

*Disability
Discrimination*

IDS

Employment Law Handbook

Disability Discrimination

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IDS



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Abbreviations

Courts

ECJ	European Court of Justice
ECHR	European Court of Human Rights
PC	Privy Council
HL	House of Lords
CA	Court of Appeal
Ct Sess	Court of Session
NICA	Northern Ireland Court of Appeal
QBD	Queen's Bench Division
Div Ct	(Queen's Bench) Divisional Court
KBD	King's Bench Division
ChD	Chancery Division
NIRC	National Industrial Relations Court
EAT	Employment Appeal Tribunal
ET	Employment Tribunal

Case references

AC	Law Reports, Appeal Cases
All ER	All England Law Reports
Ch	Law Reports, Chancery Division
CMLR	Common Market Law Reports
COET	Employment Tribunal folio number
EAT	Employment Appeal Tribunal unreported case number
ECR	European Case Reports
ET	Employment Tribunal unreported case number
EWCA	Court of Appeal unreported case number
ICR	Industrial Cases Reports
IRLR	Industrial Relations Law Reports
ITR	Industrial Tribunal Reports
KB	Law Reports, King's Bench Division
QB	Law Reports, Queen's Bench Division
SCOET	Scottish Employment Tribunal folio number
TLR	Times Law Reports
WLR	Weekly Law Reports

Legislation

DDA	Disability Discrimination Act 1995
EA	Employment Act 2002
EqA	Equality Act 2010
EqA 2006	Equality Act 2006
EqPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
ETA	Employment Tribunals Act 1996
RRA	Race Relations Act 1976
SDA	Sex Discrimination Act 1975
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992

Statutory references, unless otherwise stated, are to the Equality Act 2010 (EqA), except in Chapter 11 where references are to the Equality Act 2006.

Introduction

The United Kingdom has had disability discrimination legislation in place for some 15 years, since the introduction of the Disability Discrimination Act 1995 (DDA), which received Royal Assent on 8 November 1995. Although the Act was initially of purely domestic origin, a European element to disability equality emerged with the enactment of the EU Equal Treatment Framework Directive (No.2000/78) ('the Framework Directive'), which led to significant amendments to the DDA and resulted in the prohibition of five forms of discriminatory conduct: direct disability discrimination, disability-related discrimination, a failure to make reasonable adjustments, victimisation and disability-related harassment. The next significant legislative development was the introduction of the Disability Discrimination Act 2005, which amended, rather than replaced, the 1995 version. While the 2005 Act imposed a disability equality duty on public sector organisations and introduced provisions covering discrimination in the supply of goods and services, it changed little in the way of individual employment rights. The biggest change came not from Parliament but from the courts. The House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* 2008 IRLR 700, HL, had a profound effect on the law governing 'disability-related discrimination', rendering it substantially harder to prove and foreshadowing its eventual demise.

That demise came as a result of the most significant change to equality and discrimination law in a generation – the introduction of the Equality Act 2010 (EqA), a single statute covering all the 'protected characteristics' of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The new Act repealed of all but four sections of the DDA when it came into force on 1 October 2010 (those that remain relate to the disability equality duty, which has yet to be replaced by the public sector equality duty provided for in the EqA). In its place sit a set of provisions intended to harmonise discrimination law, so that, for the most part, the same principles apply irrespective of the protected characteristic concerned. Such a goal is, however, only partially achievable in the case of disability. So, while the provisions relating to direct and indirect discrimination, victimisation and harassment apply to disability in the same way as they apply to the other protected characteristics, the Act makes further provision for two disability-specific forms of discrimination. The first existed under the DDA and is familiar to anyone with a passing knowledge of disability equality law – a failure to make reasonable adjustments. The second is the legislative provision devised as a response to the *Malcolm* decision – a prohibition on 'discrimination arising from disability', replacing 'disability-related discrimination'. The EqA, together with the vast body of disability discrimination case law that has developed over the years – most of which remains relevant under the new Act – forms the backbone of this Handbook.

Impact of European law

As mentioned above, the 2004 amendments to the DDA were made to implement the EU Framework Directive, and in the ensuing years the decisions of the European Court of Justice interpreting that Directive have become increasingly significant. Perhaps the most important from a UK perspective was *Coleman v Attridge Law and anor* 2008 ICR 1128, ECJ, which confirmed that the scope of the Directive's protection against direct discrimination extends to those discriminated against by reason of their association with a disabled person. 'Associative discrimination' is discussed in Chapter 3, 'Forms of discrimination', under 'Direct discrimination'.

Relevance of decisions under other discrimination strands

The coming into force of the EqA ended the situation where each strand of discrimination was governed by its own Act of Parliament or set of Regulations. The fact that all the strands have been consolidated into one Act reflects the fact that there has been considerable cross-fertilization of case law under the various strands, and that it is impossible and impracticable to consider one strand in isolation. As a result, much of the case law cited in this Handbook arose from cases that did not involve disability, but which clearly apply to cases that do.

Scheme of the Handbook

This Handbook focuses on disability discrimination in the context of the employment relationship. It must be stated from the outset that other areas to which the disability discrimination provisions in the EqA apply – such as education, the provision of goods and services and the letting of premises – fall outside the scope of this Handbook.

The scheme of the Handbook is as follows:

- Chapter 1 outlines the history and scope of disability discrimination legislation in this country. It also considers the impact of European law and human rights in this area.
- Chapter 2 considers the all-important meaning of 'disability'
- Chapters 3 and 4 are concerned with the types of disability discrimination outlawed by the Act. These are direct discrimination, indirect discrimination, discrimination arising from disability, victimisation and harassment (Chapter 3); and a failure to comply with the duty to make reasonable adjustments (Chapter 4)
- Chapter 5 examines the scope of the employment provisions of the Act, explaining who is protected and who is liable under its provisions. This chapter includes an analysis of the means by which an employer can become liable for the discriminatory acts of others

- Chapter 6 looks at the situations in which discrimination can arise – before, during and after employment
- Chapter 7 considers work-related discrimination by bodies other than employers – this includes trade unions and professional organisations, employment service providers and qualifications bodies
- Chapter 8 sets out the exceptions and exclusions to the Act, where either the Act does not apply or its scope is circumscribed in some way. In particular, it looks at the scope of the ‘occupational requirement’ defence and considers the concept of positive discrimination in a disability context
- Chapter 9 deals with the means by which an individual can enforce his or her rights under the EqA. This includes such matters as tribunal jurisdiction, statutory time limits, burden of proof. This chapter also explains the rules governing the settlement of disability discrimination claims
- Chapter 10 focuses on the remedy of compensation and explains the principles that govern a tribunal’s award of compensation
- Chapter 11 looks at the statutory powers and functions of the Equality and Human Rights Commission (EHRC) – the statutory body charged with combating unlawful discrimination and promoting equality of opportunity in Great Britain.

This law is as stated at 1 November 2010. This Handbook completely replaces IDS Employment Law Handbook, ‘Disability Discrimination’ (2002), which should now be discarded.

This publication aims to provide accurate, authoritative information and comment on the subjects it covers. It is offered to subscribers on the understanding that the publisher is not in business as a lawyer or consultant.

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1 Law in context

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Codes, guidance and secondary legislation

Public sector equality duty

Disability discrimination and unfair dismissal

This Handbook offers a detailed analysis of the UK's legislative framework **1.1** for tackling disability discrimination, now predominantly contained in the Equality Act 2010 (EqA). An analysis of that framework would be incomplete, however, without some consideration of the context in which that legislation was introduced and the factors that shaped its development.

We begin by considering the number of disabled people in the labour market and what impact statutory protection from disability discrimination has had on their employment prospects. We then explain the history of domestic disability discrimination legislation, before turning to discuss the relevant provisions of European law and how they affect the development of UK law. Next, we look at the sources, other than legislation, that shape the protection from disability discrimination – namely, codes of practice and statutory guidance – and consider the duty on public authorities to take steps to promote equality of opportunity for disabled people and eliminate discrimination. Finally, we deal briefly with the interaction between the protection from disability discrimination and the right to claim unfair dismissal.

Disability and the labour market

1.2

Around the time that the Disability Discrimination Act 1995 (DDA) was introduced, the Labour Force Survey (Winter 1994/95) indicated that there were 3.8 million 'disabled' people of working age in Great Britain, of which 1.2 million were in employment. Although the Survey's definition of 'disability' was not as specific as that in the Act – it referred to a health problem affecting the kind of paid work a person could do and which was expected to last more than a year – this figure gave some idea of the potential scope of the legislation. The DDA's impact was expected to be substantial. Indeed, Acas's Annual Report for 1995 estimated that 3,000 discrimination claims would be brought in the employment tribunal in the first year of the Act's operation alone.

That estimate seems not to have been too wide of the mark. Although figures for the first year of the DDA's operation, from December 1996, are not available, statistics from the Tribunals Service show that, in the reporting year 1 April 1998 to 31 March 1999, employment tribunals received 3,151 complaints of disability discrimination. By the reporting year 2008/09 the number of disability discrimination claims had more than doubled to 6,578. In terms of the impact on tribunals, this is by no means of the same order as, say, claims of sex discrimination, equal pay and unfair dismissal, in respect of each of which annual claims number in the tens of thousands. However, disability discrimination is by no means a marginal issue.

- 1.3** The DDA, like all discrimination legislation, could be characterised as having two main objectives. On the one hand, it was designed to give a remedy to individuals who suffer discrimination. On the other, it had the more general aim of changing perceptions around disability, setting down a marker to indicate that more is expected of employers in helping to encourage the employment of disabled people. With regard to providing a remedy for individuals, it is instructive to look at the success rate of disability claims. In the year 1999/2000, the employment tribunals disposed of 1,374 cases but only 67 resulted in success for the claimant. 468 were withdrawn and 576 were successfully conciliated with Acas's help. In 2008/09, 5,460 disability claims were disposed of, with 177 succeeding at tribunal, 1,816 being withdrawn and 2,391 being settled through Acas conciliation. So, while the number of disability claims had doubled, the success rate at tribunal dropped from 5 per cent in 1999/2000 to 3 per cent in 2008/09. Of course, these figures say nothing about the number of settlements reached behind closed doors. But they do indicate that, while the protection from disability discrimination has undeniably given rise to litigation, it has not resulted in an explosion of successful claims.

It is hard to know what contribution the DDA has made to improving the employment prospects of disabled people. Current estimates of the prevalence of disability in the working age population vary, depending on the definition used. The Office for Disability Issues (ODI) puts the current figure for adults of working age with disabilities at five million (see www.odi.gov.uk). It defines 'disabled' for this purpose as having 'a longstanding illness, disability or infirmity' and 'a significant difficulty with day-to-day activities' and claims that all those in this category would be covered by the DDA. The ODI notes that the employment rate gap between disabled and non-disabled people has decreased from around 36 per cent in 2002 to around 29 per cent in 2010. It puts the current employment rate for disabled people at around 48 per cent, compared with around 78 per cent for non-disabled people. So, while the ODI acknowledges significant improvements in the employment rates of disabled people in the last decade, it still highlights the concern that disabled people are far less likely to be in employment.