


# Summary of the law on **DISABILITY DISCRIMINATION**



The Disability Discrimination Act 1995 (DDA) made it unlawful to discriminate against workers in employment, education, transport and the provision of goods and services.

This booklet explains the basic rights to which workers are entitled to under the Disability Discrimination Act (DDA) 1995 and is solely concerned with the employment aspects of the Act.

- DISABILITY DISCRIMINATION
- DUTY TO CARRY OUT REASONABLE ADJUSTMENTS
- TRIBUNAL CLAIMS
- REMEDIES



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## Who does it apply to and when?

The DDA applies to employees, workers, the self-employed, temporary and agency workers. It also extends to job applicants, apprentices, contractors, prison officers, fire fighters and police officers. Members of the armed forces and volunteers are excluded from the Act's protection.

There is no qualifying period of service required under the Act, so a worker is protected from the time they apply for a job.

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

It applies to all discrimination in the workplace such as selection for a job, terms and conditions of employment, promotion or transfer, training, employment benefits and dismissal or any other detrimental treatment.

Unlike sex and race discrimination legislation, which provide rights to equal treatment for everyone, the DDA only offers protection to disabled people. It also allows employers to discriminate positively in favour of the disabled.



## Where does it apply?

The DDA only applies to work done in Great Britain (GB) – that is England, Scotland and Wales. However, similar provisions apply in Northern Ireland. The Act also applies to workers with a base outside GB as long as they do some of their work here.



## Who is disabled under the Act?

To be protected by the Act, employees 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 also applies to artificial limbs, but not glasses or contact lenses.

People with a disability but have since recovered are included under the Act, as are people with progressive conditions such as HIV, Aids, cancer and multiple sclerosis from the date of diagnosis.



## 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)

For people with conditions that have periods of remission, the legislation says that 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 using a knife and fork, putting on the kettle, cooking etc. It does not generally refer to activities at work.



A person is likely to be regarded as disabled only if their impairment affects their ability to carry out one of the following day-to-day activities:

- Mobility
- Manual dexterity
- Physical co-ordination
- Continence
- Ability to lift, carry or otherwise move every day objects
- Speech, hearing and eyesight
- Memory or ability to concentrate, learn or understand
- Perception of risk of physical danger

Guidance to the Act lists examples of effects that are likely to amount to an impairment and those that are not. So, for example, it would be reasonable to regard a condition as having a substantial adverse effect if the person could only walk at a slow pace, but not if they had difficulty in walking any more than a mile without discomfort.

On ability to lift, the guidance suggests that inability to pick up objects of moderate weight with one hand would be a substantial adverse effect, but not an inability to move heavy objects without mechanical aid.



## What is discrimination?

There are five types of disability discrimination under the DDA. The first is direct discrimination on the ground of a disabled person's disability (section 3A(5)). The second is disability related discrimination that cannot be justified (Section 3A(1)).

The third is the duty to carry out reasonable adjustments (Sections 3A(2) and 4A). This duty to adjust is the main protection provided to disabled workers. The fourth is unlawful harassment (Sections 3B and 4). The fifth is victimisation (Section 55).



## What is direct discrimination?

Direct discrimination is when someone is treated less favourably than someone else who is not disabled, solely because of their disability. This covers situations when a person is treated differently because of stereotypical assumptions or prejudice about their condition or abilities. There is no defence to direct discrimination.

For instance, an employer turns down an applicant for a job who has schizophrenia. This is because of a negative medical report based on stereotypical assumptions about the effects of the condition without reference to the individual concerned.



## What is disability-related discrimination?

Section 3A(1) of the Act sets out two elements to test whether an employer has discriminated against a disabled person for a disability related reason:

- For a reason that relates to the disabled person's disability the employer treats the worker less favourably than they treat or would treat others to whom that reason does not or would not apply
- The employer cannot show that the treatment in question was justified

In June 2008, a decision of the House of Lords in the case of *London Borough of Lewisham v Malcolm* (2008) overturned long-established case law on 'disability-related discrimination'.

Before the *Malcolm* case the comparator for a disability-related discrimination claim would have been a non-disabled person to whom the reason did not apply. So for example if someone was absent from work and had a disability, then if the employer dismissed them for reason of the sickness absence, then provided the absence was related to the disability it would amount to disability related discrimination (subject to any defence of justification).



The disabled absent person was compared to a person who was not absent when comparing whether there was any difference in the treatment. The reasoning was that if the dismissed employee did not have the disability, he or she would not have been absent. However the decision in Malcolm has reversed the comparator test.

In the example given, the correct comparator now would not be someone who is not absent, but someone else who was absent and on long-term sick leave, but due to an illness not classed as a disability under the Disability Discrimination Act 1995. As long as an employer can show that it would have treated somebody, on long-term sick leave who did not have a disability, the same as the person who had a disability, then it can escape a liability for disability related discrimination.

For the time being, it seems this ground will be of relatively little use to claimants, and it is easier to instead seek to argue cases as a breach of the duty to make reasonable adjustments. A Government consultation document has made proposals to rectify the difficulties, caused by Malcolm, in the proposed Equality Bill.



## What is the duty to carry out reasonable adjustments?

Sections 3A(2) and 4A of the Act impose a duty on employers to make reasonable adjustments where a provision, criterion or practice and/or any physical features of premises cause a substantial disadvantage for a disabled person in comparison with persons who are not disabled.

The duty to adjust only applies where the employer either knows or reasonably ought to know of the disabled person's disability.

The Act gives examples of reasonable steps that employers might have to take including:

- 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 another vacancy or another place of work
- Giving or arranging training to 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



The key question is what is “reasonable”? The Act says that this should be decided by looking at the extent to which making the adjustment would address the problem, how practical it is for the employer to do it, the cost of making it and the financial resources of the employer.

An employer cannot justify discrimination for a reason related to a person’s disability under Section 3A(1), if a reasonable adjustment would have prevented the reason from arising in the first place. For example, a company rejects a job applicant because they have a mobility restriction, which will make it difficult for them to hand deliver confidential internal documents. This duty forms a regular and significant part of the job but could easily be reallocated to another person. If the employer fails to consider reallocation of the duties they are unlikely to be able to justify the disability-related discrimination.



## What is harassment?

A person is unlawfully harassed for a reason related to their disability if they are subjected to unwanted conduct that has the purpose or effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The conduct will only be regarded as harassment when all the circumstances are taken into account, including, in particular, the perceptions of the person being harassed.



## What is victimisation?

The DDA contains provisions to prevent people from being deterred from bringing or getting involved with a complaint of disability discrimination. Both disabled and non-disabled people are protected.

It is unlawful for employers to victimise someone because they brought a discrimination claim, gave evidence in a case or made an allegation of disability discrimination.



## Tribunal claims and time limits\*

Where the action complained of started before 6 April 2009, employees have to tell their employer in writing that they have a grievance and then wait 28 days to give them time to respond.

Once they have done that, they can then complain to the Tribunal on an ET1 form (which can be obtained from their local Tribunal office) within three months (less a day) of the act that they are complaining about.

This can be extended by three months to allow the statutory grievance procedure to take place. It can be extended even more if the Tribunal can be convinced that it is “just and equitable” to do that.

Where the action complained of started on or after 6 April 2009, the employee should still raise a grievance but even if they do, the time limit is not extended.

\*REFERS TO LEGAL CHANGES EFFECTIVE FROM 6 APRIL 2009.



## What is the Questionnaire procedure?

A Questionnaire procedure is available to disabled workers who consider that they might have been discriminated against. They can serve the Questionnaire on their employer to ask questions about the reasons for their treatment. If the employer fails to answer the questions within eight weeks, a Tribunal may use this fact to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application.



## What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

### Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

### Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on 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 enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.



Aggravated damages can also be awarded if the employer has behaved in a high-handed way which has aggravated the injury to the claimant's feelings. But compensation can be reduced if the claimant did not follow the statutory grievance procedure.

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's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that the person complained about.

For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications.

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



## Code of Practice

The code of practice for the elimination of disability discrimination does not impose legal obligations but can be put in evidence before Tribunals and must be taken into account. It provides a number of helpful examples as to what amounts to unlawful discrimination.

A copy of the Code of Practice can be obtained from the Equality and Human Rights Commission:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)



## The Disability Equality Duty

Since December 2006, public authorities have been subject to the Disability Equality Duty, which requires them to be proactive in promoting disability equality in its services and employment.

The Disability Equality Duty comprises of two elements:

- General Duty - applies to all bodies carrying out a public function
- Specific Duty - is there to help listed public bodies carry out their General Duty

The basic requirement for a public authority when carrying out their functions is to have due regard to do the following:

- Eliminating unlawful discrimination
- Promoting equal opportunities
- Eliminating disability related harassment
- Promoting positive attitudes towards disabled persons
- Encouraging participation by disabled persons in public life
- Taking steps to meet disabled people's needs, even if this requires more favourable treatment



The General Duty applies to all public authorities (apart from a small handful which have specific exemptions). It includes government departments, local authorities, governing bodies of schools, colleges and universities, governing bodies of schools, and NHS Trusts.

The Specific Duty applies to most public authorities. The Regulations provide a list of those authorities to whom the Specific Duty applies.

The Specific Duty sets out what public bodies should do to plan, deliver and evaluate action to eliminate discrimination and promote equality and to report on the activity which they undertake; this should be set out in a Disability Equality Scheme (DES). A DES sets out how a public body intends to comply with the Disability Equality Duty and must be supported by an action plan. Such schemes and action plans should:

- Identify the barriers faced by disabled people
- Set priorities for action plans
- Assist planning activity
- Assess the impact of existing and proposed policies and monitor the success of initiatives undertaken
- Review and revise the Scheme







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