

# Disability Discrimination

Law and Case Management

Karen Jackson and Lydia Banerjee



The Law Society

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ISBN-13: 978-1-907698-60-6

Published in 2013 by the Law Society  
113 Chancery Lane, London WC2A 1PL

Typeset by Columns Design XML Ltd, Reading  
Printed by Hobbs the Printers Ltd, Totton, Hants



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*This book is dedicated to three very important men in my life, without whom this book would not have been possible: my husband, Christopher; Dr Jayan Parameshwar, Consultant Cardiologist at Papworth Hospital; and my donor –*  
**Karen Jackson**

*This book is dedicated to my husband, Vikram; my family, both Carters and Banerjees; and to the many friends and colleagues at Littleton Chambers and beyond who inspire me and keep me going –*  
**Lydia Banerjee**

*This book is also dedicated to the many clients we have had the honour of representing and the invaluable lessons we have learned from their cases*

# Foreword

No one asked to be disabled. So if you are, you are entitled to be treated fairly, to be given equal access to work opportunities and to expect reasonable adjustments to be made so that you can play a full role. When that doesn't happen, your complaints must be acted upon and, as a last resort, enforced through the law.

This book looks in two directions. It is primarily written for employers, to show you how to provide fair treatment for disabled workers. It is also written so that disabled people can see how employers and fellow employees are required by law to behave towards you. It's complicated. Any book which aims to change behaviour has to explain the current legal framework. From the outset in 1995, disability law has proceeded hand in hand with soft law: guidance, codes, examples. And that's how the book works. Loads of practical examples and proportionate citing of legal cases guide us through the many problems in our way.

Litigation is daunting. According to the authors it is a lottery. What all of us involved in enforcement of the law aim to achieve is an environment where resort to the tribunal means a failure in sensible resolution of disputes. Making working life fair for people with disabilities ought to be a day-to-day ambition, and not simply an exercise in litigation avoidance. If employers and workmates understand the responsibilities we all owe, complaints will be rare and their solution more likely to be amicable.

These two highly experienced lawyers have written a book about illness and disability from the inside, and with a wealth of experience representing employees, employers and the third sector. Understanding disabilities and enforcing rights is made easy here because they both describe how the system works and how it can be made to work better. The reshaping of the law in the Equality Act 2010 is an ongoing endeavour, to be used in a focused way and, we hope, only in the last resort.

Judge Jeremy McMullen QC  
Employment Appeal Tribunal  
Salisbury Square  
London EC4Y 8JX

5 March 2013

# Preface

The idea for this book came from a desire to give a wide range of users – solicitors, HR and occupational health professionals, employees and business managers – a practical book on managing disability in the workplace. Our main aim is to provide not a definitive work on disability law but an overview of the law (**Part 1**), a case study illustrating how the law is applied in practice (**Part 2**), a guide to managing litigation around disability (**Part 3**) and templates and sample documents ready to adapt for use (**Appendices A and B**). Our other aim is to bring together in one volume the relevant extracts from statute, statutory and other guidance, so that most users will need nothing more than this book to manage a wide range of situations (**Appendix C**). The book is divided into parts so that you can just dive in where you need to.

We have attempted to make this a lively read. It's not always easy to avoid too much legalese, especially when explaining complex legal provisions and cases, but we've tried to bring it to life for you. Key cases and examples are highlighted in text boxes.

It has been hard to know where the limits of this book should end. We simply don't have enough space for a definitive guide to tribunal proceedings, for example. We hope we have given you the core elements and documents. We have also provided a list in **Appendix D** of online links taking you to further resources. Finally, we will be providing quarterly updates via the Law Society website [www.lawsociety.org.uk/disabilitydiscriminationbook](http://www.lawsociety.org.uk/disabilitydiscriminationbook) to keep pace with the law in this area as it changes.

Our case study in **Part 2** focuses on two mental health disabilities. There are reasons for this. First, physical disabilities are often easier to manage in practice, both in the workplace and in tribunal proceedings. Mental health disabilities give rise to a number of specific tricky issues which we have flagged up for you. Secondly, mental health illness is the primary reason for long-term sickness absence. The CBI calls it the biggest risk to business in the 21st century. We know that our society has much to do to tackle the stigma around mental health. It must stay at the top of the agenda. One in four people suffer depression in their lifetime. This has a big impact on the workplace. Of the 190 million working days lost to illness last year, 25 per cent of this is long term and mental health illness is the largest single cause. Early intervention and proactive management are key to



avoiding the long-term sick and disabled falling out of work and into long-term benefits. Those with long-term disabilities have a key contribution to make to work and to society.

Sickness costs the UK economy £17 billion a year. With sensitive, constructive management of disabilities in the workplace, a real contribution can be made by employers giving disabled people real opportunities. With dialogue and understanding, employers and employees can work together to avoid costly litigation.

We hope this book meets our aims and that you will find it a useful companion. We have certainly enjoyed writing it and hope you share our enthusiasm for it.

Karen Jackson and Lydia Banerjee

March 2013

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# Abbreviations

ACAS	The Advisory, Conciliation and Arbitration Service
ADR	alternative dispute resolution
AMRA 1988	Access to Medical Reports Act 1988
CMD	Case management discussion
DCM	Diagnostic and Statistical Manual of Mental Disorders
DDA 1995	Disability Discrimination Act 1995
EAT	Employment Appeal Tribunal
EHRC	Equality and Human Rights Commission
ERA 1996	Employment Rights Act 1996
ET	Employment Tribunal
ET1	Employment Tribunals Claim Form
ET3	Employment Tribunals Response Form
FCO	Foreign and Commonwealth Office
ICD	World Health Organization's International Statistical Classification of Diseases
ODI	Office for Disability Issues (now under Government Equalities Office)
PCP	provision, criterion or practice
PHI	permanent health insurance
PHR	pre-hearing review
PIB	permanent injury benefit
PIP	performance improvement plan
PSL	professional support lawyer
SSP	statutory sick pay
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006



# Introduction to disability discrimination law

## BRIEF HISTORY

This book is not intended to be an academic study of the law of disability discrimination. We have provided this brief history to set the current law in proper context. It is neither comprehensive nor detailed but we trust that it provides some background to the rest of the book as it examines the current legal position.

### In the beginning ...

Those suffering disabilities have been confined to the fringes throughout history. How a society treats its most vulnerable is said to be the very measure of civilisation. It is no coincidence that protection for those suffering disabilities is late to arrive and provision that they be treated as equals as opposed to the mere provision of financial aid, later still.

In the employment field the first piece of legislation in England and Wales, the jurisdiction addressed in this book, was the Disabled Persons (Employment) Act 1944. The legislation sought to impose on employers with over 20 employees a quota of at least three per cent of disabled employees within the organisation. The requirement was inadequately enforced and prosecutions were rare. The main impact was to provide some protection in terms of dismissals where the dismissal of a disabled person would bring the employer under the quota.

### Disability Discrimination Act 1995

The first really significant piece of domestic legislation in the employment field was over 50 years later in the form of the Disability Discrimination Act (DDA) 1995. DDA 1995 repealed the Disabled Persons (Employment) Act 1944 and created for the first time a general framework to seek to challenge disability discrimination. The DDA introduced a legal definition of disability that had to be satisfied in order to obtain the legislative protection offered. At that time the protection offered was a duty on employers to make reasonable adjustments, protection from disability-related discrimination and protection from victimisation. The legislation applied only to employers with over 20 employees.