

Disability changes to hit all employers

The Disability Discrimination Act 1995 (Amendment) Regulations 2003 come into force on 1 October 2004 and make sweeping changes to the current Disability Discrimination Act.

In this month's bulletin we provide an overview of the changes that will have the biggest practical impact.

Service providers

From October 2004 all service providers will be subject to new duties that may require changes to be made to buildings. If there are any physical barriers that are preventing disabled people from using a service, the business may have to make reasonable adjustments to make the services more accessible. This will include removing, altering or helping people avoid these barriers. Where this is not possible, consideration should be given to ways in which the service can be provided in a reasonable alternative way.

Employment protection

Changes will extend the disability discrimination legislation to all employers. The biggest impact will be the repeal of the small employers' exemption. This currently excludes from the scope of disability discrimination obligations employers with less than 15 employees.

Also covered from October will be a number of other occupations currently excluded. These include fire-fighters, the police, prison officers, barristers and their pupils, advocates and their pupils, partners, and employees onboard ships, planes and hovercraft, and remunerated office holders.

Working abroad

New provisions clarify that the prohibition on discrimination in employment extends to cases where an employee does his work wholly outside Great Britain, provided that the employment has a close connection with Great Britain. The test for that will be set out in the legislation:

That the employer has a place of business at an establishment in Great Britain

The work is for the purposes of the business carried on at the establishment and

The employee is ordinarily resident in Great Britain at the time when he applies for or is offered the employment or at any time during the course of the employment.

New definitions of discrimination

Direct discrimination cannot normally be justified, except where there is a genuine occupational requirement. However our current disability legislation provides that whilst discrimination that "relates to" the person's disability is prohibited it can still be justified.

October will see a new category of direct, non-justifiable discrimination being introduced. This will prohibit the employer treating a disabled person less favourably "on the grounds" of disability. The comparison in

treatment will be with a person in similar circumstances not having the disability. There will be no justification defence open to an employer in these circumstances.

The current definition is still being retained alongside this new provision as it is wider in its application. In determining whether "disability-related discrimination" has occurred, the less favourable treatment must be compared with that of a person to whom the disability-related reason does not apply. The comparator may therefore be a non-disabled person, or a person with the same or different disabilities. However, the disability-related reason must not apply to the comparator.

The difference can be demonstrated by looking at an example of a disabled person taking six months' sick leave because of his disability and being dismissed in accordance with the employer's sickness absence policy. The dismissal is not "on the ground of" disability, but for a disability-related reason. The employer would not be breaching the new prohibition against direct discrimination but would still be caught by the old definition of discrimination related to disability. The comparator for the latter is someone to whom that reason does not apply, i.e. someone who has not taken six months' sick leave. As such a comparator would not have been dismissed, this will amount to disability-related discrimination, but it will be open

to the employer to show that the discriminatory treatment is justified.

Reasonable adjustments

Currently where any arrangements place the disabled person at a substantial disadvantage in comparison with non-disabled persons, the employer is under a duty to make reasonable adjustments to prevent the arrangements having that effect, unless he can show that his failure to comply with that duty is justified. In October the provision allowing an employer to justify a failure to make an adjustment will be repealed.

The scope of the duty to make reasonable adjustments will be widened from "arrangements made by or on behalf of an employer" to "provision, criterion or practice applied by or on behalf of an employer", and the duty will apply to all stages of the employment process, rather than just to recruitment and the terms on which employment is afforded, as is the case at present.

The employer can still rely on the defence that there was no "reasonable" adjustment and there are a number of factors set out in the legislation to be taken into account in determining whether an adjustment is reasonable.

- how effective the adjustment is in preventing the disadvantage
- how practical it is
- the financial and other costs and the extent of any disruption
- the extent of the employer's financial or other resources

- the availability to the employer of financial or other help to make the adjustment
- the size and type of business.

From October two new factors will be added to the list:

- the nature of the employer's activities and the size of his undertaking; and
- where the step would be taken in relation to a private household, the extent to which taking it would disrupt that household or disrupt any person residing there.

Heads of claim

The effect of these changes is that, from 1 October 2004, there will be four different types of discrimination complaint:

- Direct discrimination – not capable of justification.
- Disability-related discrimination – may be justified.
- Failure to make reasonable adjustments – not capable of justification.
- Victimisation – not capable of justification.

Harassment

Although harassment is not specifically defined in the current discrimination legislation it has been always accepted as unlawful. However in the October changes a specific definition will be introduced.

"A person subjects a disabled person to harassment where, for a reason which relates to the

disabled person's disability, he 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."

It is qualified insofar as that the conduct must be reasonably considered in all the circumstances as having that effect.

Post-employment discrimination
There had been a long standing dispute as to whether the discrimination legislation allowed for claims to be made in relation to acts that occurred after the employment contract had come to an end. Last year in the House of the Lords it was decided that such claims could be made if the act was connected to the employment. The October changes formally put into place this judgement by expressly providing that it will be unlawful for an ex-employer to discriminate against a former employee by subjecting him or her to a detriment or harassment. There will be no time limit on the obligation not to discriminate after employment has ended but the applicant will need to show a "close connection" between the detriment or harassment and the former employment relationship. Realistically, the requisite relationship is likely to be readily established in reference cases but, in relation to harassment, the connection will undoubtedly weaken with time.

Burden of proof
In line with other discrimination

legislation, there are changes made to who has to establish what. The "reversed burden of proof" means that once an employee has shown an initial case of discrimination, the onus will be on the employer to prove that he did not commit an act of discrimination, failing which an employment tribunal must find that the employer unlawfully discriminated.

The shift in the burden of proof will apply to complaints presented to a tribunal before 1 October 2004, as well as ones presented after that date. However, it will not affect any case that has been determined by that date.

Questionnaires

Currently, a complainant may serve a Discrimination Questionnaire at any time before filing a complaint (provided it is within 3 months of the act complained of), or up to 4 weeks after filing a complaint, and the employer is required to reply "within a reasonable period". From October employers will be required to respond within eight weeks, unless they have a good reason for not doing so. If there is a deliberate failure to respond without reasonable excuse, or if the reply is evasive or equivocal, an employment tribunal is entitled to draw an adverse inference.

Conclusions

These changes come into force within months of two important decisions that show the extent to which the duty to make reasonable adjustments can apply. These suggested that employers should consider

allowing a disabled employee to transfer directly into another post without going through competitive interviews and that in some circumstances an employee may have to be kept on full pay during any sickness absence caused by a disability.

It is not surprising that the estimated costs to business are considerable. Government research puts the total compliance cost at around £4.3 million for one off costs and around £2.4 million for recurring costs. The ending of the small employer exemption is expected to be the most significant element, imposing additional costs of approximately £6 million on 1.087 million small businesses.

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