Proving disability and reasonable adjustments

A worker's guide to evidence under the DDA

edition 3

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Introduction

The Disability Discrimination Act 1995 ("DDA") only protects workers if they have a disability which meets the complex definition in the Act. This has become a big problem in practice, with a high percentage of claims failing because the worker cannot prove s/he meets every stage of the definition. It is not possible to list a range of conditions, eg arthritis, diabetes, depression, back impairment, and to say these will always be covered. Each case will depend on the effects of the impairment and their severity.

This Guide looks at how to go about proving that different conditions meet the legal definition. The general guidance is followed by a series of detailed examples focussing on common disabilities as well as those which are likely to be particularly difficult to prove due to prejudices around their effects, eg RSI, ME, depression and migraine.

The employer's duty to make reasonable adjustments is at the heart of the DDA 1995. This Guide sets out the law and provides examples of appropriate adjustments and sources of further ideas.

Every individual experiences his/her disability very differently. It is crucial not to make generalisations. Some people will experience little effect on their day-to-day activities and will manage at work quite easily. Others will have severe effects. It is therefore essential to listen to what the worker says about the daily effects of his/her disability, and let him/her identify the difficulties s/he has at work. Nevertheless, an adviser needs to be aware that many people have "coping strategies" and have found ways around the effects of their disability. They are likely to "play down" its effect. For legal purposes, an adviser needs sensitively to elicit the full effect. Gaining information and knowledge by some advance research into the relevant disability should help build the worker's confidence as well as give ideas of areas to explore with the worker.

This Guide has not been written by a doctor and is not intended to provide medical information or advice. The reason for giving a broad indication of the nature of each condition is to assist advisers in asking the right questions and applying the legal definition of "disability".

While every effort has been made to ensure the accuracy of the contents of this guide, the author can accept no responsibility for advice given based on its contents.

The law is as known at 1st February 2009. References to the *Guidance* are to the 1st May 2006 revision. While every effort has been made to ensure the accuracy of the contents of this guide, the author can accept no responsibility for advice given based on its contents.

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Finally, thanks to the Equality and Human Rights Commission for funding an updated edition 3 of this Guide for its website.

Overview of Disability Discrimination Act

The Disability Discrimination Act 1995 ("DDA") forbids discrimination against people because they have a disability. It is also concerned with the removal of unnecessary barriers to the full participation of disabled people in work and society.

This Guide only looks at the treatment of disabled people at work, but many of the principles will equally apply in other areas covered by the DDA, eg provision of services. The Guide does not deal with all areas of the law related to disability. For more detail on the relevant law and running a case, see "Employment Law: An Adviser's Handbook" by Tamara Lewis (bibliography p133).

There are two important documents which any adviser needs access to:

1. **The Guidance**. This deals with the definition of "disability" and therefore who is covered by the DDA. Its full name is the *Guidance on matters to be taken into account in determining questions relating to the definition of 'disability'*. Revised *Guidance* applies to discrimination occurring on or after 1st May 2006.

2. **The Code**. This deals with the kind of adjustments which employers should make to their workplace and when discrimination may be justified. Its full name is the *Code of Practice on Employment and Occupation.* The Code was revised and expanded in 2004.

These documents do not set out the law in themselves, but employment tribunals ("tribunals") must take into account any relevant provisions when deciding cases. The documents can be ordered from TSO online bookshop at **www.tso.co.uk** or telephone 0870 600 5522. Alternatively, the *Guidance* can be downloaded from the Equality and Human Rights Commission website at
www.equalityhumanrights.com/en/publicationsandresources/Pages/Guidanceondefinitionofdisability.aspx
and the Code at
www.equalityhumanrights.com/en/publicationsandresources/Pages/CodeofPracticeEmploymentandOccupation.aspx

The wide scope of the DDA

A disability discrimination case can be brought by existing employees, job applicants, workers employed on a contract personally to execute any work, apprentices and contract workers, eg agency workers or those working for contracted-out services. There is no minimum qualifying service or hours required for a worker to make a claim.

The DDA does not simply protect a small number of people with visible disabilities. It can protect large numbers of people with invisible as well as obvious and visible disabilities. It may also protect those with temporary, but long-term, injuries or ill-health, who would not normally think of themselves or be considered by others as having a disability.

Advisers need to be alert, because clients may not identify themselves as disabled and may be reluctant to do so. This can be a sensitive matter. Yet workers covered by the DDA may gain greatly improved employment rights.

According to a report by the Department of Work and Pensions in 2003, every 3 months 2.6% workers (over 600,000 people) become sick or disabled using the definition of disability under the DDA. This compares with only 0.3% (73,000) who would qualify for statutory sick pay or incapacity benefit. Over 2000 cases under the DDA are started each year in the employment tribunals.

The legal definition of disability is difficult to apply and sometimes defies common sense. This Guide aims to help advisers identify when a worker is covered by the DDA and to find the necessary evidence. The general legal principles are set out at pages 9 - 24. Then a number of specific disabilities are considered at pages 58 - 132. Obtaining medical evidence is at pages 47 - 55.

Since October 2004, all employers – however small – have been covered by the DDA.

Discrimination under the DDA

There are five different forms of discrimination under the DDA. The following is only a brief summary.

1. **Failure to make reasonable adjustments – s3A(2), s4A and s18B(2)**
   This duty is at the heart of disability discrimination law. Where any workplace practice or feature of the premises puts a disabled worker at a disadvantage, the employer must make all adjustments which are reasonable to remove that disadvantage.

   Many workers and employers do not realise quite how far employers must go

to meet this duty. Pages 25 - 40 of this Guide set out the law on reasonable adjustments. Pages 58 - 132 suggest adjustments which may be relevant to a variety of different disabilities.

2. **Direct discrimination - s3A(5)**
   It is unlawful for an employer to treat a worker less favourably or differently *on grounds of* his/her disability than s/he treats or would treat a person without that particular disability. For example, an employer dismisses a disabled worker because s/he has taken 3 months' sickness absence. The employer does not dismiss a non-disabled worker who has taken the same amount of sick leave.

   Provided the reason for the different treatment is the worker's disability, there is no defence. This concept is equivalent to that of direct sex discrimination under the Sex Discrimination Act.

3. **Disability-related discrimination – s3A(1)**
   It is unlawful to treat a worker less favourably *for a reason related to* his/her disability. Following the House of Lords decision in *L B Lewisham v Malcolm*, the scope of this definition is effectively reduced to that of direct discrimination.

4. **Harassment – s3B**
   Harassment takes place where, for a reason that relates to the disabled person's disability, the harasser 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/her. This concept is similar to that under the other discrimination legislation.

5. **Victimisation – s55**
   This concept is the same as under the other discrimination legislation. Essentially it is when a worker is punished or treated differently as a result of complaining about disability discrimination or that the employer has not made reasonable adjustments. For example, a worker raises a grievance about disability discrimination and is dismissed as a result.

   It does not matter whether the worker raised the issue formally or informally, in a grievance or in a tribunal case, on his/her own behalf or on behalf of a colleague who is disabled.

The employer has a defence if the worker's allegation was false and made in bad faith.

Discrimination by association

The ECJ in *Coleman v Attridge Law (C-303/06)* said that it is contrary to the EU General Framewok Directive (2000/78) to directly discriminate against someone or to harass them because of their association with a disabled person, eg because they have a disabled child. For example, refusing a worker time-off to collect her disabled child from school, while allowing other workers to have the same time off to collect their non-disabled children, may be unlawful direct discrimination.

When the case returned to the employment tribunal, the tribunal said the DDA must be interpreted to give effect to the ECJ's decision. The employer has appealed.

Note that this decision does not go as far as entitling non-disabled workers to claim reasonable adjustments to enable them to look after their disabled children. Indeed, in some circumstances, sex discrimination law will be of more assistance regarding requests to adjust hours for childcare purposes.

Who is “disabled” under the DDA?

To gain the protection of the DDA, a worker must prove s/he meets the legal definition of disability in the Act.

Whether or not the worker is recognised as disabled in other contexts, eg for the purpose of social security benefits, is a different legal test. S/he is not automatically covered just because she is in receipt of Disability Living Allowance or because s/he had a statement of Special Educational Needs as a child.

The DDA does not simply cover visible disabilities such as the need to use a wheelchair. It can cover invisible disabilities, eg diabetes and depression, and temporary illnesses or injuries, eg severe back disorders.

Sometimes workers with obvious disabilities are not within the DDA.

The question is not whether the named disability is covered by the DDA. It is whether the particular worker with the disability is covered. This will depend on the nature, severity and duration of the disability in the worker’s individual circumstances.

The legal definition: overview

Section 1(1) of the DDA says:

> “… a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

Schedule 1 provides guidance, and further clarification can be found in the Disability Discrimination (Meaning of Disability) Regulations 1996 and in the revised *Guidance on matters to be taken into account in determining questions relating to the definition of ‘disability’*. The *Guidance* is available on the EHRC website at **www.equalityhumanrights.com/en/publicationsandresources/Pages/Guidanceondefinitionofdisability.aspx**

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Each element of this definition should be separately considered in the following stages:

1. Is there a physical or mental impairment?

2. Does the impairment have an effect on the worker's ability to carry out normal day-to-day activities in respect of one or more of the capacities listed in the DDA? Is the effect substantial?

3. Is the substantial effect long-term?

1. Is there an impairment?

Physical impairment includes sensory impairment and severe disfigurement.

Mental impairment can include dyslexia and other learning difficulties, as well as mental illness such as depression. In the past it has been necessary to show that any mental illness is clinically well-recognised. But since 5th December 2005, this is no longer necessary and some of the old case law no longer applies.

'Impairment' does not equate with a medical condition. It is a functional concept.[1] The emphasis of the definition is more on the fact that the worker's ability to carry out normal day-to-day activities is impaired, than on the precise name of the 'impairment'.

In some cases, it is hard to identify the impairment or distinguish it from its effects. This does not usually matter. An impairment can be the cause of various adverse effects or it can itself be the adverse effects.[2]

Indeed, it seems a person can be regarded as having a disability if s/he has suffered from a combination of impairments with different effects over overlapping periods of time, even though none of the individual impairments have sufficient adverse effect on their own.[3]

Certain impairments are explicitly excluded, eg seasonal allergic rhinitis (eg hay fever), tattoos and ornamental body piercing, and various anti-social personality disorders, eg tendency to set fire, to physical or sexual abuse, to voyeurism or exhibitionism.

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[1] Ministry of Defence v Hay [2008] IRLR 928, EAT
[2] McNicol v Balfour Beatty Rail Maintenance Ltd [2002] IRLR 711, CA
[3] Ministry of Defence v Hay [2008] IRLR 928, EAT

Addictions to alcohol, nicotine or other substances are not covered unless the addiction was originally the result of medical treatment or medically prescribed drugs, eg valium or other tranquillisers and sleeping pills.

A separate disability which was caused by an addiction, eg liver damage caused by alcoholism, is covered by the DDA. This is because it does not matter how an impairment is caused (see *Guidance*, A8 and A14).

2. Substantially affecting normal day-to-day activities

The impairment must have a substantial adverse effect. This reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist between people (*Guidance*, B1). It is relevant to compare the way the worker carries out the activities in question with how s/he would carry them out if s/he was not impaired.[4]

The impairment must have substantial adverse effect on the worker's ability to carry out normal day-do-day activities falling within one or more of the capacities listed in the DDA at Schedule 1, clause 4(1). The following is the list of capacities and related paragraphs (in brackets) of the *Guidance*:

- Mobility (D20)
- Manual dexterity (D21)
- Physical coordination (D22)
- Continence (D23)
- Ability to lift, carry or move everyday objects (D24)
- Speech, hearing or eyesight (D25)
- Memory or ability to concentrate, learn or understand (D26)
- Perception of the risk of physical danger. (D27)

The *Guidance* expands on what each heading means. For example:

- Normal activities within "mobility" would include going up stairs; using public transport; walking at a normal pace.

- Normal activities within "manual dexterity" would include using a knife and fork; picking up small objects.

The *Guidance* explains what is meant by "normal" activities at paragraphs D1 – D10. It means activities carried out by most people fairly regularly, but not any special form of work (though see comments below) or hobby. However, an activity need not be carried out by the whole population for it to be a normal daily

[4] Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, EAT

activity. For example, it is normal to travel on the tube or by aeroplane[5], put on make-up or use hair rollers.[6]

Not hobbies

The test is not whether the worker can carry out a particular hobby. It is whether the worker can carry out normal daily activities. For example, it is not enough to show that because of a hand impairment, a worker cannot play the piano. It would be more relevant to prove that the worker cannot write letters.

Workplace activities

Workers tend to seek advice when there is a workplace problem and it is natural to focus on whether they have an impairment which is interfering with their ability to carry out their job. However, they still need to prove they have a disability as defined by the DDA.

Until fairly recently it did not help prove disability to show that the worker could not carry out a particular type of work (including his/her own job). This was because a particular type of work was not considered to be a normal daily activity.

For example, a garden centre worker who cannot lift heavy bags of soil due to a back injury, may nevertheless be able to lift ordinary items such as a full kettle or a loaded tray. Such a worker was not thought to be disabled under the DDA, even though s/he had an injury which interfered with his/her ability to do his/her job.

It would still be relevant evidence that the worker could not do a day-to-day type of activity while at work, eg use a telephone.

The worker would also be covered where conditions at work exacerbate his/her inability to carry out day-to-day activities there.[7] For example, smoke or chemicals in the work environment make it impossible for a worker with asthma to carry out ordinary tasks, even though s/he recovers when s/he remains at home.

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[5] Abadeh v British Telecommunications plc [2001] IRLR 23, EAT
[6] Epke v Commissioner of Police of the Metropolis [2001] IRLR 605, EAT
[7] Cruickshank v VAW Motorcast Ltd [2002] IRLR 24, EAT

Despite the above, inability to carry out work activities may after all be relevant as a result of an important European case.[8] The European Court of Justice said disability could be understood as:

> 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'

Applying this principle, the Employment Appeal Tribunal has said that 'day-to-day activities' must encompass the activities which are relevant to participation in professional life. For example, if a worker's impairment made it more difficult for him/her to take professional exams, this could amount to an adverse impact on day-to-day activities.[9]

Until there are further cases, it is unclear how far this principle goes and whether the garden centre example given above would be covered. It is recommended that, where possible, the worker provides evidence of a substantial adverse impact on both work and non-work day-to-day activities.

Only able to do the activities with difficulty

It is not necessary that the worker is entirely unable to carry out a particular activity. It is enough if:

- the activity causes pain (D11)
- the activity causes fatigue, either on doing the activity once, or on repeating it over a period of time[10] (D11)
- the worker has been medically advised to refrain from the activity or only do it in a certain way or under certain conditions (D11)
- the adverse effect only emerges under stress (B10), eg a severe stammer
- the effect is worse at certain times of day or at certain temperatures, or when the worker is tired or under stress (B10)
- the worker can only do the activity in a restricted or different way (B3), eg using a shoulder bag when unable to carry a bag by hand or unloading shopping trolleys in small quantities[11]
- the worker avoids doing the activity (B8)

[8] Chacón Navas v Eurest Colectividades SA [2006] IRLR 706, ECJ
[9] Paterson v The Commissioner of Police of the Metropolis [2007] IRLR 763, EAT
[10] Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, EAT
[11] Vicary v British Telecommunications PLC [1999] IRLR 680, EAT

Substantial adverse effect

A "substantial" adverse effect simply means an effect which is something more than minor or trivial. (*Guidance* B1)

The *Guidance* gives examples of what might be a substantial as opposed to a trivial adverse effect. For example, where the worker's impairment affects his/her ability to lift, carry or move everyday objects, the *Guidance* suggests it would be a substantial effect if the worker could not carry a moderately loaded tray steadily, but it would not be a substantial effect if the worker simply could not carry heavy luggage.

The examples given in the *Guidance* under each activity are purely examples, and the worker can give different examples of how the activity is affected, eg s/he could say s/he is unable to carry a radio.

It is possible that the impairment will not have a substantial adverse effect on any single one of the listed activities, but may have a minor effect on several of them which adds up to "a substantial adverse effect on the person's ability to carry out normal day-to-day activities." (*Guidance* B4 – B5)

The effect without medication

Where the effect of the impairment is reduced or controlled by medication, medical treatment or an aid, its impact should be measured as it would be without such medication. This is known as the "deduced" effect. (*Guidance* B11 – B15)

For example:

- A worker's ability to hear should be assessed without the benefit of any hearing aid s/he wears.
- Where a worker's depression is alleviated by counselling sessions with a clinical psychologist, the effect should be assessed as it would be if s/he were not receiving such counselling .[12]
- Where a worker's ankle is receiving continuing support from plates and pins inserted many years previously, the effect on his/her mobility should be assessed as it would be if that support were removed.[13]

The only exception is where sight is improved by glasses or lenses.

[12] Kapadia v Lambeth LBC (1999) 625 IRLB 2, EAT
[13] Carden v Pickerings Europe Ltd [2005] IRLR 720, EAT

Focus on what the worker cannot do

Legally, it does not matter that the worker can generally cope with life and can carry out most normal activities. It is enough that there is substantial adverse effect within one of the listed capacities. However, where it is disputed whether s/he has a disability, it helps if there are several adverse effects.

The EAT has said repeatedly that the tribunal

> "must concentrate on what the Claimant cannot do or can only do with difficulty rather than on the things that s/he can do." [14]

Unfortunately the law requires a rather negative approach in this way and an adviser needs to be sensitive. S/he should also be aware that many disabled people "play down" the effect of their disability.

Progressive conditions

If the worker has a progressive condition, s/he is protected as soon as it has any effect at all on a day-to-day activity, if it is likely that in the future, the effect will become substantial. An example may be rheumatoid arthritis or muscular dystrophy. 'Likely' means 'more probable than not'.

Apart from the special cases below, medical diagnosis of a condition is not enough by itself, if there are not yet any adverse effects.

The *Guidance* comments on progressive conditions at paragraphs B17 – B19.

3. Long-term effects

The substantial adverse effect must also be long-term, ie 12 months or for the rest of the worker's life if less than 12 months. It does not matter if, at the time of the discrimination, 12 months have not yet passed. However, if the tribunal hearing occurs before the year is up, it will be necessary to prove the effect is likely to be at least 12 months in total.

"Likely" means more probable than not.

[14] Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, EAT

The law covers impairments with fluctuating or recurring effects if these are still likely to recur beyond 12 months after the first occurrence. Examples of impairments with recurring effects could be rheumatoid arthritis, epilepsy, or clinical depression. See also “episodic effects” below.

Whether or not the substantial adverse effect is likely to recur must be judged by assessing the evidence available at the time of the discrimination. It is irrelevant to consider what in fact happened subsequently.[15] The tribunal can consider medical evidence obtained after the event as long as it relates to circumstances at the time.

Long-term and recurring effects are dealt with at section C of the *Guidance*.

Special cases

Workers registered with a local authority or certified by a consultant opthalmologist as blind or partially sighted are deemed disabled without the need to prove the stages of the definition.[16]

In addition, HIV infection, multiple sclerosis and cancer are deemed a disability on diagnosis without the need to follow the stages of the definition.

Under DDA Sch 1, paragraph 3(1), severe disfigurement is deemed to have substantial adverse effect on day-to-day activities, but it is still necessary to prove it is long-term. Paragraph B21 of the revised *Guidance* says examples of disfigurements include scars, birthmarks, limb or postural deformation (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (eg on the back as opposed to the face).

Particular issues which may arise

Episodic effects

Some conditions, even if uncontrolled by medication, entail only occasional “attacks” and for the remaining time, have no substantial adverse impact. Some people with epilepsy, migraine or asthma, for example, may only have a seizure or attack once a month or even once a year, each episode lasting anything from a few minutes to a few days. Assuming that during the episode, the person is suffering substantial effects, there are two questions: (1) does the impairment

[15] Richmond Adult Community College v McDougall [2008] EWCA Civ 4; [2008] IRLR 227
[16] Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003 SI No 712.

have a *substantial* adverse effect on day-to-day activities; and (2) is the effect long-term?

The second question is easier to answer. The DDA explicitly states that recurrent conditions can be long-term (see above). Paragraph C4 of the *Guidance* states that "conditions with effects which recur only sporadically or for short periods can still qualify".

The first question is not specifically addressed by the DDA or the *Guidance*. Obviously if attacks are fairly frequent, this should not be a difficulty, but how often is sufficient? Even if less frequent, it can be argued that the effect is substantial, if it is severe when it does occur and it occurs unpredictably, so that the individual is theoretically always at risk.

Managing the effects of an impairment

Paragraphs B7 and B9 of the *Guidance* say that account should be taken of how far a person can reasonably be expected to modify behaviour to prevent or reduce the effects of an impairment. However, when assessing the effects of an impairment, it is relevant if such "coping" strategies break down under stress.

The idea that someone should modify behaviour is rather dangerous and its scope is untested. To what extent is it "reasonable" to expect someone with migraine to avoid red wine and cheese or someone with asthma to give up smoking or owning a cat, if these are trigger factors? It should be strongly argued that as soon as someone has to follow restrictions on very normal activities, there is clearly a substantial adverse impact.

Paragraph B7 of the *Guidance* discusses when reasonable modification should be required. For example, someone with back pain should avoid extreme activities such as parachuting, but should not have to modify more normal activities which may exacerbate the symptoms, eg shopping or moderate gardening.

It may be suggested that "modifying behaviour" could include finding alternative ways to perform normal activities, eg a person with dyslexia taking work home, or a worker with RSI employing a cleaner to do housework. This cannot be a correct interpretation, as it would seem contrary to case law[17] and also appears to contradict paragraph D11 of the *Guidance*, which says the indirect effect of an impairment should be taken into account.

Note also that if a person is advised by a medical practitioner to behave in a certain way to reduce the impact of the disability, this might count as treatment to be disregarded (see p14). The obvious example would seem to be a person with

[17] Vicary. Ante.

diabetes who is advised to avoid sugary food (see *Guidance* B13). However, arguably this exception could apply to all the examples given in the previous paragraph.

Past disabilities

The DDA also forbids discrimination against someone because s/he had a disability in the past.

CHECKLIST ON PROVING THE WORKER HAS A DISABILITY

- Identify the physical or mental impairment.
- Is the condition deemed a disability, eg certified visual impairment, HIV infection, multiple sclerosis, cancer?
- Is it an excluded condition, eg hay fever?
- Which of the day-to-day capacities listed in DDA Sched 1 clause 4(1) are affected?
- Identify the related paragraphs of the *Guidance.*
- Is the effect substantial?
- If the effect is minor, is it likely to become substantial in the future?
- Is it a condition which is deemed to have substantial adverse effect, ie severe disfigurement?
- When considering the adverse effect, focus on what the worker cannot do or can only do with difficulty or tiredness, as opposed to what s/he can do.
- Consider the effect on normal activities, not hobbies. Include both work and non-work activities.
- Consider the deemed effect without any medication or aid.
- Is the substantial adverse effect long-term (12 months) or recurrent?
- Consider what medical evidence is necessary, eg to prove
  - the nature of the impairment
  - the nature and seriousness of the effects
  - when the effects started and how long they are likely to last
  - the deemed effect without medication or aids.
- Consider the cost of medical evidence and whether to instruct an expert jointly with the employers.
- Consider the appropriate medical expert: GP, treating consultant, independent consultant.

Good practice for advisers

- Make sure the location, timing and form of advice and assistance is accessible.
- Do not make assumptions about the effects of an impairment. The client is the person who best knows the effect of his/her condition.
- Where the client does not identify him/herself as having a disability, raise the possibility of him/her falling within the DDA with sensitivity. Explain the broad coverage of the Act.
- Ask questions sensitively. Explain why the law requires a negative approach.
- Be aware that many clients may "play down" the effects of their disability. Do not rely on clients to provide lots of examples. Make gentle suggestions.
- The worker may only give examples of his/her inability to do his/her job or a favourite hobby. It is essential to find out what "normal" activities s/he cannot do.
- Do not simply ask what the worker is unable to do at all. Ask him/her if there is anything that is painful or tiring to do.
- It helps to know something about the relevant disability before interviewing a client. There are specialist organisations for many disabilities which give useful information. Some key websites are listed at pages 58 - 132.
- When obtaining medical reports, ask precise questions of the medical experts.
- When writing a witness statement for the tribunal, if disability needs to be proved, give as many examples as possible, especially (but not exclusively) those which reflect the examples in the *Guidance*.
- Be careful that the worker does not give a misleading impression to the tribunal by the way s/he conducts him/herself at the hearing. For example, if s/he has taken pain-killers in order to be able to sit still for long periods, ensure s/he explains this during his/her evidence.

SAMPLE WITNESS STATEMENT OF WORKER RELEVANT TO PROOF OF DISABILITY

The statement

1. I started work for the Respondent company on 3rd January 2002 as manager of their shop in Richmond. Currently I am manager of the shop in Oxford Street. However, I have been off sick since November 2008, due to my heart condition and my employer's failure to move me to a quieter position.

2. I suffered a heart attack while working at Oxford Street on 25th October 2007. I was aged 36. I was off work for three months. On my return on 1st February 2008, I was put back in Oxford Street.

3. The heart attack damaged a valve in my heart. I was put on several medications: metoprolol, pravastatin, aspirin and perindopril. My doctors have told me I will have to take these for the rest of my life. I was also given a GTN spray.

4. I was able to get on my feet after three weeks and by mid November 2006, I could walk short distances. I used to walk into the shops from my home and back. This took me ten minutes each way at an extremely slow pace – small children used to overtake me. I would say the distance was about half a mile in total, at most. When I got back home, I was exhausted. I would not like to have walked any further.

5. At that time, I also found I was breathless when I walked up the stairs at home. These were normal stairs, about ten steps. I also felt some breathlessness in bed at night. I was tired all the time. I used to sleep 14 – 16 hours / day.

6. Over time, I have gradually improved my ability to walk distances and to climb stairs, although I still get breathless if the weather is hot or I am tired.

7. In the summer, I find it hard to use the tube because the heat makes it difficult for me to breathe. For example, on one occasion, I broke out into a hot and cold sweat coming down the steps. I sat on a bench and let five trains go by.

8. I always carry the GTN spray with me. If I over-exert myself or find a situation stressful, I can become breathless or experience a tightness in my chest. Then I take the GTN spray.

9. The spray is also a preventative. If you know you are going to do heavy exercise, you take it in advance. For example, I took it before doing a sponsored walk. You may also use it before or after having sex.

10. I have had to use the spray on various occasions. For example, sometimes when I have had a long and busy day at work, when I get on the train in the evening, I find I need to take it. Often the effect of a busy day hits me as I sit down at the end of it.

11. I also have to take it if the weather is particularly cold; if I run to catch the train; if I walk up more than 15 - 20 stairs.

12. In July 2008, I stopped taking the perindopril due to a misunderstanding between myself and my doctor. Within 24 hours I felt the effects. I found stairs a real problem, at home and at work. When I reached the top, I was breaking into a hot sweat and really out of breath, as if I had done a 100 metre sprint. I would sit down for a few minutes to get my breath back.

13. I began to feel tired and drowsy all the time. My symptoms were progressively getting worse. I had muscle aches, weakness in legs and arms, lack of energy and mobility. Normally I can stand 11-12 hours/day in the shop with no problem, but off the tablets, I had to sit and have a break about once an hour.

14. On Saturday 31st July 2008, we had a birthday party for my daughter. We had 6 or 7 children. Their parents came too and helped look after them. I helped host the event, getting drinks etc., but not doing anything out of the ordinary. I was not dancing or playing party games. That evening I had severe palpitations and found it hard to breathe.

15. The next day I got increasingly breathless. At 3 p.m., my wife drove me to the hospital. We parked about 60 metres from the A & E entrance. The walk from the car to the entrance left me wheezing and gasping for breath.

16. The hospital did various investigations. They said I was showing these symptoms because I had stopped taking the perindopril. They put me back on the medication and kept me in for 4 days until my condition stabilised.

Comment

The above is a sample witness statement for a worker complaining of a heart impairment. The statement deals purely with issues related to the definition of disability and concentrates on itemising the substantial adverse effects of the worker's condition.

As explained at page 10, where medication controls the adverse effect, the test is whether the impairment would have substantial adverse effect if the worker was not taking the medication. Here, the worker suffers certain adverse effects on his day-to-day activities even when he is taking the medication. However, the adverse effects are even more substantial without the medication, as is clear from the result when he accidentally stops taking the perindopril.

The day-to-day capacity which is most obviously affected by the worker's impairment is his mobility. Numerous examples are given of his difficulties going up stairs, travelling a short distance, walking less than a mile and using public transport. These examples all feed into the illustrations given at paragraph D20 of the *Guidance.* The statement does not confine itself to illustrations in the *Guidance* - for example see paragraph 14 about the party.

Although some of the examples take place at work, they still concern day-to-day activities, eg climbing stairs or standing, as opposed to specialised work activities.

You could additionally give examples of adverse effects on the worker's professional activities (see comments on 'workplace activities', p12).

The dates given in the statement show the substantial adverse effect is long-term.

The impairment is identified at paragraph 3, and the symptoms themselves would amount to an impairment in any event.

MISLEADING IMPRESSIONS

In *Mahon v Accuread Ltd* (UKEAT/0081/08), Mr Mahon brought a disability discrimination case against his employment. He had chronic back pain and the issue arose as to whether this amounted to a disability. His symptoms were confirmed in a joint expert report for the employment tribunal, provided by a consultant orthopaedic surgeon. The tribunal decided he was not disabled. It thought he had exaggerated his symptoms. Although he had told them he often had difficulty doing his teeth, shaving or putting on his shoes and socks, the tribunal noted he had shaved for the tribunal and was wearing lace-up shoes. Moreover, though he said he had pain sitting at a computer after 10 – 15 minutes, he had sat giving evidence to the tribunal without apparent pain for over an hour.

The Employment Appeal Tribunal overturned the tribunal decision and sent the case to a new tribunal to consider the matter afresh. The EAT thought a tribunal must be extremely careful about using their own observations as laymen to contradict the opinion of a jointly instructed expert. Many litigants make a particular effort to look smart for the hearing. The tribunal didn't know (or hadn't noted) how long the shaving and putting on shoes took Mr Mahon or what difficulty was involved in them. As far as sitting in one place was concerned, Mr Mahon may have dosed himself with painkillers to get through the hearing or maybe he was enduring the pain stoically

Comment

The lesson in this is

- don't make assumptions from your own observations. Always ask your client.
- anticipate any misleading impressions which the tribunal may get and ensure the worker gives an explanation at the hearing.
- see p47 regarding medical evidence.

The duty to make reasonable adjustments

The most important part of the law against disability discrimination is the duty on employers to make reasonable adjustments. Basically this means employers must take reasonable steps, eg to adjust hours or duties, buy or modify equipment or allow time off, so that the worker can carry out his/her job.

The duty is set out in section 4A(1) of the DDA[18], which says:
"Where -
(a) a provision, criterion or practice applied by or on behalf of an employer, or
(b) any physical feature of premises occupied by the employer,
places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect."

Provided an adjustment would be reasonable, an employer has no defence of justification for not carrying it out.

Employers are expected to act positively and constructively. In the key case of *Archibald v Fife Council*,[19] the House of Lords said:

> "The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination."

The House of Lords' use of the term "positive discrimination" is unfortunate. It is simply a case of removing unnecessary barriers, to place disabled people on an equal footing. However, it does illustrate how far employers must go.

[18] Previously s5(2), which had more restrictive wording
[19] [2004] IRLR 651, HL

What kind of adjustments?

The DDA lists possible adjustments at s18B(2):[20]

(a) making adjustments to premises;
(b) allocating some of the disabled person's duties to another person;
(c) transferring him to fill an existing vacancy;
(d) altering his hours of working or training;
(e) assigning him to a different place of work or training;
(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;
(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);
(h) acquiring or modifying equipment;
(i) modifying instructions or reference manuals;
(j) modifying procedures for testing or assessment;
(k) providing a reader or interpreter;
(l) providing supervision or other support.

At paragraph 5.18, the Code gives ideas and examples as to what might fit within the scope of the listed suggestions.

The list only makes suggestions. A tribunal may expect the employer to have made other appropriate adjustments, which are not in the list.

Where an employee becomes so disabled that s/he is no longer able to do his/her job at all, a reasonable adjustment may be to move him/her to another job, even at a slightly higher grade, without competitive interview.[21]

An employer must not give priority to other categories of redeployee, eg those at risk of redundancy, over a disabled worker.[22]

Paying full pay is a potential reasonable adjustment, where the worker is off sick because other reasonable adjustments have not been made.[23] In other circumstances, it will rarely be a reasonable adjustment to pay full pay for disability-related absence if there is no contractual entitlement.

[20] Replacing the former s6(3)
[21] Archibald v Fife Council [2004] IRLR 652, HL
[22] Kent County Council v Mingo [2000] IRLR 90, EAT
[23] Nottinghamshire County Council v Meikle [2004] IRLR 703, CA

The duty is restricted to job-related matters and does not extend to:

- Providing a carer for a worker's personal and toilet needs. However, there may be a duty to provide accessible toilets or accommodate a carer who the worker brings with him/her. [24]

- Providing transport to and from work (as opposed to assisting with travel while at work).[24]

Where it is necessary to make adjustments to premises which are occupied under a lease, there are special rules enabling such adjustments to be made, even where the lease forbids it or the landlord unreasonably withholds consent. (See Code, Chapter 12.)

How much must an employer do?

A tribunal will decide on the facts of each individual case how much the employer ought to have done by way of reasonable adjustment.

Section 18B(1)[25] sets out the considerations which a tribunal should particularly take account of when deciding if an adjustment is reasonable:

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him/her to take the step;

(c) the financial and other costs which would be incurred by him/her in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his/her financial and other resources;

(e) the availability to him/her of financial or other assistance with respect to taking the step;

(f) the nature of his/her activities and the size of his undertaking;

(g) where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household, or (ii) disturb any person residing there.

[24] Kenny v Hampshire Constabulary [1999] IRLR 76, EAT
[25] Replacing the former s6(4)

The Code expands on each of these considerations at paragraphs 5.27 – 5.42. It also mentions three further considerations:

1. **The effect on other employees**.
   This can sometimes be relevant, but it is important to remember that a reasonable adjustment should not be avoided simply because other employees object or would like similar concessions, eg on hours or shift working.

2. **Whether the adjustment would also benefit other disabled employees**.
   If so, this would make it particularly cost effective. However, the reverse would not be true, ie it should not be a factor against making an adjustment that it only benefits a single individual.

3. **The extent to which the disabled person is willing to co-operate**.
   It is unwise not to co-operate with adjustments which are reasonable. On the other hand, an employer cannot avoid his/her obligations by offering unattractive adjustments, when other, more suitable adjustments would be reasonable.

The employer's resources

A large employer with substantial financial resources is more likely than a small employer to have to make adjustments which are very expensive. If a shop or restaurant is part of a chain, the resources of the whole chain will be taken into account.

An employer cannot hide behind a set budget. All relevant factors will be considered in each case.

In fact, reasonable adjustments often involve little or no cost or disruption (see Code, paragraph 5.25).

Available grants from the Access to Work Scheme

The Access to Work programme is administered through Jobcentre Plus and may provide grants towards the cost of various adjustments. Many employers are unaware of the existence of Access to Work.

Workers are eligible if they have a disability or health condition which affects their work and is likely to last for at least 12 months. It applies to any paid job or interview for that job, whether full-time or part-time, permanent or temporary. It does not matter whether they are already in a job or about to start.

The programme may provide a grant towards various adjustments including adapting premises; adapting or purchasing equipment; providing readers or interpreters; and additional travel costs to work.

For workers starting new jobs or in their first 6 weeks, the programme will pay up to 100% of approved costs. For those already in a job for more than 6 weeks, it will pay a proportion of the costs, so that the employer pays the balance. The precise level of cost sharing is agreed between the employer and the Access to Work adviser. The programme will also pay approved costs up to 100% for help with support workers, fares to work and support at interviews.

Usually the employer then purchases the equipment, etc and reclaims the grant from Access to Work.

Grants will be reviewed after 1 – 3 years.

To get advice about the scheme and an assessment of the worker's needs, the worker needs to fill in an application form and s/he will then be contacted by an Access to Work adviser. A Jobcentre Plus office, Disability Employment Adviser (see below) or Access to Work Business Centre can give contact details. The adviser will then usually speak to the worker and to the employer on the telephone, and visit the workplace if necessary.

The Access to Work adviser can also arrange specialist or technical advice if it is needed. For example, if the adviser is unable to make his/her own assessment as to what is needed for a particular worker who is blind, s/he may arrange for the RNIB to make an assessment and appropriate recommendation.

Once the Access to Work adviser has decided on the appropriate level of support, s/he gets formal approval from Jobcentre Plus. S/he then sends a letter to the worker and the employer setting out the available grant. **It is the employer's responsibility** to buy the necessary equipment and reclaim approved costs from Access to Work.

For latest details on levels and eligibility for grants, it is important to check with an Access to Work Adviser. Information used to be provided on the Jobcentre Plus website (**www.jobcentre.plus.gov.uk/JCP/index.html**) but this seems to have been reduced and you are advised to contact the Access to Work team in your region - the Access to Work Team addresses are listed on the site's Access to Work page (currently **www.jobcentreplus.gov.uk/JCP/Employers/advisoryservices/diversity/Dev_015798.xml.html**)

Alternatively, there is a little more information on the Directgov site at **www.direct.gov.uk/en/DisabledPeople/Employmentsupport/WorkSchemesAndProgrammes/DG_4000347**

Disability Employment Advisers

Disability Employment Advisers (also known as DEAs) provide specialist advice, information and support to disabled workers who are recently disabled or whose condition has deteriorated. They can assist with finding a job, and also where workers are already employed, but concerned about conditions at work.

DEAs can give practical advice to the worker and, if appropriate, the employer, on job redesign and adjustments within the workplace. However, they may not have specialist knowledge of a particular disability because many of their services are now sub-contracted to specialist advisers such as the RNIB.

An appointment can be made through a Jobcentre or Jobcentre Plus office, where DEAs are usually based.

For details of Disability Employment Advisers' role, search on the Jobcentre Plus site or go to **www.jobcentreplus.gov.uk/JCP/Customers/Disabled_People_and_Carers/Dev_015099.xml.html**

For detailed information on a variety of employment-related services provided through Jobcentres to disabled workers and job seekers, see the Jobcentre Plus website, (**www.jobcentreplus.gov.uk/JCP/index.html**)

What if the employer doesn't know?

The employer only needs to make reasonable adjustment if s/he knows or can reasonably be expected to know that:
1. the worker is disabled
2. the worker is likely to be at a substantial disadvantage as a result.

Any knowledge held by a personnel officer is imputed to the employer, even if the line manager is unaware of it. However, if information is given confidentially to the employer's occupational health department, the employer cannot be taken to have that knowledge.[26]

A worker is not generally obliged to tell an employer that s/he has a disability. However, if s/he needs adjustments to be made, s/he would be wise to tell the employer clearly in writing that s/he is disabled, the nature of the problem and any adjustment s/he knows would help.

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[26] Hartman v South Essex Mental Health and Community Care NHS Trust [2005] IRLR 293, CA, although not a DDA case, establishes this principle contrary to the Code, paragraphs 5.15-5.16 and L B Hammersmith and Fulham v Farnsworth [2000] IRLR 691, EAT

Although an employer has a duty to make reasonable enquiries based on information given to him/her, there is no absolute onus on the employer to make every enquiry possible.

Note also:

- In the employment field, there is no open-ended duty to make adjustments, eg to provide all literature in different formats. The duty is owed to a particular worker or job applicant whom the employer knows has a disability and is likely to be disadvantaged.

- The duty to make reasonable adjustments also applies where the worker is a contract worker, eg employed by a contracted-out company or an agency. The Code gives examples at paragraphs 9.3 – 9.13. Obviously the reasonableness of any adjustment will be linked to how long the contract worker will be working for the principal.

- The tribunal will reach its own decision on what adjustments would have been reasonable. Unlike unfair dismissal law, for example, the tribunal should substitute its own decision for that of the employer as to what is reasonable.[27] It is an objective test.

- When running a case, the worker must give at least a broad idea of what adjustments would have been useful, so that the employer knows what allegation s/he has to meet.[28] The amount of detail which the worker needs to give to reverse the burden of proof depends on the nature of the disability. A subtle disability would require more than basic details.[29]

- It is not essential that the proposed adjustment was identified at the time. It might not be identified until the tribunal case. In certain circumstances, eg with an unrepresented claimant, it may even be appropriate for the tribunal to raise the suggestion itself, as long as the employer has a proper opportunity of answering the point.[30]

- An employer cannot justify any less favourable treatment of a worker for a reason related to his/her disability, unless s/he has already made any reasonable adjustments that are required.

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[27] Morse v Wiltshire County Council [1998] IRLR 353, EAT
[28] Project Management Institute v Latif [2007] IRLR 579 EAT
[29] E A Gibson Shipbrokers Ltd v Staples UKEAT/0178/08 and 0179/08
[30] Project Management Institute v Latif [2007] IRLR 579 EAT

STAGES WHICH A TRIBUNAL SHOULD FOLLOW IN DECIDING WHETHER THERE HAS BEEN A FAILURE TO MAKE REASONABLE ADJUSTMENT

- Identify the provision criterion or practice applied by or on behalf of the employer or the physical feature of the premises which is causing the difficulty.
- Identify the nature and extent of the substantial disadvantage suffered by the worker because of his/her disability as a result of the provision, criterion, practice or physical feature.
- If appropriate, identify a non-disabled comparator who is not disadvantaged by such provision etc. (This will not always be necessary.)
- Decide what adjustments would have been reasonable to prevent such a provision etc disadvantaging the worker.[31]
- A tribunal cannot just make a general finding that the employer should have made reasonable adjustments. It needs to identify to some extent what the employer should have done. The level of detail depends on the case. In some cases, it is enough to say the employer should have found the worker an alternative job. In other cases, the tribunal should identify precisely what other job should have been offered to the worker.[32]

[31] The stages are set out in The Environment Agency v Rowan UKEAT/0060/07; [2008] IRLR 20
[32] H M Prison Service v Johnson [2007] IRLR 951, EAT

Reasonable adjustments: some ideas appropriate to many disabilities

Section 18B(2) of the DDA lists possible reasonable adjustments (see p26), but these are only suggestions. A tribunal may think a certain adjustment should have been made which is outside that list. The following expands on some of those suggestions, and adds a few more ideas. There are also further suggestions specific to different disabilities on pages 58 - 132. Remember that any of the options could be carried out on a temporary, occasional or permanent basis.

As most conditions vary greatly in their severity and in the symptoms for every individual, it is essential to ask your client what areas of difficulty s/he has at work and which solutions might be useful. It is also important that an employer does not make assumptions. An employer should start by carrying out a proper assessment (sometimes known as a "risk assessment") of what may be required. Failure to do such an assessment is not usually regarded in itself as a failure to make reasonable adjustment, but it is likely to lead to such a failure.

Flexible hours, work schedules and breaks

This may entail allowing the worker to work part-time, fewer hours or to job share, or to alter hours, eg to avoid rush-hour travel or because s/he feels less well in mornings or evenings. The worker may find it suitable to spread the work over a longer period with more frequent breaks. Workers with only episodic attacks, eg asthma or migraine, may be happy to make up the hours on other occasions, although this is not to suggest they are not entitled to sick leave (see below).

Whether an employer should continue to pay the full rate of pay, even though the worker is working shortened hours, is a matter of what is reasonable in every case.

Employers should be relatively receptive to the idea of allowing flexible working. In a survey by the Department of Work and Pensions (DWP)[33], 55% of employers operated flexible working time. 57% of those who employed no disabled workers thought different hours or flexi-time would be easy to introduce. Moreover, employers are getting used to the idea in the context of the right to request flexible working for childcare or to care for older relatives.

[33] DWP Research Report No 202. "Disability in the workplace: Employers' and service providers' responses to the DDA in 2003 and preparation for 2004 changes."

Section 18B(2) explicitly suggests altering the worker's hours of working or training.
The Code gives these suggestions at paras 5.18 and 8.4:

- Allowing the worker to work flexible hours so s/he can have additional breaks.
- Permitting part-time working.
- Allowing different working hours to avoid rush hour travel.

Home working

Employers may be more resistant to the idea of home working. In the DWP survey mentioned above, only 12% of employers allowed home working and 52% thought it would be impossible. However, the latest CBI/Pertemps *Employment Trends Survey* shows the use of teleworking (ie working on the move or from home) has quadrupled since 2004 and is now offered by 46% of employers.

Obviously it depends on the job, but with the advent of sophisticated IT technology, it is becoming more feasible than employers' first reaction might always suggest. Home working, on a temporary, permanent or part-time basis, is a very useful solution for a number of conditions, because it gives increased flexibility in hours, cuts out difficult travel and may provide a more conducive environment. Despite the reluctance of employers, it is a suggestion which comes up frequently in the tribunal. Home working, at least temporarily, is suggested as a possibility in some circumstances by the Code at para 5.24 and by the Employment Appeal Tribunal in several cases.[34] In one case, it was said that a worker should be allowed to work from home on a temporary basis to maintain his/her skills, even if the job could not permanently be done from home.[35]

Disability leave

It is wrong to assume that a disabled worker will be absent from work any more than anyone else. However, it is possible in some cases that the worker will need additional time off, either because of illness related to the disability, eg asthma or migraine attacks, or for routine medical checks, eg to have a hearing aid checked with an audiologist.

Section 18B(2) suggests allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment. The Code backs this up by examples at paras 5.18 and 5.20. This may entail a single period of disability leave, eg for a period of treatment, rehabilitation or adjustment when someone is newly disabled, or intermittent days.

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[34] Cosgrove v Caesar & Howie [2001] IRLR 653, EAT; L B Hillingdon v Morgan, EAT 1493/98.
[35] Royal College of Nursing v Ehdaie EAT/0789/00; DRC Legal Bulletin Issue 5, page 13.

Many employers have a sickness attendance policy whereby workers are monitored, counselled, disciplined and eventually dismissed, as their absence level reaches certain levels. An employer would probably be expected to make a reasonable adjustment by not counting a certain amount of leave for disability-related reasons into such a scheme or, even better, by having a separate scheme for disability-related absence. However, this is not complete protection. Tribunals are unlikely to accept that an employer can never act on *any* absences, however long, just because they are disability-related. There is no clear guidance in the Code as to how much extra absence it would be reasonable for an employer to allow. It all depends on the circumstances.

It will rarely be a reasonable adjustment to pay a worker for disability-related absence, if s/he has no general contractual right to paid sick leave.[36] But if the whole reason the worker is off sick is because the employer has failed to make the reasonable adjustments which would enable him/her to return to work, there is a good argument that s/he should receive full sick pay.[37]

Gradual return to work

Where the worker has been absent for some time due to his/her disability, a phased return to work is likely to be a desirable option. The return can be phased in terms of number of daily hours, number of days/week or type of duties taken on. It can be combined with partial home working. In a case where a secretary had been absent for some while with depression, the EAT suggested that a phased return to work might be a reasonable adjustment.[38] However, the tribunal is unlikely to accept that this is a reasonable adjustment if the worker cannot suggest a date when s/he will be ready to start the phased return.[39]

Section 18B(2) suggests altering the worker's hours of working or training as a possible adjustment. Under this heading, the Code at para 5.18 says a phased return to work with a gradual build-up of hours might be appropriate in some circumstances.

Reallocation of some duties

Section 18B(2) suggests some of the worker's duties could be allocated to another person and the Code gives a fairly obvious example at para 5.18. It may also be possible for the worker to swap certain duties with a colleague on a temporary or permanent basis.

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[36] O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404, CA.
[37] Nottinghamshire County Council v Meikle [2004] IRLR 703, CA
[38] Cosgrove v Caesar & Howie [2001] IRLR 653, EAT
[39] Home Office v Collins (2005) 144 EOR 29, CA

Transfer to another job

It is unlikely that a tribunal would expect an employer to create an entirely new job for a disabled worker, but it may be a reasonable adjustment to reallocate or swap duties (see above), or to transfer the worker to a different location or to an existing vacancy.

Section 18B(2) lists transferring a worker to fill an existing vacancy as one of its examples. The Code points out at para 5.18 that this may entail reasonable adjustments in the new job, eg retraining or provision of special equipment.

Other adjustments may also be needed to ensure the worker can successfully apply for a post. For example, in a case concerning a worker with colitis, the employer failed to make reasonable adjustment because the interview panel was not informed of the worker's disability so that the panel could assist him. The worker performed badly at the interview because he was unwell with stress as a result of other failures to make reasonable adjustments.

The duty to make reasonable adjustments may go further than enabling the worker to apply for vacancies. It would be unlawful to give redundant employees priority over any vacancies ahead of a worker needing redeployment due to a disability.[40]

Moreover, many tribunals expect a worker to be slotted into an existing suitable vacancy without being interviewed or having to compete for it against workers who do not have a disability. There are strong arguments for this, following the positive approach urged by the House of Lords in the key case of *Archibald v Fife Council* (see p25).[41] Indeed, in *Archibald*, the House of Lords said it could be a reasonable adjustment, depending on the circumstances, to move a worker to a slightly higher grade without competitive interview. In that case, a manual worker at the lowest grade had to be transferred to office-based duties, but the lowest grade of the non-manual scale was higher than the lowest manual grade.

Acquiring or modifying equipment

This is a fairly obvious suggestion and is listed in section 18B(2). The range of equipment available is enormous and the specialist disability organisations provide the best advice on what is suitable. More detail is set out for different disabilities on pages 58 - 132. Whether or not an employer is expected to provide special equipment will depend on its effectiveness, the cost and the employer's resources. However, the Access to Work Scheme covers the cost of much of this

[40] Kent County Council v Mingo [2000] IRLR 90, EAT.
[41] [2004] IRLR 652, HL

equipment (see p28). Also, if an employer takes a worker on, knowing adjustments will be needed, s/he should see these through.[42]

Surprisingly, many cases involve employers' failure to take relatively inexpensive and easy steps to provide specialist equipment. The following difficulties are common and could amount to failure to make reasonable adjustments:

- The equipment is not ready and in place when the worker starts the new job, even though the employer knew when s/he recruited the worker of the need to acquire such equipment. Often it is left to the worker to make the arrangements.
- It takes a considerable time following a request by a worker for the equipment to be supplied. Delays often occur in getting an appropriate assessment or in following up on an assessment and recommendation. The worker often has to make repeated requests.
- When the equipment eventually arrives, there are delays in getting it installed and further delays in training the worker on its use.
- All the above delays lead to stress for the worker, which can exacerbate his/her disability and work performance, and lead to tensions or worse in the working relationship.

Training of managers and co-workers

Section 18B(2) suggests giving or arranging training for the disabled worker or anyone else. The Code at para 5.18 gives as an example, the employer providing training for employees in conducting meetings in a way that enables a deaf staff member to participate effectively.

Much discrimination against disabled workers occurs due to lack of awareness of the barriers they face. Training at the outset could make a big difference. Tribunals often suggest that awareness training for managers or co-workers would have been helpful. The Employment Appeal Tribunal in Scotland has said the provision of deafness awareness training for other employees can be a reasonable adjustment, although attendance need not be compulsory.[43] Given the wording of s18B(2) and the Code, the EAT is probably wrong to add this qualification. Compulsory training, at least of supervisers and managers, would surely be a reasonable adjustment in certain circumstances.

Linked to this is the need in some circumstances to ensure the co-operation of co-workers with any adjustments. The Code discusses this at para 8.22.

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[42] Williams v J Walter Thompson Group Ltd [2005] IRLR 376, CA

[43] Simpson v West Lothian Council (2005) 137 EOR 26, EAT.

Modifying disciplinary or grievance procedures

This suggestion is not listed in section 18B(2) but it is given as an example of an adjustment in the Code at para 5.20. The Code suggests a worker with learning disability be allowed to bring a friend outside work to act as an advocate for him/her at a grievance meeting. The Code also suggests (at para 8.26) that such a worker should be allowed to bring a friend rather than a work colleague with him/her to a disciplinary hearing.

There have been several cases where the tribunals have expected a flexible approach to the handling of disciplinary or grievance procedures, eg (depending on the nature of the worker's disability):

- Relaxing time-limits for lodging grievances and appeals against disciplinary action.
- Relaxing requirements for format of grievances, eg not insisting on forms being completed.
- Ensuring the worker fully understands the issues. Providing interpreters / signers as necessary. Allowing a friend or helper outside work to accompany the worker.
- Establishing preferred mode of communication, eg allowing written submissions before or after the hearing rather than relying on oral representations.
- Flexibility regarding hearing dates. Waiting until the worker is well enough to attend.
- Allowing full preparation time. The worker should be informed well in advance of the hearing date and sent all relevant papers well in advance.
- Not leaving the worker waiting a long time in the waiting room.
- Adopting a non-threatening manner and mode of speech.
- Allowing more time during the hearing and breaks.
- If travel is difficult, conducting the hearing by telephone, at home or at another suitable venue.
- Ensuring the worker is not disciplined for conduct which may be reasonably explained by his/her disability, eg a deaf person apparently disobeying a verbal instruction or someone losing their temper when in pain.

The fact that disciplinary proceedings are pending is not necessarily a reason not to proceed with other reasonable adjustments such as relocation.[44]

[44] Home Office v Beart [2003] IRLR 238, CA.

Tribunal adjustments

Tribunals and advice agencies must not discriminate in their provision of services to disabled users and clients and must make any necessary reasonable adjustments. The Disability Rights Commission in conjunction with the Council on Tribunals has produced guidance for tribunals to facilitate the full participation of disabled people (parties, witnesses, representatives and public) in the tribunal process. *Making Tribunals Accessible to Disabled People: Guidance on Applying the Disability Discrimination Act* is available at (**www.council-on-tribunals.gov.uk/publications/130.htm**). There is also the recently updated disability section (chapter 5) of the Equal Treatment Bench Book, which is written for judges but useful for all parties to be aware of. The index is at **www.jsboard.co.uk/etac/etbb/index.htm** These are both extremely useful documents and you should take copies to any interim or final hearing where a claimant or witness is disabled.

The Council's Guidance identifies aspects of the tribunal process which may present barriers for disabled people. Similar barriers could occur in an advice agency. For example, it is necessary to ensure:

- physical accessibility to the building and relevant rooms; accessible parking facilities, accessible toilets;
- verbal and written communication in accessible formats and user-friendly content;
- regular breaks and short waiting times for those with difficulties sitting still for long periods of time or without breaks; and for users with learning difficulties or mental health issues

Advisers should inform the tribunal ahead of the hearing about any special requirements which the worker may have. It is worth letting the employer's representative know in advance too. A good time to discuss arrangements would be at any case management discussion. The Council's guidance says tribunals must give proper consideration to requests for reasonable adjustments and if any particular adjustment is refused, explain why. These are some issues it is said the tribunal should bear in mind:

- Time-limits for making a claim or various interim steps may not provide enough time for claimants with mental illnesses, learning difficulties or literacy problems to seek advice or for visually impaired parties to get documents in an accessible format.
- Forms, letters and guides should be provided in alternative formats and hearing venues should be accessible to users with a range of impairments.

- Hearings should be guaranteed to start at a certain time and not floating, where a party has difficulty sitting or is in pain generally or liable to get more than usually stressed, eg due to learning difficulties. There should be regular breaks as necessary.
- It may be appropriate to conduct the hearing informally where the claimant or witnesses have learning difficulties.

For examples of actual cases where adjustments have been made in the tribunals or courts, see p92 (hearing) and p115 (learning disability).

Letters to the employer regarding reasonable adjustments

Where an employer is unwilling to make reasonable adjustments despite a worker's verbal requests, it is important to make a formal written request. This may take the form of a letter or a grievance.

The statutory dispute resolution procedures are being phased out, but where they still apply, a worker must write a step 1 grievance letter regarding the matters of complaint and wait at least 28 days before starting any employment tribunal claim.

Even after the abolition of the statutory dispute resolution procedures, it is a good idea to bring a grievance before starting any tribunal claim. This is because, from April 2009, the tribunal has power to reduce a claimant's compensation by up to 25% if s/he unreasonably failed to follow relevant guidance in the ACAS Code of Practice on Disciplinary and Grievance procedures. It is too early to know how tribunals will interpret the Code in this context.

If grievances are written before tribunal cases are started, advisers must be careful that they still comply with tribunal time-limits.

Sample letters are on the next two pages.

SAMPLE GRIEVANCE LETTER

I wish to lodge a grievance regarding my working conditions. I feel I have been discriminated against due to my disability and the Council has not made adequate reasonable adjustments.

I am partially sighted. I have to hold books and papers very close to my face to read them. I need magnifying equipment for computer screens. When I was interviewed for my job in May 2007, I explained my disability and that I would need magnification equipment. However, when I started on 26th May 2007, no magnification equipment was in place. When I mentioned the screen was too small, a 17" screen was installed about 3 weeks later. This was not much better. I was given a free-standing stand for my papers but it was unsuitable, because I had to keep twisting my head to look at the papers and then at the screen.

I have repeatedly asked my manager, Joy Spleen, for a larger screen but she just asks me whether I really need it. She once made a comment that I seemed to be able to read a book without glasses. Meanwhile she has been criticising me for not carrying out my work quickly enough and making typing errors. I have become so stressed by all this, that my GP advised me to stay off work for four weeks.

I need the Council to look into my situation properly and make the necessary adjustments. In particular:

- The Council should arrange for a proper assessment of my needs.
- I should be given a larger screen, appropriate magnification software and a better document stand.
- In the meantime, I should be given more time to complete my work, and duties requiring work with exceptionally small font should be reallocated.
- Alternatively, I should be offered suitable alternative employment on a permanent basis, or temporarily, pending acquisition of the necessary software.
- Joy Spleen should be sent on a training course regarding disability discrimination at work.
- My current sickness absence should not be counted towards my annual total under the sickness monitoring scheme and I should be paid full pay.

I hope this matter can be dealt with as a matter of urgency so that I can return to work on a feasible basis as soon as possible.

SAMPLE LETTER SEEKING REASONABLE ADJUSTMENTS AND COMPENSATION WHEN A GRIEVANCE LETTER HAS BEEN IGNORED.

We are writing on behalf of Mr Gilbert, who has worked for you since March 1998 as a customer service engineer. In June 2006, Mr Gilbert had an accident damaging his back and now uses a wheelchair. Mr Gilbert is unable to carry out his former duties and has not worked since his accident. Mr Gilbert has exhausted his periods of full pay and half pay under the sickness procedure and is solely receiving sickness benefits.

We understand that Mr Gilbert has made several attempts to contact you to discuss his position but with no success. A meeting was arranged in December 2006 with his manager to review his position with a view to returning to work. This meeting was cancelled two days before it was due to take place. Further meetings were scheduled for January, March and July 2007 but all were cancelled at short notice. In August 2007, Mr Gilbert wrote a grievance letter regarding these matters. As a result, he was told that the company would look into the situation. He has heard nothing further.

Mr Gilbert is very keen to return to work, but feels the company is doing nothing to facilitate this. He requests that his situation be assessed and the following adjustments (as appropriate) be made as a matter of urgency:

- Mr Gilbert is offered suitable alternative employment. The company has a large office in Ilford, near Mr Gilbert's home, and he believes there are a number of jobs which he could do there.
- If there are no immediately available permanent vacancies, Mr Gilbert should be offered suitable temporary work.
- Alternatively, Mr Gilbert should be allowed to work from home on a temporary or permanent basis.
- As Mr Gilbert has been off work for some time, through no fault of his own, his return to work should initially take place on a part-time basis, with the stages of his return to full-time work to be agreed.
- Mr Gilbert should be compensated for his loss of pay since September 2002, when he was put onto half pay. Had appropriate reasonable

adjustments been made promptly, Mr Gilbert would have been able to return to full-time work by this date.

- Mr Gilbert has become severely depressed as a result of his treatment by the company. We therefore invite you to pay him a sum in compensation for his injury to feelings. This sum will need to be agreed before his return to work.

As this matter has now dragged on for some considerable time, we must ask you for your written proposals within 14 days, failing which, our client will be forced to seek a resolution in the Employment Tribunal.

Sample tribunal claim concerning reasonable adjustment

An employment tribunal cannot find that an employer has failed to make reasonable adjustments without identifying the adjustments which the employer should have made. A worker bringing a tribunal case needs to give the employer some idea of what adjustments s/he says should have been made. If possible, the worker should set out some suggestions in the tribunal claim. Always leave open the possibility that other ideas will emerge during the case preparation – see 4(v) in model 1 and the 3rd paragraph in model 2 below.

WORDING OF TRIBUNAL CLAIM: MODEL 1

1. The claimant worked as a legal secretary with the respondent firm of solicitors from May 1980. She was absent from work due to depression from 2nd December 2004. On 11th December 2005, the claimant was given 12 weeks' notice of dismissal.

2. *(Insert additional relevant factual details including any disciplinary or grievance procedures followed.)*

3. The respondent did not obtain any medical evidence as to the claimant's condition and did not discuss with the claimant what reasonable adjustments could be made to enable her to return to work.

4. The respondent failed to make reasonable adjustments contrary to s3A(2) and s4A of the Disability Discrimination Act 1995. The respondent failed to offer or discuss any of the following possible adjustments:
   (i) Making a risk assessment and gathering medical evidence as to the claimant's condition.
   (ii) A transfer of the claimant to another branch office, whether permanently or temporarily.
   (iii) A reduction or alteration of the claimant's working hours to assist her in coping with her mother's illness and thus reduce her own stress, which contributed towards her depression.
   (iv) A gradual return to work in terms of hours or nature of duties.
   (v) Any other reasonable adjustment.

5. Further or alternatively, as a consequence of the failure to make reasonable adjustments, the claimant was dismissed.

WORDING OF TRIBUNAL CLAIM: MODEL 2

1. The claimant managed one of the busiest branches of a national clothing chain. In March 2005, his assistant manager and a senior superviser left and were not replaced.

2. Due to his disability *(specify)*, the claimant was advised by his GP that the pressure of work was adversely affecting his health. The claimant showed the respondent a letter from his GP to this effect and requested more staff or a transfer to a quieter branch. His request was refused.

3. The respondent failed to make reasonable adjustments contrary to DDA 1995 s3A(2) and s4A including, but not exclusively, the following:

   (i) The respondent failed to replace the assistant manager and senior superviser at the claimant's branch or otherwise to offer him more staff or assistance.
   (ii) The respondent failed to transfer the claimant to manage a quieter branch.
   (iii) The respondent failed to transfer the claimant temporarily to a quieter branch until a suitable alternative permanent vacancy could be found.
   (iv) The respondent failed to discuss with him or offer him alternative work, eg project work.

Medical evidence

It has become increasingly necessary to obtain some form of medical evidence for most DDA cases. It is almost always provided in the form of a written report as opposed to doctors appearing as witnesses in the tribunal.

It is not for a doctor to give advice on the law and the meaning of concepts in the definition of disability such as “substantial” and “day-to-day activity”. What a doctor can do, for example, is comment on the ease or otherwise with which the worker carries out day-to-day activities.[45]

What medical evidence is needed for

Medical evidence may be needed on any of the following matters, where the position is challenged by the employer or not obvious.

1. Relevant to proving the definition of disability:
   - Identifying the impairment.
   - Describing any substantial adverse effects on day-to-day activities .
   - Confirming where an effect is minor but likely to become substantial.
   - Confirming when the effect started or when it is likely to end.
   - Where an effect fluctuates, confirming it is likely to recur and when.
   - Where the substantial effect is apparent only without controlling medication or aids, confirming what the deduced effect would be.

2. Relevant to reasonable adjustments:
   - Identifying or confirming the adverse effect or substantial disadvantage which needs addressing.
   - Confirming that particular adjustments would be effective in reducing or removing the disadvantage. Note that a medical expert is not always the best person to give this kind of evidence. It depends on the type of adjustment proposed. Often a technical expert or specialist organisation has more knowledge about suitable equipment.

3. Relevant to compensation:
   - Confirming the extent and likely length of any physical or psychological damage caused by the employer’s failure to make reasonable adjustments. This is relevant to the award for injury to feelings and, in particular, injury to health. It may also be relevant to loss of earnings where the worker feels unable to seek new employment.

[45] Vicary v British Telecommunications plc [1999] IRLR 680, EAT

- A worker's compensation will be reduced if his/her health was deteriorating anyway, so even if reasonable adjustments had been made, s/he would not have been able to continue working for much longer. A medical prognosis would be necessary in such cases

What type of medical expert?

Medical evidence may be obtained from one or more of the worker's GP, physiotherapist, counsellor or consultant. As well as analysing the worker's general condition and prognosis, medical experts who have treated the worker can describe the treatment which they have been giving and verify the worker's condition as it appeared at the time.

In addition or alternatively, a report can be obtained from an independent medical expert, usually a consultant in the relevant specialism. An independent occupational physician could be useful as s/he is more likely to understand the DDA, but s/he may not have the relevant specialism. An independent expert will make an appointment to see the worker. S/he will also want to see the medical notes of the treating practitioners.

The advantage of an independent consultant is that his/her evidence will probably be taken more seriously by the tribunal. This is because s/he will tend to be more specialist and highly qualified than a GP or counsellor. S/he will also be seen as more independent.

The disadvantage is that s/he will not have seen the worker's condition over a period of time and will rely on accurate information from the notes and the worker. His/her report will also be more expensive and may take more time, because s/he will need a special appointment to see the worker.

An independent consultant may also provide a report which unsettles the worker because it is not consistent with advice s/he has been getting from his/her own consultant or GP.

On the other hand, reports from those treating the worker tend to be over-positive, especially as to prognosis, and from a legal point of view, this can be unhelpful.

If the worker does get a report from an independent consultant, the employer can probably insist on getting his/her own report from another independent consultant. Generally the tribunal prefers a single joint expert to be used by both sides.[46] This means the cost can be shared, and means the worker does not need to go through the trauma of seeing two unknown doctors. There can be

[46] As recommended by the EAT in De Keyser Ltd v Wilson [2001] IRLR 324

difficulty in agreeing who should be used as a joint expert. Make sure the expert has had no previous dealings with the employer or employer's representatives.

The choice of expert will ultimately depend on the issues requiring evidence. Where there is a dispute as to whether the worker meets the definition of disability, a consultant is often necessary. Where the issue relates to compensation, it will depend on the severity of the worker's reactions. For example, if discrimination caused severe depression, post-traumatic stress syndrome or nervous breakdown, evidence from a consultant psychiatrist would be usual. Where it is a case of lesser injury to feelings, a GP may give evidence of the worker's visits complaining of mild depression, sleeplessness etc. Usually a medical expert is required, but where the case concerns a mental impairment which is not an illness, eg dyslexia or learning difficulties, a report from a non-medical expert may be more appropriate, as long as s/he is suitably qualified, eg an educational psychologist.[47]

Again depending on the issues, it will often be necessary to get more than one report (subject to cost), eg from a GP, counsellor or physiotherapist, as well as from a consultant.

How to find and instruct the expert

Independent consultants can often be found by contacting the main teaching hospitals and asking which consultants have the relevant specialism and write tribunal reports. You could also try asking the relevant specialist voluntary organisation whether it can supply an expert or recommend anyone. There are some directories of experts, eg 'The Expert Witness Directory' at www.legalhub.co.uk which lists experts by field of expertise.

The letter instructing the expert should set out in detail the questions s/he should answer and be expressed in neutral terms. Remember you may have to show this letter to the tribunal. A sample letter is at p52. If a single joint expert is instructed, it will be necessary to agree the wording of a joint letter of instruction, which should come equally from both parties.

The letter should also attach the worker's written consent to the report. (See p55.)

In a DDA case, the tribunal will probably hold a case management discussion at some stage. The subject of medical evidence is likely to come up. You should be aware of the guidelines in *De Keyser Ltd v Wilson* [48] even if you want to argue that a report from the worker's treating consultant is more appropriate than one

[47] Dunham v Ashford Windows [2005] IRLR 608, EAT.
[48] [2001] IRLR 324, EAT

from an independent joint expert.

The tribunal may set a time-table for instructing an expert and getting a report. It is important to avoid unrealistic time-scales as doctors are busy people and cannot be forced to adhere to tribunal deadlines.

The *De Keyser* guidelines

The EAT has set out guidelines for getting medical evidence in De Keyser Ltd v Wilson. The key points are:

- it is preferable for an expert to be jointly instructed by the employer and worker;
- if one side cannot afford to share the cost of a joint expert, so that the other side goes ahead and instructs their own expert, it is still a good idea if both sides agree the terms of instruction;
- the letter instructing an expert should set out in detail the questions which s/he should answer and avoid partisanship;
- the ET may set a timetable for instructing experts and getting their reports (unfortunately this is often unrealistic as doctors are busy people and cannot be forced to keep to deadlines);
- if each side instructs their own expert, the experts should be encouraged to meet on an off-the-record basis and agree as many issues as possible. (It is rather unrealistic to expect this to happen, both in terms of the experts' time and willingness, and the costs to the parties.)

Where a jointly-instructed expert's report has confirmed the worker's symptoms, the worker should not be cross-examined at the hearing on the basis that s/he is exaggerating his/her symptoms without forewarning, so s/he has a chance to ask the expert to attend.[49]

The cost of a report

The tribunal says it will pay the reasonable costs of a medical report or for medical witnesses to attend the tribunal, where essential to the case. However, the report or evidence must have been ordered by the tribunal. The best time to seek an order is probably at the case management discussion. The rates for medical reports or attendance of witnesses are in line with BMA Treasury rates, but are unfortunately rather low. Tribunal staff will show the rates on request. The practice on expenses is set out briefly in "Expenses and allowances payable to

[49] Mahon v Accuread Ltd UKEAT/0081/08

parties and witnesses attending an Employment Tribunal". This can be found at **www.employmenttribunals.gov.uk/Documents/Publications/ExpensesAllowances.pdf** The problem is that most consultants charge a higher sum than the BMA rates. Ideally you should find out the cost from the expert and get the tribunal's confirmation in advance that it will pay, but it may be unwilling to make a commitment. If you have any difficulty getting an order for medical evidence or persuading the tribunal to pay any higher rate insisted upon by the expert, you could try quoting the Council on Tribunal's "Making tribunals accessible to disabled people – Guidance on applying the Disability Discrimination Act" (see p39 above). Together with article 6 of the European Convention on Human Rights (the right to a fair trial), this recommends that procedural as well as physical barriers to justice should be removed.

There are other possibilities. The cost of the report (though not of a witness attending the hearing) is an allowable disbursement if the client is covered by legal help. However, prior authority may be needed above a certain amount (check the terms of your contract). If the client has legal expenses insurance, this may cover the cost of medical evidence. Most insurance policies require the client to use nominated solicitors, but there may be scope for negotiation. Another possibility is that the EHRC may be willing to help, especially if it is a test case. If a report is commissioned jointly with the employer, the cost should be shared; in some circumstances, a tribunal may even encourage the employer to pay the entire cost.

SAMPLE LETTER TO MEDICAL EXPERT

Dear Dr . . . . . .

Re: *(Worker's name and address)*

I am advising C regarding a potential claim against her employers under the Disability Discrimination Act 1995. In order for me to assess whether C is covered by the Act, I should be grateful if you would write a Report concerning her condition and covering the following points:

1. Please could you specify the nature of the impairment from which C suffers.

2. Please could you comment on whether C's ability to carry out day-to-day activities in any of the following respects is adversely affected, eg because s/he cannot do certain activities activity at all or because s/he can only do them in a certain way or slowly or with pain, fatigue, or difficulty or only under certain conditions:

    a) mobility;
    b) manual dexterity;
    c) physical co-ordination;
    d) continence;
    e) ability to lift or move everyday objects;
    f) speech, hearing or eyesight;
    g) memory or ability to concentrate, learn or understand;
    h) perception of the risk of physical danger.

3. Please could you confirm that any such effect is substantial as opposed to trivial or minor.

4. *(If the worker has a progressive condition:)* It is usually necessary under the law to prove the impairment has substantial rather than minor effects. However, there is one exception. The law says that if a person suffers from a progressive condition, it is sufficient to prove a minor adverse effect on one of the above activities at the time of the discrimination, if it is likely the impairment would in future have substantial adverse effects. Would you say it is more probable than not that any minor effects you have identified will become substantial?

5. If C's condition is controlled by medication or aids, please could you also state how C's abilities under the above categories would be affected were

she not taking any medication.

6. The Act protects workers where the effect of the impairment has lasted at least 12 months or is likely to last for 12 months or for the rest of their life, if less. Please could you clarify when the substantial adverse effects started to apply to C and when they ceased or, if they have not yet ceased, when they are likely to cease. *(If the worker has a condition which has lasted less than 12 months but might be recurring:)* Recurring effects are also covered, ie, if the effect lasts less than 12 months but is likely to recur. Would you say it is more probable than not that the effects of C's impairment will recur more than 12 months from their temporary cessation?

7. C has told me that she has particular difficulties with mobility. Could you please especially address this point and let me know whether you would expect her:

   i) to have difficulty using public transport;
   ii) to be able to travel a short journey in a car;
   iii) to have difficulty going up or down stairs.
   Would the position be any different if she were not taking medication-

8. Do you have any suggestions as to adjustments to C's working conditions which may be of assistance to her?

I should be grateful if you would set out in the report your relevant qualifications and experience. *(If this is the treating consultant:)* Please could you set out how you know A and the history of your treatment of her.

Please could you supply the report by *(date)* as the tribunal has made an order that it should be disclosed by *(date)*. I understand from my telephone conversation with your secretary that this time-scale is acceptable for you, but please let me know immediately if you forsee any problems. The tribunal tends to be very strict about deadlines.

I enclose C's written authorisation for you to disclose the above information to me. Please feel free to telephone should you wish clarification.

Please could you provide an assessment of your likely fee. I confirm my client will be responsible for paying this.

Comment:

The letter on the previous page is not a standard letter. The letter would vary according to the facts and how obvious the worker's disability and symptoms are. In some cases, it will be appropriate to write a shorter letter focusing on very specific points of concern.

If you are aware of an area of difficulty for C, you may wish to guide the doctor further, eg by reference to the examples in the *Guidance* from D20 to D27. Paragraph 7 is an example of this.

In some letters, you may also want to ask the doctor for his/her prognosis. This may be relevant to the definition of disability, ie whether a condition is long-term, or in relation to compensation, where there is a dispute as to whether the worker would be able to work in the long-term in any event.

If the letter is to be shown to the employer, the worker must think carefully about its implications. If the letter suggests that the worker cannot do the job at all, but no adjustments are feasible, this could lead to difficulties.

Ideally the fee should be agreed in writing before the letter of instruction is written.

On the next page are sample written authorities for disclosure of medical information.

WRITTEN AUTHORITY FOR SUPPLY OF MEDICAL REPORT

I, *(name)* of *(address)* hereby authorise *(name and address of doctor)* to provide medical information and a medical report as requested to my solicitor, *(name and address)*.

Signed:
Dated:

WRITTEN AUTHORITY FOR RELEASE OF RECORDS BY A HOSPITAL

To: *(name and address of hospital)*
Re: *(name, address and date of birth of client; client's hospital reference number)*
I, *(name)* of *(address)* hereby authorise you to release all my medical records, notes, memoranda, x-rays and photographs to *(solicitors' name and address and reference)* for medico-legal purposes. For the avoidance of doubt, I confirm litigation is not contemplated against your hospital.

Signed:
Dated:

The public sector equality duty

Section 49A of the DDA imposes a disability equality duty (DED) on public authorities. This duty is similar to the race and gender equality duties, although different in some important respects. It came into force on 5th December 2006.

With limited exceptions, it applies to all public authorities, including local authorities, NHS Trusts, government depts., the police, schools and universities.

When carrying out their functions, including the employment function, authorities must have due regard to the need to:

- eliminate discrimination and harassment of disabled people
- promote equality of opportunity
- take steps to take account of disabled persons' disabilities, even where this involves treating disabled people more favourably than others
- promote positive attitudes towards disabled people
- encourage the participation by disabled people in public life.

An example of the practical effect of always considering the impact of new policies on disabled employees is the experience of one public authority which introduced a green travel policy. Employees were penalised if they did not choose 'greener' travel options to travel to and from work. The DED helped the authority to recognise that many disabled workers did not have the same opportunities as their non-disabled colleagues to choose their travel options.

Many public authorities are also subject to specific duties which include publishing a Disability Equality Scheme by 4th December 2006 (except for some schools) and revising the scheme every three years. Disabled people must be involved in all aspects of developing the scheme.

The former Disability Rights Commission published two statutory Codes of Practice on the duty to promote disability equality, one for England and Wales and one for Scotland. The Codes give practical guidance to public authorities on the general and specific duties. These will be taken into account by any court or tribunal where relevant. If you are running an individual case of disability discrimination against a public authority, it is worth checking to what extent the employer has complied with any relevant recommendations in the Codes. The Codes can be downloaded from the EHRC website.

A government research report has found that some authorities focus more on the development of written schemes than on outcomes: *An in-depth examination of the implementation of the Disability Equality Duty in England* (Office for Disability Issues, **www.odi.gov.uk**)

Directory of impairments

pages 58 – 131

AGORAPHOBIA

It is estimated that up to 5 million people suffer from agoraphobia, which is the most common of all the phobias.

Agoraphobia is a complex phobia which can manifest itself in several different ways and with greatly varying severity. Most commonly it entails fear of travelling away from a person's "safe" place (usually their home), but it is often linked to fear of being trapped somewhere (similar to claustrophobia). A person with agoraphobia may fear being far from home or leaving home altogether or fear unfamiliar routes and places, wide open spaces, crowded places, confined spaces such as shops, restaurants, trains or lifts, standing in long lines, or being left alone. When in a feared place, s/he will often suffer a panic attack, with severe physical symptoms (palpitations, chest or stomach pain, headache, fast breathing). S/he may become anxious even thinking about going to such places and s/he will tend to avoid them.

The Legal Definition

Impairment

Mental

Day-to-day activities

All day-to-day activities should be checked, but those most likely to be affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Perception of the risk of physical danger (*Guidance*, D27)

Under "Mobility", the *Guidance* says that account should be taken of the extent to which, because of a mental condition, a person is inhibited in getting around unaided, using a normal means of transport, leaving home or getting around in an unfamiliar place. The *Guidance* gives as an example of "substantial" adverse effect, difficulty going out of doors unaccompanied, eg because the person has a phobia.

Under "Perception of the risk of physical danger", the *Guidance* includes an overestimation of physical danger including danger to well-being.

"Ability to concentrate" would clearly be severely affected during a panic attack.

Some questions to check substantial adverse effect, depending on circumstances:

- What places and situations cause the worker anxiety?
- How the worker reacts to such anxiety. What are the symptoms? Does s/he get panic attacks? What places does s/he avoid altogether?
- Over the last year, how many panic attacks has s/he had, in what situations and what did s/he do?
- Is the worker undergoing any treatment? If so, what and when? What difference has it made to his/her condition?

Medical treatment: The worker may be undergoing counselling or taking medication. If this treatment reduces the effect of the agoraphobia, the test is the effect without such treatment.

Long-term effect

Agoraphobia is very likely to be long-term. In so far as the only effects are short-lived panic attacks, these could fall within the definition of recurrent conditions. However, the anxiety and avoidance over certain situations tends to be an ever-present effect.

Reasonable adjustments

Always consult the worker. Adjustments depend on the severity and nature of the worker's condition. Possibilities are:

- Home-working.
- Ensuring the worker does not need to travel to unfamiliar places or attend other offices or restaurants, or providing a trusted colleague to travel with the worker.
- Suitable workspace, neither too confined, nor open-plan.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Anxiety UK (formerly The National Phobics Society) is at **www.phobics-society.org.uk** Tel: 0870 7700 456

No Panic is at **www.nopanic.org.uk** Tel: 0808 808 0545 (confidential helpline)

ARTHRITIS

Arthritis is a leading form of disability and affects many people of all ages. The Arthritis Research Campaign says that over 7 million adults in the UK have long-term health problems due to arthritis and related conditions. There are over 200 types of arthritis and rheumatic disease. Arthritis is the second most common cause of time off work.

Arthritis primarily affects areas in and around the joints, eg in hands, knees and hips. By far the most common form is osteoarthritis, a degenerative joint disease. Rheumatoid arthritis is one of the most disabling types, where the joints become inflamed. Lupus is also a serious disorder, which mainly affects young women, particularly those of African Caribbean origin. Gout affects small joints, especially the big toe. Ankylosing spondylitis affects the spine.

Arthritis causes pain, stiffness and inflammation in the joints, which can lead to permanent damage and weakness. Systemic forms of arthritis can damage the whole body. Certain forms of arthritis can cause limb shortening or deformity. Arthritis can cause difficulty standing, walking, sitting, lifting, reaching, making repetitive movements, dressing, taking a bath, gripping things, opening packages, washing hair, brushing teeth, lifting dishes out of the oven, using a scissors, cutting food, lifting a baby etc. Systemic arthritis may be treated by steroids, which can also cause health problems.

The legal definition

Impairment

Physical

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24).

Medical treatment: if the worker's pain is controlled by medication, the test is the effect on him/her without the medication.

Long-term effect

Arthritis has long-term effects although these may fluctuate. As the effects are recurring, they can be treated as long-term (see p16).

Reasonable adjustments

Always consult the worker. As with other “invisible” conditions, employers and colleagues may not take arthritis seriously. It tends to be associated with older people complaining about small “aches and pains”. Appropriate adjustments will be of the kind suited to conditions such as RSI (p119), Shoulder, Arm or Hand Impairment (p127), Back Impairment (p68) or Mobility Impairment (p115).

Also see p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Useful websites: The Arthritis Research Campaign at **www.arc.org.uk** and Arthritis Care on **www.arthritiscare.org.uk** are full of information. See also the National Rheumatoid Arthritis Society at **www.rheumatoid.org.uk**

The National Rheumatoid Arthritis Society has two free guides on its website with advice on best practice and suitable adjustments. Click on ‘employment’ for links to ‘Your employment and rheumatoid arthritis’ and ‘When an employee has rheumatoid arthritis’.

Particularly good on workplace accomodations are two American sites: the Arthritis Foundation at **www.arthritis.org**, and the Job Accommodation Network at **www.jan.wvu.edu/media/arth.htm** (factsheets on Arthritis).

ASTHMA

Asthma is very common. Approximately 5 million people in the UK have asthma, of whom 3.7 million are adults.

Asthma involves a narrowing of the airways of the lung due to tension or spasm of the muscles in the bronchial walls. It can be triggered by various factors including allergies (eg to animals or house-dust mites), irritants (eg cigarette smoke, chemical fumes, aspirin and other drugs, air fresheners and furniture polish), viral infections (colds or 'flu), exercise, stress or excitement. Poor ventilation, damp, and building work can aggravate these factors.

The symptoms, which vary from very mild to very severe, include tightness in the chest, shortness of breath, coughing and wheezing, fatigue and in severe cases, cessation of breathing. An asthma attack can seem to occur very suddenly and symptoms can become progressively worse if untreated. Asthma is usually controlled by minimising contact with triggers and use of medication, normally a short-acting reliever inhaler which can immediately relieve symptoms, and often a long-acting preventer medication (inhaler or tablets).

Asthma UK estimates that each year, 750,000 employees who already have asthma, find things at work trigger their symptoms. This work-related asthma is very commonly triggered by cigarette smoke, but other factors can be latex gloves, paints and dyes, chlorine, dust, cold air.

It is estimated that 3000 people per year develop "occupational asthma". This is triggered in people who did not previously have asthma, by breathing in substances at work. Early diagnosis is important as is it potentially curable. Common causes are wood dust, latex, and flour dust. High-risk occupations include health workers, spray-painters, people working with chemicals or in the baking and flour industry.

The legal definition

Impairment

Physical

Day-to-day activities

Severe difficulty breathing would affect most day-to-day activities, but most obviously:

- ☑ Mobility (*Guidance*, D20)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24)

☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)

The *Guidance* suggests the following may amount to substantial adverse effect:
- Difficulty in going up or down steps, stairs or gradients.
- Difficulty walking other than at a slow pace.

Paragraph D11 of the *Guidance* says it can be a substantial adverse effect if an impairment makes an activity more than usually fatiguing, so that a person might not be able to repeat the task over a sustained period of time.

If the worker only suffers asthma at work, eg because of a smoky atmosphere, but recovers when s/he is at home, this may nevertheless amount to a substantial impact on his/her day-to-day activities.[50]

If there is any suggestion that the worker has behaved in a way which aggravates his/her asthma, see comments at "Managing the effects of an impairment" (p13 above).

See also "episodic effects" (p12 above).

Medical treatment: A worker may have asthma attacks only rarely, but this may be because s/he is taking preventative medication. As always, the test is the effect if the worker were not using any medication.

Long-term effect

Even if asthma attacks occur only sporadically, the impairment would still be considered long-term as a recurrent condition. It is unlikely that overall the asthma would last less than 12 months unless it is a case of occupational asthma which was diagnosed and cured at a very early stage.

Reasonable adjustments

The employer should consult the worker about triggers and take steps to avoid these, eg:
- Clean, smoke-free work environment; non-toxic and unperfumed cleaning products and office supplies.
- The worker should be moved if there are any building or repair works causing dust.
- If necessary, relocation away from irritants.
- If the worker is sensitive to humidity, hot or cold air, these should be controlled by air conditioners, humidifiers, heaters.

[50] Cruickshank v VAW Motocast Ltd [2002] IRLR 24, EAT.

- There should be ready access to fresh air by means of windows which open and additional rest breaks.
- Exposure to known causes of occupational asthma should be avoided by special equipment, cleaning, supervising and training.
- If the worker finds movement difficult, possibilities are ground floor working, lifts, accessible parking space, home-working.

Real tribunal cases:

- In one case, a tribunal said the company should have modified its attendance improvement scheme to take account of the fact that some of a worker's absences were due to a disability, ie asthma.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Asthma UK's website lists symptoms, triggers and treatments on **www.asthma.org.uk**
In 2004, it launched "Asthma at Work – Your Charter" in partnership with the Health & Safety Executive, employers and trade unions. This is regularly updated, so is easiest to find by a search. The January 2009 version is at **www.asthma.org.uk/health_professionals/ordering_materials/asthma_at_work_your.html** and sets out 5 recommendations to employers to reduce asthma in the workplace.

There is a section on occupational asthma on the Health and Safety Executive website at **www.hse.gov.uk/asthma**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Respiratory.html** has useful suggestions on its fact sheet about respiratory impairments.

AUTISM OR AUTISTIC SPECTRUM DISORDER

Autism is not a mental illness. It is a developmental disability. Its effects range enormously from mild to severe. A minority of people with autism also have learning difficulties, but others have average or above-average intelligence. Asperger's Syndrome is a form of autism with many similarities, although without learning difficulties.

It is estimated that there are over 500, 000 people in the UK with autism, of whom only 6% of adults are in work. Only 12% of adults with Asperger's Syndrome or high functioning autism are in work.

Autism affects the way people interact with others and process information. People find it hard to think in the abstract, adapt to change, interpret body language and tone of voice, empathise with others and communicate socially.

The legal definition

Impairment

Mental

Day-to-day activities

Always check all the activities, but most likely to be affected are:

- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)

- A person with autism may find it hard to adapt to change or understand new instructions unless communicated in clear concrete terms. S/he may also find it hard to understand verbal instructions, especially if these use figurative (non-literal) speech or rely on non-verbal cues. The *Guidance* says at D26 that account should be taken of the person's ability to take in new knowledge or understand spoken or written information.
- D26 says it would be reasonable to regard difficulty in adapting after a reasonable period to minor changes in work routine as having substantial adverse effect.
- Concentration can be adversely affected in certain situations, eg by the stress of having to communicate in group situations or with strangers.
- Ability to understand includes understanding of normal social interaction and the subtleties of human non-factual communication.[51] It covers ability to understand human non-factual information and non-verbal communication. (*Guidance*, D26 which gives Asperger's syndrome as an example.)

[51] Hewett v Motorola Ltd [2004] IRLR 545, EAT – a case concerning Asperger's syndrome

- "Speech, hearing or eyesight" may be affected by hypersensitivity to noise.

- D25 says account should be taken of how far a person is able to understand someone else speaking normally in the person's native language.

***Medical treatment*:** If the effects are reduced by any medically prescribed counselling, the effects should be assessed as they would be if the worker was not attending such counselling.

Long-term effect

Autism is likely to have long-term effect. There is no "cure" but people can be taught to develop communication and other skills.

Reasonable adjustments

Suitable adjustments, depending on the individual, could include:

- Communication in concrete non-ambiguous terms.
- Following verbal instructions with written instructions.
- Giving clear guidance and explanations for everything; explictly requesting any necessary action.
- Giving feedback during work.
- Identified priorities; breaking down tasks into smaller tasks and stages.
- Giving more time to learn new tasks; providing a colleague to work alongside in early stages; clear and structured training.
- Flexible hours if rush hour travel is stressful.
- In interviews, specific and closed questions, eg about the worker's experience; no abstract questions; interpreter in interview to re-word questions.

An example given by the Code is:

- Providing a structured working day and ensuring other employees cooperate with this arrangement. (Code, 5.22.)

Real tribunal cases:

A tribunal has made these suggestions:

- Increasing a worker's appraisal rating because the score was lowered for a factor related to his communication style, which was related to his disability.
- Adjusting the way a worker was questioned during a grievance meeting, because he found questioning stressful.
- Paying full sick pay where the worker's absences were due to the employer's failure to make reasonable adjustments.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general list of adjustments in the DDA and p33 for further suggestions.

Sources of further information

The National Autistic Society is on tel: 0207 833 2299, web: **www.nas.org.uk**

"The Undiscovered Workforce: information for employers" and 'The undiscovered workforce: looking for a job" can be downloaded from the National Autistic Society's website. Links are on page **www.nas.org.uk/nas/jsp/polopoly.jsp?d=507&a=5974** or search 'The undiscovered workforce" on the site search engine.

It explains the key effects of the disability and is full of useful tips for workplace adjustments.

BACK IMPAIRMENT

A 2005 survey carried out for the Chartered Society of Physiotherapists found 68% of adults had been struck down with back pain at least once in the previous 12 months. A third of those affected experienced five or more episodes over the course of a year. Although back pain is widespread, it is extremely variable in its severity and duration. Whether a worker has a disability under the DDA very much has to be assessed on a case-by-case basis.

The legal definition

Impairment

Physical

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Ability to lift, carry or move everyday objects (*Guidance*, D24)

It is particularly important with back impairments to assess the severity of the effects. The *Guidance* gives the following examples of what may amount to substantial adverse effect:

- Difficulty in travelling a short journey as a passenger in a vehicle (as opposed to discomfort after 2 hours in a car).
- Difficulty in using one or more forms of public transport.
- Difficulty going up or down steps or gradients.
- Inability to walk other than slowly or with unsteady or jerky movements. Experiencing some tiredness or minor discomfort as a result of walking unaided for about 1 mile (1.5 km) would not usually be a substantial adverse effect, though this would depend on the worker's age and nature of the terrain.
- Difficulty picking up objects of moderate weight with 1 hand, eg books, a kettle, shopping bags, a briefcase, a chair. But inability to carry heavy luggage is not in itself an indication of disability.
- Difficulty in carrying a moderately loaded tray steadily.

Further questions to check substantial adverse effect, depending on circumstances:

- Can the worker get dressed without pain or assistance?
- Does the worker have difficulty getting out of bed?

- Does the worker have difficulty sitting down for more than short periods at a time?
- Is the worker able to reach top shelves of a cupboard without pain?
- Can the worker unpack a bag of shopping or unload a dishwasher without substantial pain?

Medical treatment: If the worker is taking painkillers or undergoing other medical treatment which lessens the effect, the test is the effect without the treatment.

Long-term effect

The substantial effect of a back injury may well not be long-term, so check this. It is also possible that the substantial adverse effect comes and goes. If so, it will be long-term if it is more likely than not that the effect will recur.

Reasonable adjustments

The Health & Safety Executive says on its website "tackling back pain needs good management and a partnership approach". Always ask the worker. Adjustments, depending on the nature and degree of disability, may include:

- Training on proper lifting techniques.
- Assistance with lifting or mechanised lifting.
- Light duties only.
- Ergonomic chair and workplace design.
- (If needs to stand for prolonged periods) anti-fatigue mat and stools to lean against.
- Automatic stapler.
- Trolleys to move files.
- Locating frequently used supplies and tools at waist height.
- Automatic door opening.
- Reduction of physical exertion.
- Mobility aids if long-distance walking is necessary.
- Accessible parking.
- Nearby toilets.
- Providing an occupational physiotherapy service.

An example given by the Code is:

- Reallocating lifting duties to colleagues. (Code, 8.13)

Where the back is damaged by repeated movements, see also RSI (p119).

Real tribunal cases:
Tribunals have made these suggestions:

- Reallocating a deputy ward sister's manual duties to other workers.
- Allowing a school dinner lady to undertake fixed duties which she could manage, rather than share a rota for a variety of duties.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general list of adjustments in the DDA and p33 for further suggestions.

Sources of further information

The Health & Safety Executive has a brief section on musculoskeletal disorders including back pain on its website: **www.hse.gov.uk**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Back.html** has useful suggestions on its fact sheet about back impairments.

CANCER

The legal definition

Although many people get discriminated against because they have or have had cancer, in the past it has been difficult to fit many instances of cancer within the artificial definition of disability in the DDA. Cancer is now deemed a disability as soon as it is diagnosed.

Reasonable adjustments

Always ask the individual, but the most likely adjustments to be required would be those to alleviate stress and fatigue or weakness, eg:

- Reduced or changed working hours or flexi-time.
- Increased rest periods and self-paced workload.
- Reduction of stress.
- Arrangement of the workplace so less physical exertion is necessary
- Controlled workplace temperature.

Other adjustments will depend on the nature of the individual's illness and treatment. For example, if the worker has respiratory difficulties, see ideas for Asthma (p62).

For further ideas, see the general adjustments suggested in the DDA on p26 and other suggestions at p33.

Sources of further information

There is a cancer fact sheet on the American website, the Job Accommodation Network at **www.jan.wvu.edu/media/canc.htm**

A guidance report, "Cancer and working: guidelines for employers, HR and line managers" produced jointly by Cancerbackup, the CIPD, and the Working with Cancer group, is available on the CIPD website via a link at **www.cipd.co.uk/subjects/health/general/_cncrwrkg.htm**

CEREBRAL PALSY

Cerebral palsy is not an illness. It is a physical impairment, usually caused by failure of part of the brain to develop before birth or in early childhood. The main effect is difficulty in movement, which may affect hands, arms, legs or feet, and sometimes face and tongue muscles, causing grimacing and drooling. Muscles may be stiff, weak or shaky. There are different types of cerebral palsy and the level of disability can vary enormously. Some people may simply move a little awkwardly. Others may be unable to walk at all. As well as difficulty maintaining balance or walking, the effects can include poor coordination; abnormal movements; loss of control of posture; difficulty eating; incontinence; difficulty with fine motor tasks, eg writing, using a scissors, turning pages or doing up buttons; speech difficulties.

Sometimes other parts of the brain are also affected, causing difficulties with sight, hearing, touch and concentration. About 10% of adults also have epilepsy. Mental abilities are not necessarily impaired at all, but a proportion of people will have moderate or severe learning difficulties.

The legal definition

Impairment

Physical

Day-to-day activities

Potentially all the day-to-day activities listed in the DDA could be affected, in particular:

- ☑ Mobility (*Guidance*, D20)
- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Physical Co-ordination (*Guidance*, D22)
- ☑ Continence (*Guidance*, D23)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)
- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)

Whether the effect is substantial depends on the individual case, judging the effect without any medication or medical treatment. The *Guidance* notes at paragraph A5 that someone with mild cerebral palsy may experience minor effects in a number of respects, but taken together these could have an overall substantial effect on his/her ability to carry out day-to-day activities.

Long-term effect

There is no cure, but the effects may either improve over time as a result of treatment or worsen with the normal aging process. However, it is unlikely that this part of the definition will be a problem in practice.

Reasonable adjustments

Always consult the worker. Suitable reasonable adjustments will vary but could include some of those suitable to people with MS (p117), Visual impairment (p129), Hearing impairment (p92), RSI (p119), Learning difficulties (p115), or Mobility (p115).

See also the general adjustments suggested in the DDA (p26) and other suggestions on p33.

An employer may be under a duty to make physical arrangements for the worker to go to the toilet or to accommodate an external carer to help the worker do so. However, this does not go as far as a duty actually to provide the carers to attend to a worker's personal needs.[52]

Sources of further information

Useful websites are Scope on **www.scope.org.uk**, the National Institute of Neurological Disorders and Stroke (cerebral palsy section) on **www.ninds.nih.gov**, and the cerebral palsy fact sheet on the Job Accommodation Network site at **www.jan.wvu.edu/media/cere.htm**

[52] Kenny v Hampshire Constabulary [1999] IRLR 76, EAT – a case concerning a worker with cerebral palsy.

DEPRESSION

Depression is a very common mental health problem. Although everyone feels sad or fed up on occasions, for some people depression can be an illness interfering with their ability to live a normal life. It is estimated that 7 – 12% of men and 20 – 25% of women experience diagnosable depression at some point in their lives. GPs often write “stress” on a sicknote to avoid stigma, when they are in fact treating depression.

The World Health Organisation’s International Classification of Diseases (WHO ICD) says the most typical symptoms of depression are depressed mood, loss of interest and enjoyment, and reduced energy leading to increased fatiguability and diminished activity. Marked tiredness after only slight effort is common. Other common symptoms are reduced concentration and attention, disturbed sleep, diminished appetite, reduced self-confidence, ideas of guilt and unworthiness, bleak views of the future and ideas of self-harm.

Depression is often triggered by traumatic life events which are unrelated to the workplace situation. However depression, anxiety and related mental health problems can also be caused or exacerbated by problems at work, eg unrealistic workloads, too high expectations, long hours and bullying. The Health and Safety Executive (HSE) says stress at work is a serious problem. It defines stress as the adverse reaction people have to excessive pressure or other types of demand placed on them. The HSE has commissioned research which indicates that up to 5 million people in the UK feel “very stressed” by their work, with about half a million experiencing work-related stress at a level they believe is making them ill.

As well as general depression, there are specific conditions such as Post Natal Depression, Manic or Bipolar Depression and Seasonal Affective Disorder. For related conditions, see Mental Health Issues on p109.

The legal definition

Impairment

Mental. As a mental illness, the DDA originally required workers to prove they had a clinically well-recognised condition. This is no longer necessary. It will still be useful if a particular condition can be identified, but it should be enough just to prove substantial adverse effects on day-to-day activities. It will not be enough to show the tribunal a series of medical certificates with such loose terms as “stress” or “anxiety”. Even “depression” written on a medical note may not mean it was a formal diagnosis. A more specific medical report will be necessary.

As mentioned above, the WHO ICD lists Depressive Episodes as well as a whole range of other specific mental illnesses. “Stress” is not regarded as an

impairment in itself unless it amounts to a stress condition, eg Post-Traumatic Stress Syndrome.

Day-to-day activities

Check all the activities, but most likely to be affected are:

- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Mobility (*Guidance*, D20)
- ☑ Perception of the risk of physical danger (*Guidance*, D27)

Depression can affect virtually all of the activities because of the overriding effect of extreme tiredness. As well as those listed above, tiredness can also affect "Manual Dexterity", "Physical Co-ordination" and "Ability to lift, carry or move everyday objects". A good illustration of this is found in the case of *Leonard v Southern Derbyshire Chamber of Commerce*.[53]

There can be substantial adverse effect on an activity if the worker finds it very tiring to carry out. Paragraph D11 says it should be taken into account that "the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time."

Where a worker has a mental illness such as depression account should be taken of whether, although s/he has the physical ability to perform a task, s/he is, in practice, unable to sustain an activity over a reasonable period.

As always, it is important to focus on what the worker cannot do, or can only do with extreme fatigue. It is irrelevant to consider what s/he can do or to weigh up what s/he can do against what s/he cannot do.

Under D26, the *Guidance* suggests that considerable difficulty in following a short sequence such as a simple recipe or a brief list of domestic tasks would amount to substantial adverse effect. However, inability to concentrate on a task over several hours would not be significant in itself.

Some questions to check substantial adverse effect, depending on the circumstances:

- How far can the worker walk without getting tired or drive without needing a break?
- Does s/he lose co-ordination due to tiredness, eg by tripping over pavement edges?
- Does s/he find it exhausting to carry shopping for as far as s/he usually would?
- Does s/he step in front of cars without thinking?
- Does s/he find it hard to concentrate, eg following a recipe, listening to a whole television programme, reading a book for half an hour?

[53] [2001] IRLR 19, EAT.

- If s/he is taking medication, has the dose had to be increased? Has s/he noticed the difference if s/he stops taking the medication or going to any counselling?

Medical treatment: Where depression is controlled by medication or medically prescribed counselling, the effect must be assessed as it would be without medication or counselling.

Long-term effect

Depression, especially when it is a reaction to a particular event, may well not last 12 months. On the other hand, a worker may have recurring bouts of the same depression and thus would fall within the definition of long-term.

Reasonable adjustments

Always consult the worker. Appropriate adjustments depend on each individual and the nature of their difficulties. Possibilities could include:

- Shorter, adjusted or flexible hours.
- Longer or more frequent breaks.
- Full or partial home-working.
- Time-off for counselling; allowing personal telephone calls at work for support.
- Allowing the worker to listen to soothing music, through headphones if necessary.
- Natural light in workspace.
- To help with concentration: reducing distractions and interruptions; private office or workspace; breaking large tasks down into small stages.
- Allowing meetings to be recorded or providing written notes/minutes afterwards.
- Not ignoring symptoms of stress or depression.
- If the worker is off sick, not pressurising by setting deadlines for return.
- Staged return to work in terms of hours, days, workload.
- Ensuring the worker receives welcome from colleagues and managers on return; training supervisors on positive response; ensuring no isolation or bullying from colleagues.
- Ensuring worker returns to a clean in-tray.
- On return, reviewing physical environment; briefing worker on social and work developments; planning workload and support; discussing possible adjustments.
- Dealing with any underlying cause of stress, eg bullying, excess workload.
- Provision of ongoing positive support.
- Careful handling of any disciplinary hearings, with flexibility and good notice of dates, allowing a companion of choice, giving full detail and information in advance.

The Code gives these examples:

- Allowing private telephone calls during the day to a support worker. (Code, 5.12)
- It may be a breach of the duty to make reasonable adjustments to fail to ask a worker why s/he keeps crying at work and to discipline him/her without giving him/her the chance to explain the problem arises from depression. (Code, 5.12)

Real tribunal cases:

Tribunals have made these suggestions:

- Altering working hours.
- Where the worker was absent for a while, allowing a phased return to work.
- Where the depression was caused by the worker's relationship with her line manager or by the type of work she was doing, redeployment or providing a mediator to intercede.
- Allowing a grievance to be lodged outside the time-limit set in the employer's grievance procedure.[54]
- Where the worker is facing disciplinary action in relation to any matter, allowing additional time to prepare, being flexible over dates, postponing the hearing until the worker is fit to attend (presumably not indefinitely), allowing an appeal to be lodged outside the time-limit in the employer's disciplinary procedure.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

MIND has a useful website at **www.mind.org.uk** There is an excellent publication from Mind Out for Mental Health: "The Line Managers' Resource – a practical guide to managing and supporting mental health in the workplace" available at **www.mindfulemployer.net/Line%20Managers%20Resource.pdf**

There is a fact sheet on Depression as well as on different depressive disorders on the informative website of the Mental Health Foundation, **www.mentalhealth.org.uk** Shift (a five year, Department of Health-funded initiative to tackle stigma and discrimination surrounding mental health issues in

[54] But advisers should bear in mind implications for time-scales under the statutory dispute resolution procedures, if they apply.

England) Shift has published the “Line Managers' Resource” - a booklet and website that gives advice and information for managing and supporting people with mental health problems in the workplace. It also gives advice and information for workers to help them assess their own needs and plan for meetings with their manager. Available at **http://shift.org.uk/employers**

The Health and Safety Executive has published Management Standards regarding stress, which are a useful measure for assessment and support. These are available on its website at **www.hse.gov.uk/stress/index.htm** There is a companion ACAS booklet “Stress at Work” available at **www.acas.org.uk/index.aspx?articleid=782**

The TUC’s ‘Representing and supporting members with mental health problems at work: Guidance for trade union representatives’ is available at **www.tuc.org.uk/extras/mentalhealth.pdf**

See also section on Mental Health Issues (p109).

DIABETES

Diabetes UK estimates that 1.8 million people in the UK have diabetes and probably another million have it without realising.

Diabetes mellitus is a condition when the amount of glucose (sugar) in the blood is too high because the body cannot use it properly. Insulin is the hormone which helps glucose correctly enter the cells of the body. There are two main types of diabetes. Type 1 (also known as insulin dependent diabetes) occurs when the body is unable to produce any insulin, and usually appears before the age of 40. Type 2 (non-insulin dependent diabetes) occurs where the body cannot make enough insulin or use it properly. Type 2 tends to develop over the age of 40 and its symptoms are usually less severe.

Diabetes may be controlled by insulin tablets or by diet alone. Type 2 may not need insulin injections or tablets. Without treatment, people with diabetes may well feel tired all the time and need constantly to pass urine. This is caused by their high levels of blood glucose (technically known as “hyperglycaemia”).

Hypoglycaemia means blood sugar levels which are too low. In diabetes, it is caused by the insulin (usually) or tablet treatment. Triggers can be taking too much insulin, missing a meal, vigorous exercise or other factors. People usually get warning symptoms before having a hypoglycaemic attack (or “hypo”). The early effects are normally hunger, feeling shaky and starting to sweat. Unless immediately treated with food or glucose tablets, blood sugar will fall further, and the person may feel weak and dizzy, become uncoordinated and get blurred vision. Some people may become aggressive. These symptoms can resemble those of someone who is drunk. If no action is taken, the person will lose consciousness and can go into a coma. Unfortunately some people do not experience good warnings of a hypo and can suddenly lose consciousness.

Research suggests that two thirds of people have no severe hypos at work in any one year. Of the one third who do, the impact on the workplace is marginal, entailing minimal time off. (See feature “Hypos in the Workplace” on Diabetes UK website.) Yet people are regularly dismissed purely because of assumptions that there is a safety risk.

People with diabetes are also more prone to viruses and infections and these may take longer to clear, as well as make the diabetes harder to manage during that period. Absences for apparently neutral reasons, therefore, may be disability-related.[55] There are also various complications, such as eye disease, or foot or leg ulcers.

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[55] For an illustration, see British Telecommunications PLC v Pousson UKEAT/0357/04.

The legal definition

Impairment

Physical

Day-to-day activities

It is hard to see how diabetes which requires treatment by insulin injections or tablets could not be covered by the legal definition of disability. Virtually every one of the listed day-to-day activities would be affected.

Medical treatment: As with all forms of disability, where any substantial adverse effect is avoided by measures taken to treat the diabetes, the test is the effect without such treatment. The position with diabetes which is purely diet-controlled is less clear. It is uncertain whether the effects of the diabetes would be considered "substantial" if they can be avoided purely by adhering to a correct diet. However, if this is on medical advice, then the effects should be measured as they would be if the worker was not adhering to the diet. (See "Managing the effects of an impairment" on p13.)

Long-term effect

Once it has developed, diabetes would be long-term.

Reasonable adjustments

Always ask the worker. A few jobs are barred to people on insulin and some others may be dangerous to someone with a history of severe hypos. In general, however, a person should be perfectly able to work normally if appropriate adjustments are made. Depending on the individual, these could include:

- Allowing food and drink at the workstation, to help regulate blood sugar.
- Allowing the worker time away from his/her desk so s/he can test sugar levels or make an injection.
- Timing between insulin injections and food ingestion can be crucial and the worker should be given flexibility as well as reliable breaks.
- A suitable location for blood testing and injecting, and somewhere to dispose of lances and needles.
- Avoiding variable shifts, particularly overnight, as these disrupt timing of meals and injections and provide irregular stress levels.

- Making an allowance regarding sickness absence, including general viruses and infections.

Adjustments may also be necessary for related impairments, eg Visual (see p129), Heart (see p96), neuropathy / nerve damage (see RSI, p119).

Real tribunal cases:
Tribunals have made these suggestions:

- Ensuring an estate agent had a fixed lunch break of at least half an hour, even though other staff had to be flexible over when they took their breaks because of the business of the office.
- Giving facilities for blood testing and injecting away from the worker's desk; allowing breaks to do so.[56]

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Diabetes UK has a good website at **www.diabetes.org.uk** Also informative is a website run by the West Suffolk Hospitals NHS Trust: DiabetesSuffolk.com at **www.diabetessuffolk.com**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Diabetes.html** has useful suggestions on its diabetes fact sheet.

[56] British Telecommunications PLC v Pousson UKEAT/0357/04 is a very good illustration.

DISFIGUREMENT

The charity Changing Faces estimates that over 1 million people in the UK have a disfigurement to the face, hands or body from many different causes. One in 111 people have a significant disfigurement to their face from birth, scars from accidents, cancer surgery, skin conditions and facial paralysis, eg caused by stroke, cleft lip and palate, to name just a few. Just the simple act of using public transport to get to work can be a daunting and awful experience due to staring, comments and sometimes even outright rudeness.

Unfortunately, a public attitude survey conducted in 2008 suggests that 9 out of 10 people have unconscious (or conscious) negative attitudes towards people with disfigurement. This can translate into considerable disadvantage at work.

The Legal Definition

Impairment

Most obviously physical, but it can be accompanied by lack of confidence and self-esteem, which can lead to depression (a mental impairment).

Day-to-day activities

Schedule 1 para 3(1) of the DDA says that a severe disfigurement is to be treated as having substantial adverse effect on a person's ability to carry out day-to-day activities. The *Guidance* at para B21 says that disfigurements include scars, birthmarks, limb and posture, restricted bodily development and skin diseases. The *Guidance* says that whether the disfigurement is 'severe' will be a matter of degree and it may be relevant to take account of where the disfigurement is, eg on the back as opposed to on the face. Presumably this depends on the nature of the job and parts of the body revealed.

This viewpoint seems to focus on the likely impact of the impairment on others – but what can appear severe to one person may not to someone else, according to personal experience and knowledge. Changing Faces notes that the severity of a disfigurement does not correlate with the amount of distress experienced by the person with it. Something apparently minor to others may affect self-esteem and disfigurements hidden by clothing may nevertheless cause emotional distress.

It is only the disfigurement aspect of the worker's impairment which is treated as having substantial adverse effect. In one case, a worker was rejected from an

ambulance person post because of his severe psoriasis. The problem was not the cosmetic aspects of his impairment, but that there would be a cross-infection hazard for patients and himself. This aspect was not automatically protected in the same way. (*Cosgrove v Northern Ireland Ambulance Service* [2006] NICA 44.)

Tattoos and decorative body piercings are explicitly excluded from the definition of disability.

Long-term effect

This depends on the nature of the impairment.

Reasonable adjustments

The most important adjustment is for employers to ensure that disfigurement is considered and included in relevant policies and to change the culture of the workplace to ensure there is no harassment or teasing and that workplace decisions, eg as to recruitment, promotion, client assignments, are not consciously or unconsciously based on physical appearance. In some cases, flexibility regarding dress codes will be appropriate if requested by workers. But there is a fine line between allowing a self-conscious employee to dress in a way s/he feels comfortable or, for example, avoid public speaking, and imposing such requirements on a worker. Changing Faces can work with both the employee and the employer to develop appropriate support and strategies ensuring that the employee with the disfigurement can do their job with confidence and to the best of their ability. For example a swimming instructor with a disfigurement on their back may need reasonable adjustments such as awareness training for colleagues, whilst someone with a facial disfigurement in a customer facing role may need a strategy in place if a customer refuses to be served by them as a reasonable adjustment.

Sources of further information

Changing Faces has a useful website at **www.changingfaces.org.uk** and should be a good source of advice, or contact them directly on 0845 4500 275. They also have self help literature which is free to those with a disfigurement.

DYSLEXIA

The British Dyslexia Association says around 4% of the population is severely dyslexic and a further 6% have mild to moderate dyslexia. This means up to 2.9 million workers may be affected.

There is no universally accepted definition of dyslexia, although it is a widely recognised condition, which is included in the World Health Organisation's International Classification of Diseases. Essentially, it is a neurological condition which affects the way the brain processes information and causes specific difficulty in writing, reading and spelling. Numeracy, verbal and listening skills, organisational and other non-verbal skills may be affected. The worker may have difficulties with, for example, sustained concentration, organising activities, expressing ideas clearly, presenting thoughts succinctly, keeping track of appointments, reading maps, remembering phone numbers, completing forms, finding his/her way around a strange place, remembering where things have been put, reading time-tables, reading recipes, writing letters or cheques, remembering messages.

It is possible that the worker will have been diagnosed as dyslexic while at school and may have been statemented at that time, ie received a statement of Special Educational Needs. This may not be enough for the tribunal, but it will be very helpful.

The British Dyslexia Association provides an "adult dyslexia checklist" as a first self-diagnosing step. For a formal diagnosis of dyslexia, there are screening tests and full assessments which can be undertaken by specialists. If you obtain a medical report for the tribunal, it is likely that your expert will carry out some of the recognised tests.

The legal definition

Impairment

Mental

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)

The original *Guidance* said severe dyslexia would clearly be covered by the definition of "disability". Also, the introductory paragraph of D26 seems to fit

dyslexia perfectly. Speech is less obviously affected by dyslexia, but it could apply. Paragraph D25 of the *Guidance* says account should be taken of how far a person is able to understand someone else speaking normally, and gives these examples of substantial adverse effect:

- Difficulty giving clear basic instructions orally to colleagues or providers of a service.
- Difficulty asking specific questions to clarify instructions.
- Taking longer someone who does not have an impairment to say things.

Paragraph D26 gives these examples:

- Inability to fill in a long detailed technical document would not in itself be significant.
- Inability to read at faster than normal speed, or minor problems with writing or spelling are not a substantial adverse effect. Persistent and significant difficulty with reading or in remembering the spelling and meaning of words in common usage, would be substantial.
- Inability to concentrate over several hours is not an example of substantial adverse effect. This suggests that inability to concentrate for shorter periods may be an indication.

Depending on the circumstances, you could ask the worker whether s/he:

- Takes longer than average to read a document.
- Finds it hard to remember what s/he has just read.
- Has difficulty concentrating.
- Finds forms confusing.
- Has difficulty writing a cheque.
- Finds it hard to take telephone messages and pass them on correctly.
- Finds it hard to do mental arithmetic, eg adding up change in a shop.
- Mixes up numbers when s/he dials or notes down a telephone number.
- Mixes up bus numbers, eg reversing 28 and 82.
- Mixes up dates and misses appointments.
- Finds it hard to follow a series of verbal instructions or a long explanation.
- Needs longer than average to pick up new procedures.
- Finds it hard to take written notes of a meeting.
- Has difficulties banking, shopping or using a cashpoint.

It is relevant if s/he can do these tasks but only at a slower than average pace (*Guidance*, D11), or with great effort causing tiredness, or only if s/he is not under stress (B10).

If s/he can carry out many of these activities but only with mechanical aids such as computers, dictionaries, specialist software and dictaphones, the effect of the dyslexia without such adjustments should be assessed.

Long-term effect

Although people may reduce the effect of their dyslexia over many years by training and self-learning, it is highly unlikely that the effect would last less than 12 months.

Reasonable adjustments

Discuss options with the worker. Depending on the nature and severity of his/her dyslexia, there are numerous adjustments which could be made including:

- Provision of assistance.
- Using clear typefaces and pastel or matt paper for documents and application forms
- Sending application forms on e-mail or disc.
- Notifying interview questions in advance in the waiting room.
- Allowing time to read and complete tasks.
- Providing dictionaries and electronic spell-checks, or colleagues to proof-read documents.
- Giving verbal or written instructions according to which is easiest.
- Using voice-mail rather than written memos.
- Communicating verbal instructions slowly and in a quiet location.
- Recording important instructions on tape.
- Offering help with prioritisation of tasks.
- Providing a quiet work environment without distractions.
- Providing appropriate technology, eg computer with pastel background to screen.
- Support software including voice-activated software, hand-held tape recorder, digital camera, portable writing aids, scanning pen; talking calculator.
- Allowing the worker to be accompanied to meetings and/or providing notes of content in advance and minutes afterwards.

The Code gives these examples:

- Allowing more time for written tests. (Code, 5.3)
- Rather than handing out policy documents by way of induction, talking them through with the worker. (Code, 8.7)
- Not requiring written qualifications for a post, when general ability can be measured in a different way. (Code, 7.10)

Some adjustments relevant to Visual Impairment (p129) may be helpful.

Real tribunal cases:

Tribunals have made these suggestions:

- Providing written feedback on the reasons for a worker's lack of success on a job application or allowing her to be accompanied to verbal feedback, even

though the normal method of feedback is to attend a meeting unaccompanied.
- Supply of voice recognition software, by a large company which had purchased an expensive computer system.
- Speaking directly to the worker's disabilities adviser at the job centre.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

The British Dyslexia Association, tel: 0118 966 8271, web:
www.bdadyslexia.org.uk
The website includes a description of the effects of dyslexia plus the adult (self-diagnosis) checklist. It also has a guide for employers including a detailed list of possible adjustments and descriptions of available technology.

An American site, Dyslexia Adults Link at **www.dyslexia-adults.com** has many ideas for reasonable accommodation on its "in the workplace" page.

For a related condition, see the website of the Dyspraxia Foundation:
www.dyspraxiafoundation.org.uk

The TUC has produced a useful guide for unions, "Dyslexia in the workplace: a guide for unions" which is available from the TUC's publications department (stock code ER 252). To order, search at
www.tuc.org.uk/publications/srchForm.cfm
It contains useful checklists for identifying the impact of dyslexia on day-to-day activities; workplace difficulties; and ideas for reasonable adjustments. It also contains a small section on dyspraxia.

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 (if you call from home)
or 01926 312847 (if you call from work) and website: **www.abilitynet.org.uk**

EPILEPSY

According to the British Epilepsy Association, one in 130 people in the UK has epilepsy – around 420,000 people altogether. There are many myths, fears and misconceptions around its effects. In general, one would expect the law to accept that epilepsy fell within the definition of disability under the DDA. However, experience suggests that employers may require a worker to prove that his/her particular condition falls within the DDA.

There are many different types of seizure and individuals are affected very differently. Most people are familiar with “tonic-clonic” (“grand mal”) seizures, where the person loses consciousness, falls to the ground, and has jerking movements for a couple of minutes. However, other forms of seizure can have quite different symptoms, eg “atonic” (sudden loss of muscle tone causing the person to fall), “myoclonic” (brief forceful jerks, which may not lead to the person falling) or “simple partial”, where the person remains conscious but suffers disturbances to hearing, vision, smell or taste, or other symptoms which are often not apparent to onlookers. In some people, seizures may only occur at night. Under the law, people with any form of epilepsy may well be disqualified from driving on a temporary or permanent basis.

Anti-epileptic medication may reduce a person’s seizures significantly or remove them altogether. In such a case, the effects on a person if s/he were not taking the medication should be assessed.

The legal definition

Impairment

Physical

Day-to-day activities

The day-to-day activities most likely to be affected during a seizure will depend on its type. Loss of consciousness would affect all the listed activities. Where the worker retains consciousness, activities which may be affected could include:

- ☑ Mobility (*Guidance*, D20)
- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Physical co-ordination (*Guidance*, D22)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)
- ☑ Memory or ability to concentrate learn or understand (*Guidance*, D26)
- ☑ Perception of the risk of physical danger (*Guidance*, D27)

- “Mobility” could be affected by falling to the ground or inability to drive.
- Loss of muscle tone or knocking over drinks due to jerking, could affect “Manual dexterity”, “Physical co-ordination” or “Ability to lift, carry or otherwise move everyday objects”.
- Interference with vision or auditory hallucinations would affect “Speech, hearing or eyesight”.
- Confusion or sense of déjà vu would affect “Memory or ability to learn concentrate or understand”.
- Wandering around without being aware of doing so could affect “Perception of the risk of physical danger”.

It is uncertain what number and nature of seizures would amount to “substantial” adverse effect under the law. Paragraph D26 of the *Guidance* simply notes that intermittent loss of consciousness and associated confused behaviour may amount to substantial adverse effect. Although most seizures have severe effects when they occur, they tend to be very short (just a few minutes) and the after effects may not be very lengthy. If a worker without medication would have only one such seizure in a year, is this enough to amount to “substantial adverse effect”? Arguably, yes, because it is the potential consequences of a seizure which may occur at a random time which causes longer lasting substantial adverse effects, such as the need for certain safety precautions and prohibitions on driving.

Questions which may be relevant to check substantial adverse effect, depending on circumstances and whether the worker remains conscious during seizures:

- Whether the worker has seizures. If so, when, how often, what are the symptoms and effects, and how long do the effects last, both during a seizure and afterwards?
- Whether the worker is taking medication. If so, when did s/he start doing so? What has happened and what would happen if s/he stopped taking the medication?
- Is there anything which specifically triggers seizures?
- Does s/he get any forewarning?
- Does s/he suffer any interference with her vision, hearing, thoughts or concentration?
- If suffering myoclonic seizures, do these cause the worker to spill drinks and have similar accidents?
- Has the DVLA disqualified him/her from driving? During the day or at night only?
- What safety precautions does s/he take at home and in his/her everyday life?

Medical treatment: The worker is likely to be taking controlling medication. If so, the test is the effect on him/her if s/he were not taking such medication.

Long-term effect

Normally epilepsy would satisfy this requirement, ie have an adverse effect for at least 12 months. To the extent that seizures are intermittent, this would be covered by the rule on recurring effects (see p11 and *Guidance*, C4 – C5). Occasionally, however, a person can undergo a one-off seizure (not necessarily epileptic), eg induced by drugs or an accident.

See also “episodic effects” (p12 above).

Reasonable adjustments

As always, adjustments depend on the nature and severity of the disability and the worker should be consulted. Employers need to provide safeguards against certain dangers for those whose seizures are uncontrolled, eg:

- Guards on machinery.
- Protection for working at heights.
- Chairs with arm rests and no casters.
- Rubber mats on the floor.
- Ensuring the worker does not work alone at isolated sites.

If the worker has photo-sensitivity:

- Avoiding fluorescent lights.
- Anti-glare guard on the computer and a flicker-free monitor.

Where medication causes sleepiness or difficulty in waking in the mornings, employers should consider adjusting hours and allowing breaks.

Certain jobs are subject to special rules or restrictions on the employment of people with epilepsy, eg train, ambulance and taxi drivers; nurses; teachers (of certain subjects).

Real tribunal cases:

Tribunals have made these suggestions:

- Allowing later shifts or more flexible hours where the worker finds it difficult to get up in the morning.
- Avoiding rotating shifts where disruption to the worker’s sleeping patterns would have adverse effect.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

British Epilepsy Association on **www.epilepsy.org.uk**

The site includes a detailed explanation of many different forms of seizure; the rules regarding driving; a list of occupations where there are statutory restrictions on employing people with epilepsy.

Ability Net is a charity providing free information and advice on computer technology for people with disabilities, including those with photo-sensitive epilepsy. Tel: Freephone 0800 269545 (if you call from home)
or 01926 312847 (if you call from work) and website: **www.abilitynet.org.uk**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Epilepsy.html** has useful suggestions on its epilepsy fact sheet.

HEARING IMPAIRMENT

The RNID estimates that there are about 3.5 million people of working age who are deaf or hard of hearing, of whom 160,000 are severely or profoundly deaf. There are four levels of deafness, measured by the level of decibels which can be heard by a person's better ear: mild, moderate, severe and profound. People with moderate deafness will probably need a hearing aid and those with severe or profound deafness will usually rely on lip reading or sign language. Tinnitus is a buzzing, ringing or other noise heard in the ear or head. It can be temporary or permanent and vary in its severity.

The term "prelingually deaf" is used for those who were born deaf or lost their hearing in early childhood, before they acquired language. People who are prelingually deaf are the most likely to use sign language. BSL (British Sign Language) is the preferred language of approximately 50,000 people in the UK, but deaf people from different countries will have their own sign language. Other deaf people may use Sign Supported English or may not be able to sign at all.

The Labour Force Survey in 2001 showed that only 68.1% of people of working age who had difficulty in hearing were in employment compared with 81.2% of people who were not deaf, hard of hearing or otherwise disabled.

The legal definition

Impairment

Physical

Day-to-day activities

All activities should be checked, but most obviously affected are:

- ☑ Speech, hearing or eyesight (*Guidance*, D25)
- ☑ Ability to learn, concentrate or understand (*Guidance*, D26)

The most obviously affected activity would be speech or hearing in "Speech, hearing or eyesight". Whether a worker is covered by the definition will depend on the degree of his/her deafness. Tinnitus, depending on its severity, may also affect ability to concentrate.

Under the *Guidance*, it is likely to be considered a substantial adverse effect if the worker has difficulty hearing someone talking at a normal sound level in a moderately noisy environment. This is as opposed to in a very noisy place, eg a factory floor, pop concert or busy main road. It would also be a substantial effect if the worker cannot hear and understand another person speaking clearly on the telephone.

Medical treatment: Where the worker's hearing is improved by a hearing aid or cochlear implant, the test is the level of his/her hearing without such aid.

Long-term effect

Deafness is generally likely to have a long-term effect but some conditions, eg tinnitus, or hearing loss caused by infection, loud noise or earwax, may only be temporary.

Reasonable adjustments

Always ask the worker. Possible adjustments, depending on the worker's level of deafness, whether s/he uses BSL and his/her level of English:

- Providing an interpreter / signer (BSL interpreters need to be booked well ahead).
- In meetings or training, good positioning for worker and interpreter. Breaks for interpreters.
- For shorter or less important messages, communication through written notes or e-mail.
- In meetings, provision of a speech to text operator (the operator types into a computer; the deaf person reads off the screen).
- Speech recognition software (software is trained to recognise speaker's voice and turn words into computer text).
- For lip-reading in meetings, good lighting and positioning of speakers where they can easily be seen (a round table is best).
- Applying good practice principles also to disciplinary meetings.
- Assistive listening devices, eg an induction loop or infra red system, in the office and training or meeting rooms.
- Portable induction loops for training outside the office.
- Good lighting in the office and meeting rooms (deaf people rely on visual clues).
- Good acoustics in the office; reduction of background noise from machinery, traffic or other people; thick carpeting.
- Positioning worker in office where s/he can see colleagues and not in isolated position, eg with back to door.
- Allowing more time for communication, meetings, tests.
- Giving information in advance of meetings, training or induction. Providing minutes afterwards.
- Telephone: provide amplification through the telephone; text phones; registering with Typetalk (a telephone relay service run by the RNID and funded by BT (for info, call 0800 500 888 (text) or 0800 7311 888 (voice)).
- Use of plain English.
- Deaf awareness training to colleagues and tutors of training courses.

- Offering basic sign language training for any colleagues who are interested.
- Explaining fire procedures; trained fire officer; visual alarm or vibrating pager.

The Code gives these examples:

- Avoiding hard flooring as it is noisy. (Code, 5.9)
- An adapted telephone (see above for details). (Code, 5.18)
- Sub-titles on training videos. (Code, 8.8)
- When interviewing a worker who can lip-read, interviewer sitting facing the worker in good light, speaking clearly, repeating questions if necessary. If the worker uses BSL, arranging an interpreter and more time for the interview. (Code, 7.22)
- Training employees on conducting meetings in a way which enables the worker to participate effectively. (Code, 5.18)

Real tribunal cases:

- In one case, a tribunal found failure to make reasonable adjustment where an employer did not provide a profoundly deaf worker with an interpreter throughout his disciplinary and review hearings.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

The tribunal hearing:

In a case reported by the former Disability Rights Commission in its Legal Bulletin[57], a tribunal made these adjustments during the hearing:

- The worker was allowed to use his own regular lip-speaker as an interpreter. The ET paid the fee.
- A palentypist was used for the expert witness, who was also hearing impaired. A palentypist is a stenographer who types on a keyboard during the hearing so that the worker and his witness could read the evidence off a computer screen.
- Breaks were taken every 45 – 60 minutes for the lip-speaker and palentypist.
- An audio-loop was installed in the tribunal room and the same room used throughout.
- Where the worker had difficulty answering some of the long complicated questions put to him in cross-examination, the chair suggested these were broken down into shorter questions.

RNID recently researched employers' attitudes towards deaf people. "Opportunity blocked: The employment experiences of deaf and hard of hearing people" is available at **www.rnid.org.uk/VirtualContent/84923/2476_Opportunity_Blocked1.pdf**

[57] Issue 3, December 2002.

The Employment Tribunal Service has produced a leaflet, “Guidance for tribunal users who are deaf or hard of hearing”. For details, contact the ETS enquiry line on 08457 959 775 or minicom 08457 573 722.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

The RNID has an excellent website at **www.rnid.org.uk**. There is a very practical “Don’t Panic Pack”. It is aimed at employers, but full of ideas useful for workers. It is available at
www.rnid.org.uk/VirtualContent/85015/panic_pack.pdf
Although an American site, the Job Accomodation Network at **www.jan.wvu.edu/media/Hearing.html** has a detailed and useful fact sheet.

HEART IMPAIRMENT

There are many different types of heart condition and the symptoms will vary in each. The British Heart Foundation says almost 1 in 8 people have been diagnosed with a disease of the heart or circulatory system.

The legal definition

Impairment

Physical

Day-to-day activities

All activities should be checked, but most obviously:

- ☑ Mobility (*Guidance*, D20)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24)

Unfortunately, heart disease often does not fit easily into the artificial definition of disability. In severe cases, a person may find "Mobility" and "Ability to lift, carry or otherwise move everyday objects" substantially affected. But someone who has had a heart attack and is at a greater risk of another attack, may nevertheless not demonstrate a *substantial* adverse effect on those activities.

Questions for the worker could include:

- how far s/he can walk or use stairs, at what pace, and whether it is with breathlessness; whether s/he finds public transport difficulties
- whether s/he needs to sit down and rest after certain activities
- how often s/he needs to take any emergency spray and in what circumstances
- can s/he play with children
- does s/he get very tired
- what medication is s/he taking and how does s/he think s/he would feel without it?

Remember that if the worker has a progressive disease, s/he will be protected even if the effects are not initially substantial. On the other hand, someone who has had a heart attack may have suffered the worst effects in the first 3 – 6 months and be improving. The timing of the discrimination will therefore be important.

Medical treatment: A worker will usually be on preventative as well as symptom-relieving medication. The test is the effect on the worker were s/he not taking the medication. This can be hard to prove as consultant cardiologists tend to be

reluctant to speculate on the particular person's capabilities if s/he were not taking the medication.

Long-term effect

The effects are likely to be long-term if there was no medical treatment.

Reasonable adjustments

Always consult the worker, but these may include reducing stress, physical exertion or tiredness and could be similar in some respects to those appropriate to someone suffering from fatigue, breathing difficulties, mobility or lifting difficulties. For ideas, see suggestions at pages 53 (Asthma), 59 (Back) and 93 (ME).

See also general list of adjustments in DDA (p26) and further suggestions at p33.

Sources of further information

There are specific suggestions regarding reasonable adjustments in the "Heart conditions" fact sheet on the American website, Job Accommodation Network at **www.jan.wvu.edu/media/Heart.html**

HIV / AIDS

It is estimated that 73,000 adults were living with HIV in the UK at the end of 2006. Of these, a third were unaware of their infection. Since 1999, heterosexually acquired HIV has led to a steep increase in the number of HIV diagnoses. There have been over 23,000 diagnoses of AIDS.

HIV attacks the body's immune system, making it hard for people to fight off infections and exposing them to serious illnesses. The effects can be weight loss, fatigue and weakness, respiratory impairment, light sensitivity or visual impairment, difficulty concentrating, chronic diarrhoea, the side-effects of medication, depression and psychological impact.

The legal definition

HIV is deemed a disability as soon as it is diagnosed.

Reasonable adjustments

Always consult the worker. Medication has improved the health of people living with HIV enormously, but the side-effects of the drugs also have to be dealt with. Some people have to take a large number of pills daily at specific times and accompanied by dietary restrictions. Adjustments, depending on the nature and severity of the worker's condition, could include:

- Allowing flexi-time or the worker to start later.
- Ensuring water is available.
- Providing easy access to food or kitchens and being flexible over eating times.
- Providing safe and confidential places for storage of medication.
- Allowing the worker time off for medical appointments or if unwell.
- Notifying the worker in advance of changes to routine, eg training days, travel or overtime requirements.
- Nearby access to toilets (medication can cause chronic diarrhea).
- Ergonomic chairs if severe weight loss.
- Time-off for counselling; allowing telephone calls to emotional supports.
- For weakness or fatigue: reduced hours, rest areas, breaks, reduced lifting and walking.
- For difficulty in concentration, see adjustments suggested for Dyslexia (p84).
- For any visual impairment or light sensitivity, see adjustments suggested for Visual impairment (p129) or Migraine (p112).

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Information is available from AVERT, an international AIDS charity, on **www.avert.org**

You can buy a briefing paper from the Employers' Forum on Disability at a low price ("Employment adjustments for people with HIV") through its website at **www.efd.org.uk/publications/order-publications**

The National AIDS Trust have produced a resource pack – "HIV@work: addressing stigma and discrimination" – find by search on google.

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/HIV.html** has useful suggestions on its HIV fact sheet.

INFLAMMATORY BOWEL DISEASE

Crohn's disease and ulcerative colitis are two different forms of inflammatory bowel disease (IBD). They are both chronic diseases affecting the digestive tract. About 1 in 400 people in the UK are affected by IBD. The main symptoms are abdominal pain, urgent diarrhoea, tiredness and weight loss. It is sometimes associated with fever, arthritis and inflammation of eyes, mouth or skin. There can be long periods of remission with no symptoms, and unpredictable relapses when symptoms flare up to varying extents. Treatment is mainly by drugs and occasionally by surgery, but there is no permanent cure (except for ulcerative colitis, if the colon is surgically removed).

Irritable bowel syndrome (IBS) is a different condition altogether and not within the heading of IBD. However, certain symptoms are similar, eg a need to rush to the toilet. It is more common, but far less serious.

The legal definition

Impairment
Physical

Day-to-day activities
All activities should be checked, but potentially affected are:

- ☑ Continence (*Guidance*, D23)
- ☑ Mobility (*Guidance*, D20)
- ☑ Memory or ability to learn concentrate or understand (*Guidance*, D26)

Most obviously, IBD and, if sufficiently severe, IBS, would have a severe effect on continence. However, the other activities may be affected by severe pain or tiredness.

Medical treatment: If the worker is controlling the effects by medication, the test is the adverse effect if s/he were not taking the medication.

Long-term effect
Once onset, IBD is generally a permanent condition. However, the effects tend to be fluctuating with periods of remission. Since the substantial adverse effect is likely to recur, it should be considered long-term.

Reasonable adjustments

Where continence is an issue, quick and easy access to a toilet is important. The usual adjustments should be made in respect of pain and tiredness, eg:

- Breaks.
- Shorter or flexible hours.
- Avoiding rush hour travel.
- Relocation of office to nearer home.
- Home working.

Real tribunal cases:

- In several cases, tribunals have suggested relocation to an office nearer the worker's home would be a reasonable adjustment.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

The tribunal hearing:

Appropriate adjustments could be:

- Toilet breaks as and when requested by the worker. Not asking the worker if s/he can "hang on" for a few more minutes to finish off a section of evidence.
- Shorter hearing days.
- If the hearing is longer than one day, listing these days separately. It may be hard for a worker to sustain more than one day successively since, eg, s/he may refrain from eating to avoid needing to go to the toilet.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

LEARNING DISABILITY OR LEARNING DIFFICULTIES

People with learning disability (some prefer to say “learning difficulties”) are one of the most marginalised groups in society. Although a small proportion are successfully employed in a wide range of jobs, the vast majority have a level of unemployment below that of other disabled people. The government is keen to address the difficulty people with learning disability have in finding and keeping jobs.

There are no reliable statistics, but it is estimated that broadly 1.5 million people have learning disability in the UK, of whom approximately 300,000 have severe learning disability.

Learning disability is not a mental illness. It is a life-long condition acquired before, during or soon after birth, which affects intellectual development. The World Health Organisation defines learning disability as “a state of arrested or incomplete development of mind”, entailing a significant impairment of intellectual functioning or adaptive/social functioning. As with most disabilities, learning disability can be mild, moderate or severe.

People with learning disability generally find it harder to understand and remember new or complicated information, to generalise any learning to new situations, and to learn new skills, whether practical or social, eg communication or self-care. Some people may have difficulty speaking or be unable to read. Those with more severe difficulties may need help in getting dressed or making a cup of tea.

It is possible that the worker will have received a statement of Special Educational Needs while at school (sometimes referred to colloquially as being “statemented”). This may not be enough for the tribunal, but it will be very helpful.

The legal definition

Impairment

Learning difficulty is a recognised mental impairment, although it will need to be proved by expert evidence.[58]

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Speech, hearing or eyesight (*Guidance*, D25)
- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)

[58] Dunham v Ashford Windows [2005] IRLR 608, EAT, p48, n47 above.

- ☑ Perception of the risk of physical danger (*Guidance*, D27)
- ☑ Mobility (*Guidance*, D20)

The *Guidance* suggests the following may amount to substantial adverse effect:

- Under paragraph D20: difficulty going out of doors unaccompanied because of often getting lost.
- Under paragraph D25: inability to ask specific questions to clarify instructions or to give clear instructions; taking significantly longer than usual to say things.
- Under paragraph D26: inability to adapt after a reasonable period to minor change in work routine or considerable difficulty in following a short sequence such as a simple recipe or a brief list of domestic tasks, but not inability to concentrate on a task requiring application over several hours. Account should be taken of the person's ability to remember his/her thoughts, plan a course of action and carry it out, take in new knowledge, or understand spoken or written instructions. This includes considering whether the person learns to do things significantly more slowly than is normal.

Note that inability to "understand" is not restricted to understanding information, knowledge or instructions, but includes understanding normal social interaction among people.[59]

Long-term effect

The effect will be long-term.

Reasonable adjustments

Discuss these with the worker and an appropriate helper or friend. Depending on the severity of the worker's disability, adjustments could include:

- ❑ Allowing assistance with completion of a job application form.
- ❑ Conducting the interview at a slow pace.
- ❑ Asking short direct rather than long hypothetical questions.
- ❑ Using practical rather than written tests.
- ❑ Offering a work trial as an alternative means of assessing ability.
- ❑ Providing training and ongoing support in new tasks.
- ❑ Adding tasks one at a time.
- ❑ Permitting low work hours, especially at first.
- ❑ Speaking slowly in plain jargon free English.
- ❑ Explaining procedures, eg for health and safety.
- ❑ Explaining significance and potential consequences of disciplinary hearings.
- ❑ Using graphics to assist understanding.

[59] Hewett v Motorola Ltd [2004] IRLR 545, EAT.

- Training co-workers on effective communication and support.

The Code gives these examples:

- Allowing the worker to take a friend from outside to any grievance or disciplinary meeting. (Code, 5.20; 8.26)
- Conducting a grievance meeting in a way which does not disadvantage or patronise the worker. (Code, 5.20)
- Allowing the worker to bring a supportive person to a job interview to assist in answering questions that are not part of the assessment itself. (Code, 7.22)
- Putting on longer and specially adapted induction training or allowing someone to sit with the worker on the induction training. (Code, 8.7)
- Giving extra training when changing the worker's role on any reorganisation. (Code, 8.18)

The tribunal hearing:

In two cases reported by the DRC in its Legal Bulletin[60], a court and a tribunal made adjustments before and during the hearing including:

- Putting a photograph of a legal officer at the head of each letter from the court, so it was clear who the letter came from.
- Writing letters with a simple language and structure.
- Letting the worker see the tribunal room one week before the hearing.
- Starting promptly to reduce anxiety.
- Going at a slow pace. Giving breaks when required.
- Ensuring questions were simple. Giving more time to answer. Letting the worker sit with a helper in the witness box to explain the questions.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Useful websites are Mencap at **www.mencap.org.uk**, the British Institute of Learning Disabilities at **www.bild.org.uk**, and the Foundation for People with Learning Disabilities at **www.learningdisabilities.org.uk**

Although aimed at employers, it is useful to look at "I want to work – a guide to employing people with a learning disability" - available on the Mencap website via a link on **www.mencap.org.uk/document.asp?id=4396&audGroup=&subjectLevel2=&subjectId=&sorter=1&origin=pageType&pageType=112&pageno=&searchPhrase=**

[60] Issue 3, December 2002

M.E. OR CHRONIC FATIGUE SYNDROME

ME (Myalgic encephalomyelitis) is also known as Chronic Fatigue Syndrome (CFS), although strictly speaking there are some slight differences between the two. Occasionally it may be diagnosed as Post Viral Fatigue Syndrome.

It is estimated that there are up to 240,000 people with CFS/ME in the UK. Historically there has been much scepticism about CFS/ME, and unfortunately some GPs still hold the view that it is all in the mind. However, the government has now recognised that CFS/ME is a “debilitating and distressing condition”.

It has been found that people with CFS/ME have abnormalities in the nervous and immune systems, although these abnormalities are not properly understood. CFS/ME is difficult to diagnose. Much of the diagnosis is based on identification of core symptoms persisting over 6 months and taking tests to rule out other conditions.

Symptoms are very variable and can be mild or severe. The most common symptoms are overwhelming and persistent fatigue following mental or physical activity (often a delayed reaction), muscle pain, inability to concentrate, problems organising thoughts, memory loss, sleep difficulties. Other symptoms may include dizziness, migraines, increased sensitivity to light and noise, digestive problems, irritable bowel syndrome, poor temperature control and feeling generally unwell. People with CFS/ME tend to have good days and bad days. Overdoing it on good days can worsen the symptoms. CFS/ME may also cause depression (see p74).

The legal definition

Impairment

CFS/ME is a physical and arguably also mental impairment. Given the controversies and difficulties regarding its diagnosis, it may be useful to rely on the principle established by the Court of Appeal in *McNicol v Balfour Beatty Rail Maintenance Ltd*.[61] This case establishes that an impairment can simply be the sum of its effects and it does not matter if the underlying illness cannot be identified or even if it is caused by psychological factors rather than any organic physical cause. However, it may be easier to prove the genuineness and severity of the effects if a doctor concretely diagnoses ME.

[61] [2002] IRLR 711, CA.

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Physical Co-ordination (*Guidance*, D22)
- ☑ Continence (*Guidance*, D23)
- ☑ Ability to lift, carry or otherwise move everyday objects (*Guidance*, D24)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)
- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)

- "Mobility" could be affected because of difficulty climbing stairs; inability to walk more than ½ mile; fainting; in severe case inability getting out of bed.
- Clumsiness could affect "Physical co-ordination".
- "Continence" could be affected by diarrhoea.
- "Ability to lift, carry or otherwise move everyday objects" could include inability to lift shopping.
- "Speech, hearing or eyesight" could cover inability to organise thoughts; blurred vision; tinnitis; photosensitivity.
- "Memory or ability to concentrate, learn or understand" would cover short-term memory loss; inability to pay attention or concentrate; exhaustion when holding a brief conversation.

It is relevant to take account of where a person can only do an activity with pain or fatigue (*Guidance*, D11). Effects of the environment should also be taken into account, ie if adverse effects depend on temperature, stress or other environmental conditions (*Guidance*, B10). The symptoms of CFS/ME can be exacerbated by infections, mental or physical stress, temperature extremes.

Note that although an impairment may not have a substantial effect on any one activity, taking together its effects on several activities together, it could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities. (*Guidance*, B4 - B5.)

Some useful examples from the *Guidance* of substantial adverse effect may be:

- Under D20: difficulty going up stairs or gradients; difficulty walking other than at a slow pace; inability to walk a short distance – but a mile would not be considered a short distance.
- Under D24: difficulty in carrying a moderately loaded tray steadily.
- Under D25: difficulty giving clear basic instructions orally; taking longer to say things.
- Under D26: it is relevant to take account of a person's ability to remember, to organise his/her thoughts, plan a course of action etc. Inability to concentrate on a task over several hours would not be a substantial effect,

but considerable difficulty in following a short sequence, eg a simple recipe or brief list of domestic tasks, would be substantial.

Long-term effect

The illness varies greatly in its duration but is highly unlikely to last less than one year. Some people may recover after 10 years. Others may never completely recover. ME/CFS can also occur in cycles with apparent recovery and then a relapse.

Reasonable adjustments

International research suggests that between 25 – 50% of people with CFS/ME are unable to maintain previously held employment, while substantial proportions of those who do maintain employment report decreased work performance. Nevertheless, as the severity of symptoms does vary, it is important to identify adjustments which will enable a certain proportion to continue in work. These could include:

- Reducing or changing working hours or allowing flexi-time.
- Working from home.
- Increased rest breaks and self-paced workload.
- Arrangement of workplace so less walking or physical exertion is necessary.
- Reduced stress.
- Memory aids, eg organisers and written job instructions.
- Minimised distractions.
- Controlled workplace temperature.
- Modified dress code.
- No fluorescent lighting; window blinds.
- See also adjustments relevant to Migraine (p112), Depression (p74), for some forms of muscle weakness, see RSI (p119).

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

Action for M.E. has an informative website from which you can download “All about M.E.: an introduction” via a link on **www.afme.org.uk/booklets.asp**

The ME Association also provides information on **www.meassociation.org.uk**

The Department of Health's website at **www.dh.gov.uk** contains details of the government's investment in the development of clinical services for CFS/ME.

The section on CFS/ME on the Job Accommodation Network website, even though an American site, is extremely useful:
www.jan.wvu.edu/media/employmentcfsfact.doc

MENTAL HEALTH ISSUES

The Mental Health Foundation says 1 in 4 people in the UK will experience some kind of mental health problem in the course of a year. A complete list of mental and behavioural disorders is given in the World Health Organisation's International Classification of Diseases (ICD-10). Depression and anxiety are the two most common forms of mental illness. It is estimated that 1 in 6 people will have depression at some point in their life. Clinical depression is dealt with in more detail at p74.

Mental health issues include:

- **Manic Depression** or **Bi-Polar Affective Disorder.** This is a mood disorder, where a person's mood swings from depression to euphoric. About 1 in 100 people have manic depression, but there is great variation in the pattern of mood swings and some people have long periods with no problems. Symptoms during the depression phase are as described on p74. Symptoms of the manic phase may include speeding up of thought and speech, inappropriate optimism, gross overestimation of personal ability, unrealistic plans and poor judgment. A person may experience hallucinations and delusions in both phases. Treatment can be by antidepressants, tranquillisers, sleeping pills and therapy.

- **Schizophrenia.** About 1 in 100 people have one episode of schizophrenia and two thirds of these have further episodes. During an episode, a person may lose touch with reality and experience delusions and visual or auditory hallucinations. An episode may last a few weeks. Longer-lasting symptoms include tiredness, lack of energy and loss of concentration. Treatment is usually by medication for lengthy periods. The drugs may have unpleasant side-effects.

- **Post-Traumatic Stress Disorder (PTSD).** This is a reaction to witnessing or experiencing a traumatic event, eg rape, sexual harassment, an accident or natural disaster. Common symptoms include flashbacks and nightmares, severe anxiety, poor sleep and depression. Counselling and anti-depressants are often prescribed.

- **Obsessive Compulsive Disorder (OCD).** This involves repetitive obsessional thoughts and compulsive behaviour to relieve anxiety, eg repeated washing to avoid germs or going back to check the oven is switched off when leaving the house. Other fears can include fear of making a mistake or behaving unacceptably or causing harm to someone else. Counselling and therapy is the usual treatment and the worker may also take medication.

- **Paranoid Personality Disorder.** Paranoia may be a symptom of another mental health problem or it may be considered a disorder in itself. Symptoms can include being very suspicious and misconstruing friendly or neutral behaviour as hostile, belief in conspiracy theories, extreme sensitivity to rejection, and holding grudges.

- **Panic Disorder.** Panic attacks cause extremely unpleasant physical sensations, including breathlessness, palpitations, dizziness and sweating. The person has an intense sensation of fear and sometimes feels they are going to die.

- **Agoraphobia.** See p58.

- **Seasonal affective disorder (SAD).** See p124.

The Legal Definition

Impairment

Mental.

It is no longer necessary to prove that a mental illness is clinically well-recognised. It is still helpful to identify a particular condition, but if this is difficult, adverse effects can in themselves amount to an impairment.[62]

Day-to-day activities

The list of activities in the DDA is not well suited to mental illness. The two activities most likely to apply are:

- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Perception of the risk of physical danger (*Guidance*, D27)

    - Paragraph D27 includes underestimation and overestimation of physical danger, including danger to well-being.
    - Where there are auditory or visual hallucinations or the worker is unable to communicate logically or at a normal pace or hold an ordinary social conversation, “Speech, hearing or eyesight” (*Guidance*, D25) may apply.
    - “Mobility” could be affected by panic attacks or Obsessive Compulsive Disorder.

The *Guidance* stresses that mental impairments can have physical effects (and vice versa). So, for example, a worker may be unable to sustain ordinary

[62] See McNicol v Balfour Beatty [2002] IRLR 711, CA and p10, n2 above.

activities under the heading of “Mobility” because s/he is tired, in a manic phase, hallucinating or obsessively washing his/her hands.

For a case where paranoid schizophrenia was obviously covered, see *Goodwin v The Patent Office.*[63]

Medical treatment: Where medication, counselling or therapy reduces the effect of an impairment, the test is the effect without such medical treatment.

Long-term effect

Many of these serious conditions are likely to be long-term, but this needs to be checked in each case. Some conditions will have periods of remission, but should be treated as long-term in that they are recurring.

Reasonable adjustments

Always consult with the individual regarding suitable adjustments. Many of the adjustments suitable to ordinary Depression (p74) will be suitable here.

Sources of further information

The Mental Health Foundation has an excellent website including fact-sheets on an A-Z of conditions at **www.mentalhealth.org.uk**

The Job Accomodation Network, an American website, provides a very useful fact sheet on accomodating people with Post-Traumatic Stress Syndrome at **www.jan.wvu.edu/media/ptsd.html**

The TUC’s ‘Representing and supporting members with mental health problems at work: Guidance for trade union representatives’ is available at **www.tuc.org.uk/extras/mentalhealth.pdf**

[63] [1999] IRLR 4, EAT.

MIGRAINE

The Migraine Trust says that nearly 6 million people in the UK suffer from migraine and estimates that each working day, up to 90,000 people are absent from work or school due to migraine. In a 2002 report, the World Health Organisation ranked migraine amongst the world's top 20 disabling conditions. Yet migraine frequently is not taken seriously.

Migraines are not ordinary headaches. Migraine is a condition of recurring headaches of a particular kind. There are often other symptoms, eg sensitivity to light and noise, eyesight changes, lethargy and nausea. About 15% of migraine sufferers have migraine with "aura", ie neurological symptoms such as changes in sight (zigzags, dark spots etc), disturbances to speech and hearing or, more rarely, partial paralysis. Migraine attacks usually last one or two days.

The legal definition

Impairment

Physical

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Memory or ability to concentrate, learn or understand (*Guidance*, D26)
- ☑ Mobility (*Guidance*, D20)
- ☑ Physical coordination (*Guidance*, D22)
- ☑ Speech, hearing or eyesight (*Guidance*, D25)

- Intense throbbing headache interferes with "Memory or ability to concentrate, learn or understand".
- "Mobility" is affected by dizziness; vertigo; having to go to bed.
- Dizziness or numbness in hands can affect "Physical co-ordination".
- "Speech, hearing or eyesight" can be affected by sensitivity to light and noise; interference with vision; slurred speech; inability to remember words.

Whether the effect is "substantial" probably depends on the frequency and severity of the migraines. Such is the effect of a severe headache on concentration, however, it is hard to see how the effect would not be substantial. Regarding frequency, a survey of 4754 migraine suffers conducted by the Migraine Trust in 2004 found only 30% suffered them infrequently. Of the remainder, 35% had monthly migraines, 27% suffered them weekly and 8% daily.

Questions to check substantial adverse effect, depending on circumstances:

- Symptoms of migraine attack?
- During an attack, does the worker have to go to bed?
- During an attack, is the worker able to read, watch television, concentrate, travel?
- Frequency of attack?
- Nature of medication taken by the worker and its effect on the symptoms?

See also “episodic effects” (p12 above).

Medical treatment: The worker may take pain relief when a migraine occurs or ongoing medication to prevent attacks. As always, where medication reduces the effect of the migraine, the test is the effect without medication.

Long-term effect

Migraines are intermittent, but would usually be covered by the provision on recurrent conditions, except where they occur at extremely infrequent intervals.

Reasonable adjustments

The difficulty with migraines is their unpredictability. Reasonable adjustments may be either to prevent attacks or to enable workers with less incapacitating migraine to work during attacks. Always ask the individual, but examples of adjustments could be:

- Time off (paid or unpaid) or flexible hours.
- Home working during an attack (sometimes it is the travel to work which is unmanageable).
- No fluorescent lighting.
- Computer glare guards.
- Reduced visual or auditory distraction; an environmental sound machine to block out noise.
- Avoiding any identified trigger factors at work (long working hours without regular food breaks; night working; fan heaters).
- Allowing food at the work station.

The Code gives this example:

- Keeping the worker off night shifts if these trigger migraines, even if other workers do not want to work night shifts for reasons unrelated to disability. (Code, 5.42)

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

The Migraine Trust is very informative. It has a newsletter and website on **www.migrainetrust.org** and tel: 020 7436 1336 or (helpline) 020 7436 2880. There is an information pack, 'Working with Migraine' including tips for migraine sufferers at work and best practice guidance for employers, available as a free download via a link on **www.migrainetrust.org/C2B/document_tree/ViewADocument.asp?ID=135&CatID=93**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Migraine.html** has useful suggestions on its migraine fact sheet.

MOBILITY IMPAIRMENT

Mobility impairment can be due to leg or foot impairment, general muscular weakness, illness or injury. People may not need an aid or may use an aid some or all of the time, eg a stick, crutches or a wheelchair. Depending on the reason for the mobility impairment, a person may have other impairments. A wheelchair user may have full, partial or no use of his/her upper limbs.

The legal definition

Impairment

Physical

Day-to-day activities

All the listed activities should be checked, as the reason the worker has a mobility impairment may be due to a variety of different underlying conditions. Most likely to be affected would be:

- ☑ Mobility (*Guidance*, D20)
- ☑ Ability to lift, carry or move everyday objects (*Guidance*, D24)

Medical treatment: Where a wheelchair, stick or crutches enable a worker to move around, the test is his/her mobility were s/he not using such aids.

Long-term effect

The length of the effect will depend on the reason for the impairment.

Reasonable adjustments

Appropriate adjustments will depend very much on the nature of the impairment and the individual should be consulted. Possibilities could include:

- ❑ Wheelchair accessible toilets. Handrails in toilets.
- ❑ Non-slip grips on stairs.
- ❑ Accessible routes between office and car park, toilets, coffee machine, colleagues.
- ❑ Location of office, meetings, training on ground floor or with lifts or ramps.
- ❑ Corridors, hallways, reception areas and walking routes with sufficient space and obstruction free.
- ❑ Where the worker uses lifts, establishing safe fire evacuation procedures.

- Reduction of need to carry files or heavy objects around, eg by better lay-out, mechanisation, computerisation, assistance of an unskilled worker to lift and move.
- Adjusting office layout – height adjustable desk; accessibility of files, equipment, photcopier, coffee machine from a seated position.
- If restricted use of upper limbs – automatic stapler; writing aids; voice-activated telephone or head-set. See also adjustments suggested for RSI (p119).

The Code gives these examples:

- Widened doorways; ramps for wheelchair users. (Code, 5.18)
- Relocating light switches, door handles and shelves within reach. (Code, 5.18)
- Designated car parking space close to the office, even if this is normally reserved for senior managers. (Code, 5.8)

Real tribunal cases:

A tribunal said the following adjustments should be made for a clerical worker who used a wheelchair and had restricted use of his arms:

- Desktop photocopier.
- Computerising his paperwork or assigning an unskilled person to lift and move his files.
- Ground-floor working or reassurance on the safety of the lift.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

The American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/Wheelchair.html** has a fact sheet on adjustments for office workers who use wheelchairs.

A useful site concerning plantar fasciitis, a foot impairment, is on **www.heelspurs.com/index.html**

MULTIPLE SCLEROSIS

Multiple Sclerosis (MS) affects approximately 85,000 people in the UK. It is a complex neurological disorder affecting the central nervous system. Potentially it affects a whole range of physical or mental functions, but most people only experience a few aspects.

Possible symptoms are muscle weakness, most commonly in the legs, spasms or tremor, dizziness and balance difficulties, pain from poor posture or positioning, visual disturbance, speech disorders, needing to go to the toilet frequently and urgently, severe fatigue, pain, problems with short-term memory and concentration. Symptoms vary in their severity and duration, and can be exacerbated by heat, exercise (raising body temperature), stress and overwork. The symptoms of MS come and go and it can be in remission for very long periods.

The Legal Definition

MS is now deemed a disability on diagnosis. Older case law, which suggests that MS may not always be covered, can be disregarded.[64]

Reasonable adjustments

Always consult the worker. Depending on the nature of the worker's symptoms:

- Adjustment of hours to avoid rush-hour travelling.
- Reduction of hours or extended breaks to assist with tiredness.
- Provision of lifts or locating worker on ground floor, providing handrails on any stairs used by the worker.
- Ergonomic workplace design.
- Ensuring doors are not heavy to open and close.
- Locating worker with easy access to toilets; ensure toilets are user-friendly, eg grab bars to hold onto.
- If visual impairment, see Visual impairment (p129).
- If concentration difficulties, see suggestions for Dyslexia (p84).

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

[64] Particularly Mowat-Brown v University of Surrey [2002] IRLR 235, EAT

Sources of further information

The Multiple Sclerosis Society at **www.mssociety.org.uk**

Although an American website, the Job Accommodation Network site at **www.jan.wvu.edu/media/MS.html** has useful suggestions on its MS fact sheet.

RSI

The TUC estimates each year 400,000 people suffer from upper limb or neck disorders. The Health and Safety Executive says it is estimated that 4.1 million working days were lost in 2001/2 through musculoskeletal disorders mainly affecting the upper limb and necks, caused or worsened by work.

RSI (Repetitive Strain Injury) is an umbrella term for a range of painful conditions affecting the musculoskeletal system. An alternative umbrella term for many of these injuries is Work Related Upper Limb Disorder (WRULD). The Health & Safety Executive uses the term ULD (Upper Limb Disorder) under a general heading of Musculoskeletal Disorders, which also includes back pain (see p68).

RSI is usually caused or aggravated by work and is associated with repetitive movement, sustained or constrained postures and/or forceful movements. It includes many different localised conditions, eg bursitis, carpal tunnel syndrome, tenosynovitis, tendinitis, epicondylitis (including tennis elbow), writers' cramp, white finger or Raynaud's syndrome. There is also diffuse RSI, which spreads through areas of the body and is harder to diagnose.

Workers particularly at risk include those using computers, working on assembly lines, manual labourers, bus and lorry drivers, cashiers, cooks, cleaners and housekeepers, hairdressers and ambulance workers. RSI is a growing problem with the vast increase in computerisation.

RSI is often incorrectly diagnosed and a report from a specialist will probably be needed for a tribunal. There is a certain amount of scepticism about RSI, particularly the diffuse form, which may show no visible signs of injury and be regarded as all in the mind. However, research carried out at UCL indicates a possible cause may be nerve damage (see site of RSI Association, below).

Common symptoms are pain, loss of grip, loss of movement, muscle weakness or spasm, numbness, sensation of cold, burning sensation, pins and needles. RSI is a progressive condition and usually goes through 3 broad stages. Initially pain, aching and tiredness of muscles improves overnight, but eventually it remains even when the worker is resting completely. Some conditions can become irreversible. It is very important to recognise symptoms early and take remedial action.

Depending on the form of RSI, workers may find they are unable to write, type, dial or hold a telephone receiver, turn on taps, brush teeth, comb hair, get dressed, operate domestic machinery, do housework, iron, cook, bath a baby, make a sandwich, grip a cup of coffee, use a knife, hold a tray, put up a picture, drive, sew on a button, open drawers and doors.

It is relevant if the activities can only be performed very slowly or with pain; only in the morning (after overnight rest); provided it is not too cold or if the worker is under stress (when muscles tense up); or in an unusual way (eg using an electric toothbrush). (See *Guidance* B10 and D11)

The legal definition

Impairment

Physical.

Given the controversies regarding diagnosis of an actual physical condition, it may be useful to rely on the principle established by the Court of Appeal in *McNicol v Balfour Beatty Rail Maintenance Ltd*.[65] This case establishes that an impairment can simply be the sum of its effects and it does not matter if the underlying illness cannot be identified or even if it is caused by psychological factors rather than any organic physical cause. However, it may be easier to prove the genuineness and severity of the effects if a doctor concretely diagnoses a form of RSI.

Day-to-day activities

All activities should be checked, but those most obviously affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Physical coordination (*Guidance*, D22)
- ☑ Ability to lift, carry or move everyday objects (*Guidance*, D24)

The *Guidance* suggests the following may amount to substantial adverse effect:
Under D21:

- Loss of function in the dominant hand.
- Difficulty using a knife and fork at the same time, peeling vegetables or opening cans.
- Difficulty turning door knobs or gripping handrails.
- Difficulty pressing keyboard buttons at the same speed as someone without an impairment (as opposed to inability to reach secretarial typing speed).
- Difficulty in picking up or manipulating small objects would probably be a substantial effect, but not difficulty in picking up a pin.

Under D22, ability to pour liquid into another vessel only with unusual slowness or concentration.

[65] [2002] IRLR 711, CA.

Under D24:

- Difficulty in picking up objects of moderate weight with one hand, eg a kettle, shopping bag, briefcase, overnight bag or chair, but not inability to move heavy luggage.
- Difficulty in carrying a moderately loaded tray steadily.
- Account should be taken of a person's ability to repeat such functions or bear weights over a reasonable period of time.

Under D20, account should be taken of the extent to which a person is inhibited from sitting, standing, bending or reaching.

For further examples, see Shoulder, Arm or Hand Impairment (p127).

Medical treatment: The test is the effect if the worker were not using any painkillers.

One problem which arises is under paragraph B7 of the *Guidance* which says account should be taken of how far a person can reasonably be expected to modify his/her behaviour to reduce the effects of an impairment. If the RSI was caused by a hobby such as knitting or tennis, the worker would probably be expected to give that hobby up. But what if it is the work itself which is causing the RSI? Can the employer argue that the worker should get another job? Presumably, by analogy with the *Cruickshank* case on asthma,[66] the worker should be protected even if it is work itself which causes or worsens the conditions, as long as the condition itself affects day-to-day activities.

Long-term effect

The worker may have suffered severe RSI for at least 12 months. A difficulty arises where the worker has not suffered for 12 months, but has recovered through a period of sickness absence. However, it will recur as soon as s/he returns to work. The worker's condition is thus only "recurring" if s/he returns to the particular work. The *Guidance* says at paragraph C8 that recurrence should be assessed in the light of what a person could reasonably be expected to do to prevent it. As with paragraph B7 (above), does this include giving up a job which is causing the disability?

[66] Cruickshank v VAW Motorcast Ltd [2002] IRLR 24, EAT, and see p12 above, "Not hobbies or workplace activities.

Reasonable adjustments

As always, appropriate adjustments will depend on the individual situation and the worker should be consulted, but they could include:

- The employer should carry out a risk assessment - the Health & Safety Executive has produced risk assessment checklists. The employer should also set up internal reporting system and monitor for early signs of RSI.

- Reviewing design of tools, workplaces and tasks; keeping tools lightweight, sharpened, lubricated and easy to use; powered versions if possible; mechanical moving of loads; smaller loads and reduced carrying distances; levers; training on lifting techniques; tools and equipment to meet individual needs; ensuring women need not use tools designed for men. Redesign of tasks to minimise repetitive movement. Redesign of work station so everything is within easy reach; adjustable work benches; proper ergonomic design. Reduced conveyor belt speed. Reduced use of vibrating tools; vibration absorbing grips; rubber flooring to absorb vibration. Reduction of time working in cold environment; warm breaks; protective clothing, though gloves can increase problem by making grip difficult.

- Providing electronic staplers, easy grip pens, headset telephone. Restricting intensive keyboard work; keeping deadlines reasonable; training in touch typing; good lighting to avoid hunching to see screen; document holders; adjustable chair; alternatives to mouse; voice recognition software and allowing extra time for its use; training for use of specialist software; payment for eye tests - in any event, employers must pay for eye tests if requested, where the worker uses a VDU as a significant part of his/her work.

- In general: avoiding of repetitive work and incentives to carry it out at a high pace; breaks for rest and recovery; giving workers more control over work rate and breaks; variation of tasks and job rotation. Training on risks. Reduction of stress (mental or physical).

- Time off to recover, with staged return, and to improved workplace (otherwise injury will recur).

The Code gives these examples:

- Letting a job candidate with RSI take an administrative test using voice-activated software, if this is how s/he would carry out the job if s/he were appointed. (Code, 7.25)
- Different or longer training on new machinery for workers with restricted hand or arm movements. (Code, 5.18)

- Relocating light switches, door handles or shelves for someone who has difficulty reaching. (Code, 5.18)

For further examples, see Shoulder, Arm and Hand Impairment (p127).

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Note: if the employer's negligence has caused the RSI or if the employer refuses to make improvements and the worker's condition becomes worse, the worker may have grounds for claiming personal injury.

Sources of further information

The London Hazards Centre operates an advice line on 020 7794 5999 and has produced an extremely useful handbook ("RSI Hazards Handbook", 1996,) on its website at **www.lhc.org.uk/members/pubs/books/rsi/rsi_toc.htm** The TUC has a basic guide on its website: **www.tuc.org.uk**

RSI Awareness (RSIA) is at **www.rsi.org.uk** There are a number of fact-sheets on different conditions and its information pages are very informative.

The Health & Safety Executive has an informative section on musculoskeletal disorders and upper limb disorders on its website: **www.hse.gov.uk** . There are various guides available at **www.hse.gov.uk/msd/information.htm** For example, you can download "Display Screen Equipment (Working with VDUs)" and "Aching arms (or RSI) in small businesses". You can send off for further information in "Upper Limb Disorders in the Workplace".

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 (if you call from home) or 01926 312847 (if you call from work) and website: **www.abilitynet.org.uk**

SEASONAL AFFECTIVE DISORDER (SAD)

SAD is a type of depression which has a seasonal pattern, most commonly occurring in the winter months when daylight hours are shortest. Symptoms tend to fade away as Spring approaches. People can be affected in the summer, but this is rare and has different symptoms.

Some managers do not take SAD seriously, believing it is a product of the worker's imagination, but it can be a serious disabling illness. The term, SAD, was invented in 1984 and it is now included in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (one of two standard diagnostic manuals used by psychiatrists for diagnosis). SAD is also recognised by the NHS. According to NHS Choices, around one in 50 people in the UK has SAD, and the condition affects twice as many women as men. People can be affected at any age, but SAD is most common for those aged 18 – 30.

SAD is diagnosed when there is a relationship between the onset of major depressive episodes and a particular time of year, eg Autumn or Winter, with full remissions also occurring at a characteristic time of year, eg Spring. In 30% of cases, people experience a seasonal mood swing from depression to elation , which may even amount to a hypomania if severe. The American Psychiatric Association's diagnosis says the seasonal pattern must have occurred in the previous two years, there having been no non-seasonal major depressive episodes in that period. SAD may not be suggested if there is some other seasonal cause of depression, eg seasonal unemployment.

SAD's symptoms are characteristically those associated with depression, eg feeling low, decreased energy, increased irritability, concentration difficulties, anxiety and social withdrawal. Additionally, most people develop symptoms less common in classical depression, eg needing more sleep and a tendency to oversleep, difficulty staying awake during the day, incapacitating fatigue making normal tasks very difficult, increased appetite and craving for carbohydrates.

The most successful form of treatment is phototherapy - daily exposure to high-intensity broad-spectrum light, usually provided by a specially designed light box. Certain anti-depressant drugs may help, but not the ones which exacerbate the lethargy and need to sleep. Cognitive behaviour therapy may help some people cope with the symptoms.

There is a milder form of SAD which is still clinically significant, sometimes known as 'subsyndromal SAD' (S-SAD). This milder form may be known as 'winter blues'. It is estimated that one in eight people have this milder condition.

The legal definition

Impairment
Mental and physical.

Day-to-day activities
All activities should be checked, but those most obviously affected are:

- ☑ Mobility (*Guidance*, D20)
- ☑ Memory or ability to concentrate, learn or understand *(Guidance*, D26)

Many other activities may be affected if, for example, the worker takes substantially longer to carry them out due to fatigue, lack of energy or lack of concentration. (See *Guidance*, B2 and for the cumulative effects of an impairment, *Guidance*, B5.)

For suggestions as to further questions you could ask the worker, see Depression p74 and Mental Health Issues, p109.

Medical treatment
The test is the effect on the worker if s/he were not taking any medication, undergoing prescribed counselling or using an aid such as special lighting.

Long-term effect

Once diagnosed, SAD should be considered to have long-term effect in that the substantial adverse effect is recurring. Although possibly lasting only 3 – 4 months on each occasion, it is likely to recur beyond 12 months after the first occurrence. (See *Guidance*, C5.)

Reasonable adjustments

The obvious adjustment is to supply a light box. For sub-syndromal SAD, reasonable adjustments may be as simple as letting the worker sit by a window and take tea-breaks outside.

These kind of adjustments would be unlikely to assist in the rare cases of summer SAD.

Adjustments appropriate to many forms of depression may also help with the feelings of tension, irritability and lethargy – see Depression, p74.

Sources of further information

The Seasonal Affective Disorder Association offers support to those suffering from SAD and provides some basic information on its website at **www.sad.org.uk**

SHOULDER, ARM OR HAND IMPAIRMENT

Disabilities connected with arms or hands are amongst the commonest form of disability founding cases under the DDA.

The Legal Definition

Impairment
Physical

Day-to-day activities
All activities should be checked, but those most obviously affected are:

- ☑ Manual dexterity (*Guidance*, D21)
- ☑ Physical coordination (*Guidance*, D22)
- ☑ Ability to lift, carry or move everyday objects (*Guidance*, D24)

Relevant parts of the *Guidance* are as quoted in the section on RSI (p119).

Some questions to check substantial adverse effect, depending on the nature of the worker's impairment:

- Is the worker able to peel, grate and prepare vegetables, cut meat or roast potatoes?
- Can s/he carry saucepans full of water or baskets full of washing or unload a shopping trolley? (It is irrelevant if s/he could get round this by carrying washing or unloading shopping in very small quantities.)
- Can s/he manually open jars, tins or packets? (It is irrelevant if s/he could use an automatic electric can and jar opener instead.)
- Can s/he hold a book in the air while reading? (It is irrelevant if s/he could manage by resting the book on the arm of a chair.)
- Can s/he do DIY tasks or housework, iron, scrub pans, make the bed, shake a duvet, polish furniture?
- Can s/he sew or use scissors?
- Can s/he apply make-up, file nails, tong or put rollers in hair or groom animals?
- Can s/he shift a chair when sitting down or getting up from a table?

The above examples are taken from the useful and important cases of *Vicary v British Telecommunications PLC*,[67] where the worker had a disability relating to the use of her right arm and hand, and *Epke v Commissioner of Police of the*

[67] [1999] IRLR 680, EAT.

Metropolis,[68]where the worker had a wasting of the intrinsic muscles of her right hand.

Long-term effect

This depends on the reason for the impairment.

Reasonable adjustments

Suitable adjustments are similar to those suitable for RSI (p119) or Back impairment (p68).

Sources of further information

See sources listed under RSI (p119).

[68] [2001] IRLR 605, EAT.

VISUAL IMPAIRMENT

The RNIB estimates there are approximately 140,000 blind or partially sighted people of working age, but only 27% of these are in employment. This is a much lower figure than for people with disabilities generally, let alone compared with the entire population of working age. This is not surprising. RNIB research indicates that 9 out of 10 employers believe employing a blind person would be difficult or impossible. Moreover, over 75% of employees eventually lose their job if they lose their sight.

Well over a million people have some form of visual impairment. There are many different eye conditions of varying severity, some of which may slowly deteriorate. Some conditions involve loss of peripheral vision alone or central vision alone, blurred or patchy eyesight. The effect on the person's ability to see will vary and can cause others to think there is less difficulty than is in fact the case.

The legal definition

Deemed disability

Workers registered with a local authority or certified by a consultant opthalmologist as blind or partially sighted are deemed disabled without the need to prove the stages of the definition. (The Disability Discrimination (Blind and Partially Sighted Persons) Regulations SI 2003/712.)

In other situations, the worker needs to prove the stages of the definition in the usual way.

Impairment

Physical

Day-to-day activities

All activities should be checked, but most obviously affected is:

☑ Speech, hearing or eyesight (*Guidance*, D25)

The *Guidance* suggests the following may amount to substantial adverse effect:

- Inability to pass the eyesight test for a standard driving test.
- Difficulty reading ordinary newsprint (as opposed to extremely small print).
- Total inability to distinguish colours (as opposed to inability to distinguish between green and red).

- Difficulty recognising by sight a known person across a moderately sized room (as opposed to at a substantial distance, eg across a playing field).
- Difficulty walking safely without bumping into things.

Further possible questions to check substantial adverse effect, depending on the circumstances:

- If the worker is able to read a newspaper, is s/he only able to do so by holding it within a few inches of his/her eyes, or by reading very slowly?
- Is the worker unable to read the number of buses even when they are quite near?

Medical treatment: Unlike for other disabilities, the test is the effect of the impairment when the worker is wearing corrective glasses or contact lenses.

Long-term effect

Most conditions are likely to be long-term or have fluctuating effects, but if in doubt, check.

Reasonable adjustments

As always, consult the worker. Depending on the nature and severity of his/her condition, reasonable adjustments could include:

- Allowing a working dog on the premises.
- Provision of written information (eg recruitment packages and application form, training manuals, minutes of meetings, letters and memos, time-tables, schedules) in large font, hand-writing in thick black pen, Braille, on audio tape.
- Application forms with larger spaces as worker's handwriting may be larger than average.
- Readable print: 14 or 16 point font; black or dark ink; white or yellow paper; matt not glossy paper; plain type faces, particularly for numbers; evenly spaced words and unjustified right hand margins; no italics or continuous capitals; simple and uncramped lay-out.
- Provision of written materials in advance of training.
- Providing information, eg recruitment packs, well in advance of any deadlines.
- Document holder for desk; hand-held magnifier; enlarging photocopier.
- Thick black pen or audio tape recorder for note-taking.
- Large PC monitor; keyboard with large print letters.
- Adapted software plus training and time to learn to use it, eg PC with a magnification system; a text scanner to transfer text on paper to screen;

voice-activated software; speech output software (converts text on screen to speech); computer Braille display (transforms text on screen to Braille).
- Support worker or reader for some of time.
- Appropriate lighting, reduction of glare, specialist lighting.
- Colour contrasts in office and building; colour strips on edge of stairs.
- Alternative transport to driving.
- On recruitment interviews or training or meetings at new places, meeting the worker at reception.
- Orientation training on starting job.
- Evacuation partner for emergencies.
- For those losing their sight while in work, disability leave for intensive rehabilitation.

The Code gives these examples:
- Removing clear glass doors from the end of a corridor. (Code, 5.9)
- Providing a support worker to accompany the worker if s/he needs to make home visits. (Code, 5.18)

Real tribunal cases:
Tribunals have made these suggestions:
- Acquiring and adapting suitable software and providing adequate training on it.
- Allowing home working.
- Ensuring a job candidate is met at reception on arrival for an interview.
- Providing a teacher with a classroom assistant.

Note: while it is useful to know the kind of adjustments tribunals think should have been made in real cases, it is important not to generalise, as each case depends very much on its own facts.

See p26 for general adjustments suggested in the DDA and p33 for further suggestions.

Sources of further information

The RNIB has an excellent website at **www.rnib.org.uk** The site includes a description of common eye conditions, technology information sheets, guidance on web accessibility and the “See it right” pack on producing accessible written information. The latter is available at **rnib.org.uk/xpedio/groups/public/documents/publicwebsite/public_seeitright.hcsp**
To fully benefit from its services, however, it is necessary to get in contact with the RNIB (helpline tel: 0845 766 9999).

Tiresias is the RNIB's scientific research unit. Its website is also informative at **www.tiresias.org/index.htm**

An American Site, the Job Accomodation Network, has a factsheet, "Worksite accomodation ideas for individuals with vision impairments" at **www.jan.wvu.edu/media/sight.html**

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 (if you call from home)
or 01926 312847 (if you call from work) and website: **www.abilitynet.org.uk**

Bibliography

Web-sites

The Job Accomodation Network, a free consulting service of the Office of Disability Employment Policy , the U.S. Department of Labor, has an extremely useful website with numerous fact-sheets suggesting reasonable adjustments ("accomodation" in the USA) on **www.jan.wvu.edu/**

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 (if you call from home)
or 01926 312847 (if you call from work) and website: **www.abilitynet.org.uk**

The Employment Tribunals website at **www.employmenttribunals.gov.uk** has general guidance on ET procedure and online ET1 and ET3 forms

The Employment Appeal Tribunal website at **www.employmentappeals.gov.uk/judgments/judgments.htm** has EAT judgments going back several years, appeal forms and other information

Resources relevant to specific disabilities are listed in the directory at pages 58 - 132.

Publications

- **Equal Opportunities Review**. Published every month by Michael Rubenstein Publishing. Tel: 0844 800 1863. News, policy features on HR initiatives, legal analysis and law reports in the equal opportunities field.

- **Legal Action** magazine. Published Legal Action Group. Tel: 020 7833 2931. Employment Law update in May, June, November and December issues written by Central London Law Centre's Employment Unit. Useful summary of key statutes and cases in the previous 6 months, selected from the worker's point of view and put into an understandable context.

- **Statutes and Regulations** are available on the Office of Public Sector Information website (formerly HMSO) at **www.opsi.gov.uk**

Textbooks

- **Butterworths Employment Law Handbook**. Edited by Peter Wallington. All relevant Statutes, Regulations and Codes fully reproduced. No commentary. The Book is regularly reissued with latest Statutes.

- **Harvey on Industrial Relations and Employment Law**. Published Butterworths.
  Multi-volume loose-leaf, regularly updated and available on line. The most authoritative academic text on employment law. Reviews case-law and reproduces key Statutes.

- **Employment Law - An Adviser's Handbook** by Tamara Lewis
  Published Legal Action Group. Tel: 020 7833 2931. Edition 7 (2007). Updated every two years. Ed 8 due Autumn 2009. For workers and their advisers in unions / voluntary sector. Guide to law, evidence, tactics and procedure, with comprehensive check-lists and precedents. Covers all areas of employment law with large discrimination section. Updated approximately every 2 years.

Central London Law Centre guides

Tel administrator: 020 7839 2998

- **DDA Questionnaires: How to Use the Questionnaire Procedure in Cases of Disability Discrimination in Employment**. By Tamara Lewis. Published Central London Law Centre. Guide to procedure and sample Questionnaires for many disability discrimination situations. Updated (2008) version on EHRC website.

- **Discrimination Questionnaires: How to Use the Questionnaire Procedure in Cases of Discrimination in Employment.** By Tamara Lewis. Published Central London Law Centre. Guide to procedure and sample Questionnaires for situations related to discrimination on grounds of race; religion and belief; sexual orientation, sex; equal pay; disability, age. Updated (2008) version on EHRC website.

- **An employer's guide to reasonable adjustments under the DDA**. By Tamara Lewis. Published by Central London Law Centre. Good practice guide for employers. Updated (2009) version on EHRC website.

- **A discrimination claimant's companion: a client's guide to discrimination cases in employment tribunals.** By Tamara Lewis. On EHRC website, 2009. Guide for advisers to hand out to their clients in discrimination cases to answer common queries and uncertainties. This is not a guide for clients to run cases themselves. Adapted from the generic *Claimant's Companion* available from Central London Law Centre.

- **Identifying employment cases: checklists for diagnosis and interviews**. By Tamara Lewis. Published Central London Law Centre, February 2008. Useful guide on how to start investigating cases for generalist advisers or those new to employment law. Discrimination issues woven into general employment law throughout. Cross-references to *Employment Law: An Adviser's Handbook.*

- **Redundancy Discrimination: Law and evidence for tribunal cases.** By Tamara Lewis. On EHRC website, 2009.

- **Using the Data Protection Act and Freedom of Information Act in Employment Discrimination cases**. By Tamara Lewis. On EHRC website, 2009.

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