action to help the disabled.
- Ensure that the candidate actually has the disability if the job genuinely requires the jobholder to have a particular disability.

## IS IT EASY TO PROVE A CLAIM?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of their disability.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate against them. This is known as the reversal of the burden of proof.

## HOW DO CLAIMANTS GATHER INFORMATION FROM THEIR EMPLOYER?

Workers can no longer use standard forms (the questionnaire procedure) when requesting information from their employer about their complaint. However, you could raise a Subject Access Request which your employer is legally required to respond to within a one month period. An employee can make a general request for any material including their personal data, or make a more specific request such as documents relating to the hiring process.

Employment Tribunals also have powers to grant requests for documents or information in the course of an employment tribunal claim if they consider it appropriate to do so.

## WHAT REMEDIES ARE AVAILABLE?

There are three remedies available to a Tribunal :

- A Declaration that discrimination has occurred.
- Compensation.
- Recommendations.

## DECLARATION

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

## COMPENSATION

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit to the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary widely. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

## RECOMMENDATIONS

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.



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For more information visit:

**[TalkToThompsons.com](https://www.talktothompsons.com)**

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