

Disability and Reasonable Adjustments

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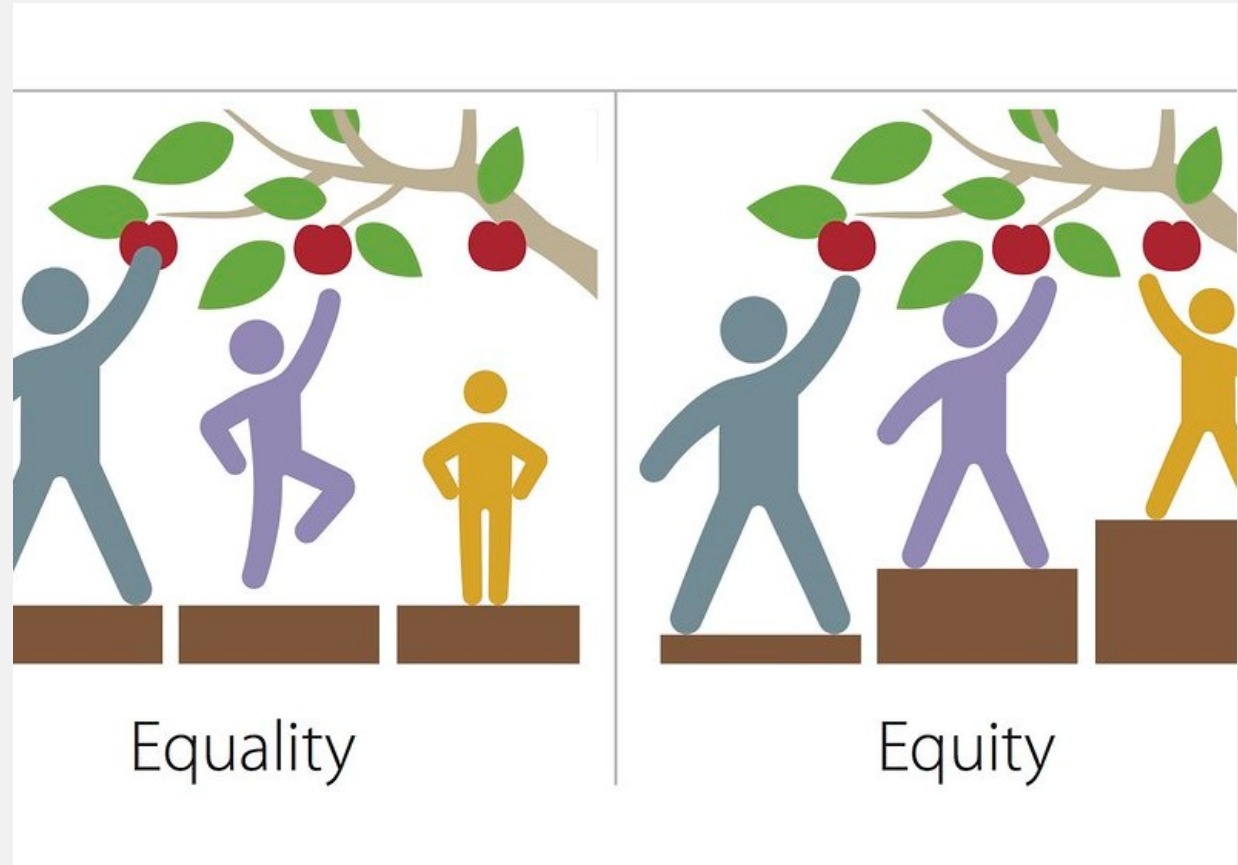
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What we will cover

- Cultural Change
- Disability
- Duty to Make Reasonable Adjustments
- Is an adjustment reasonable?
- Considering adjustments
- Case law

Culture change

What are we trying to achieve?



Public sector equality duty

- Duty is a legal obligation
- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act
- Advance equality of opportunity between people who share a protected characteristic and those who do not
- Foster good relations between people who share a protected characteristic and those who do not
- Transparency
- Requires public bodies to be open about
 - information on which decisions are based
 - what you are seeking to achieve
 - results

Public sector equality duty

- Requirement to report on equality issues
 - publish equality objectives at least every four years (all organisations)
 - publish information annually to demonstrate compliance with the general equality duty (all organisations)
 - publish information relating to their employees and others affected by their policies (such as service users) (where 150 or more staff)
 - publish gender pay gap data every year (where 250 or more staff)
- All information must be published in a way that is accessible to the public
- Aim is a “light touch” approach
- Key resources
 - [PSED: government guidance](#)
 - [PSED: EHRC statutory code of practice](#)
 - [PSED: EHRC technical guidance](#)

Creating a disability friendly workplace

- Raise awareness of disability
- Challenging ableism
- Foster a tolerant culture
- Recognise individual strengths
- Encourage disclosure of disabilities
- Staff Networks / Initiatives
- Be patient
- Access to Occupational Health
- Equality Impact Assessments
- Reasonable adjustments

Disability

What is a disability?

- A person (P) has a disability if:
 - P has a **physical or mental impairment**; and
 - the impairment has a **substantial and long-term adverse** effect on P's ability to carry out **normal day-to-day activities**
- Deemed Disabilities
- Excluded Conditions
- Occupational health / medical advice

Hidden disabilities - examples

■ Mental health conditions:

- Work-related stress
- Anxiety and depression
- PTSD
- Bipolar Disorder
- Schizophrenia
- Eating disorders

■ Neuro-diversity

- Dyslexia
- Dyspraxia
- Autism spectrum disorder
- ADHD
- Other neurological conditions

Normal day-to-day activities

- In general, what people do on a regular or daily basis e.g.
 - shopping
 - reading and writing
 - having a conversation or using the telephone
 - watching television
 - getting washed and dressed
 - preparing and eating food
 - carrying out household tasks
 - walking and travelling by various forms of transport
 - taking part in social activities
- Does not include “activities which are normal only for a particular person or small group of people.”
- 1 January 2024 – definition of disability now includes the “ability to participate fully and effectively in working life on an equal basis”

**Substantial adverse
effect
Elliott v Dorset CC (EAT)
(2021)**

- Guidance from the EAT
- When determining “substantial adverse effect” of disability, the s212 definition of “substantial” meaning “more than minor or trivial” prevails over any guidance.
- If the adverse effect is more than minor or trivial – the statutory test is met
- No need to consider the 2011 Statutory Guidance (which gives examples) unless can’t reach a view
- Focus of the test is what the person cannot do or can only do with difficulty, not on what they can do.
- Need to also determine what the day to day activities are before can assess effect of impairment

Tricky Issues

- Staff member in denial about condition
- Substance abuse
- Difficult behaviours – disciplinary or ill health?
- Dysfunctional relationships
- Delivering difficult messages
- Individual detained under Mental Health Act
- Employees may need to understand the individual's disability and may need to adjust their behaviour – *Sherbourne v N Power Ltd*
- Managers' understanding of legal liability – constructive knowledge

Types of Discrimination

- Direct discrimination
- Discrimination arising from disability
- Indirect discrimination
- Harassment
- Victimisation

- The duty to make reasonable adjustments

Reasonable
adjustments

When does the duty to make reasonable adjustments arise?

- The individual must have a **disability** within the meaning of the Equality Act 2010; **and**
- The employer **knows or ought reasonably to know** of:
 - the disabled person's **disability**; and
 - that the disabled person is likely to be placed at a **substantial disadvantage**

Duty to make reasonable adjustments

■ Duty comprises **three requirements**:

- Where a **provision, criterion or practice** puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to avoid the disadvantage;
- Where a **physical feature** puts a disabled person at a substantial disadvantage...;
- Where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as are reasonable to provide the auxiliary aid

Is an adjustment
reasonable?

Is an adjustment reasonable?

“Reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer.”

(Salford NHS Primary Care Trust v Smith UKEAT)

“It is not to treat them as objects of charity which may in fact sometimes and for some people tend to act as a positive disincentive to return to work.”

(O’Hanlon v Commissioners for HM Revenue & Customs)

Ill-Health Retirement

The whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so.

*(Tameside Hospital NHS Foundation Trust v Mylott
UKEAT/0352/09; UKEAT/0399/10, 11 March 2011)*

Is an adjustment reasonable?

- Factors that might be taken into account:
 - extent to which the adjustment will **ameliorate the disadvantage**
 - extent to which the adjustment is **practicable**
 - financial and other **costs** of making the adjustment, and the extent to which the step will **disrupt** the employer's **activities**
 - financial and other **resources available**
 - availability of **external** financial or other **assistance**
 - nature of the employer's **activities** and the size of the undertaking
 - **Effect on workforce**

Cost of adjustments

- Employer must bear the cost
- Factors to take into consideration:
 - size of any budget dedicated to reasonable adjustments
 - level of spend in comparable situations
 - what other employers are prepared to spend
 - collective agreement
- “..even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make”

Access to Work

- Government funded scheme to help disabled people with accessing, starting or continuing in work by funding:
 - Specialist equipment
 - Adaptive equipment
 - Travel costs
 - Costs of support workers or interpreters
- Employee led
- Costs sharing depending on size
- Maximum funding

Potential adjustments

- Modifying procedures for testing/assessment for recruitment and promotion
- Acquiring specialist equipment or modifying existing equipment
- Altering a process
- Reallocating part of a job to another member of staff with balancing exchange of duties
- Transferring to another more appropriate job
- Providing additional supervision or checking

Considering adjustments

Considering adjustments: The Don'ts

- **Don't** make assumptions about the disabled employee's abilities
- **Don't** let time slip by without proactive management
- **Don't** overlook the disabled employee's skills, experience and positive qualities
- **Don't** just send a vacancy bulletin when looking at alternative work

Considering adjustments: The Do's

- **Do** discuss the situation fully and openly with the employee and seek their views on changes to working practices or physical alterations
- **Do** make a full and proper assessment of the employee's abilities
- **Do** seek medical advice about the effects of the employee's condition and their abilities
- **Do** give full and fair consideration to all reasonable possibilities
- **Do** take proactive approach to redeployment/alternative work

Case law

Case law
Roberts v North West
Ambulance Service

- Mr Roberts had a social anxiety disorder (he'd disclosed this on application for the role) and so he was exempt from hot desking policy. Was moved to the edge of the room and desk reserved
- When Mr Roberts arrived for his shift, often his allocated desk had been taken and he had to ask people to move
- Mr Roberts brought claims of constructive unfair dismissal, disability discrimination – duty to make reasonable adjustments

Case law
Roberts v North West
Ambulance Service

- Employer argued that Mr Roberts was not subject to hot desking as a PCP, therefore no duty to make reasonable adjustment
- EAT - although Mr Roberts was exempt from the hot desking policy, it still had an impact on him.
- It's important to think of a policy in the round and that making an exemption will not always be enough to alleviate the disadvantage caused to someone with a disability

Case law

Secretary of State for Work and Pensions v Wilson

- W suffered from agoraphobia and panic and anxiety attacks in new situations
- At the end of a fixed term role she was to be redeployed
- W asked to work from home
- SoS had no alternative roles and proposed alternative adjustments to an office based role
- ET found that SoS had failed to make reasonable adjustments
- EAT disagreed – EAT concluded it would not be practicable to allow W to work from home where the role included face to face contact with customers and need to access confidential materials w

NHS Employers Resources

- [Making workplace adjustments to support disabled staff | NHS Employers](#)
- [Managing a centralised workplace adjustments budget | NHS Employers](#)

Any questions?



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Thank you