UNISON
the public service union

Proving Disability and Reasonable Adjustments

A Guide to evidence under the Equality Act 2010

September 2018

trained and active

Contents

Introduction 3

Overview of Equality Act 5

The definition of disability

- Who is disabled under the EqA? 10
- Checklist on proving the worker has a disability 21

Reasonable adjustments

- The law: the duty to make reasonable adjustments 23
- Access to Work 26
- Stages which a tribunal should follow in deciding whether there has been a failure to make reasonable adjustment 29
- Reasonable adjustments: some ideas appropriate for many disabilities 30
- Individually tailored reasonable adjustment agreements (Passports) 38
- Employer excuses – common misunderstandings 39

Disability-related sickness absence 40

Creating a supportive environment for disabled workers 46

Bringing a tribunal claim 48

- The non-statutory Questions Procedure
- Early Conciliation
- Time-limits
- Burden of proof

The public sector equality duty 51

Communication and language 52

Directory of Impairments 54

Bibliography 150

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Introduction

There are two big problems facing UNISON representatives trying to support the rights of disabled members in the workplace. First, in many cases, employers refuse to acknowledge that the member has a disability which is protected by the legislation. Second, employers do not understand how much the law requires them to do by way of reasonable adjustment. This Guide aims to help representatives recognise and understand members' rights and persuade employers to take appropriate action.

The law prohibiting disability discrimination in employment and other fields was introduced by the Disability Discrimination Act 1995 ("DDA"). On 1 October 2010, it became part of the Equality Act 2010 ("EqA") instead.

The EqA 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 workers can't prove they meet 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 disability discrimination law. This Guide sets out the law and provides examples of appropriate adjustments and sources of further ideas.

Every individual experiences their 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 members say about the daily effects of their disability, and let them identify the difficulties they have at work. Nevertheless, a rep 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, a rep needs to find out the full effect, but this must be done sensitively. Gaining information and knowledge by some advance research into the relevant disability should help build the member's confidence as well as give reps ideas of areas to explore with the member.

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 reps in asking the right questions and applying the legal definition of "disability".

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Please note that this guide is not intended to amount to legal advice. While every effort has been made to ensure the accuracy of the contents of this guide, the author can accept no responsibility for its correctness or for the consequences of advice given or action taken based on its contents.

It is important always to get advice through the relevant union channels where the rep is uncertain or if there is any possibility of a future case. Time-limits are particularly easy to miss in disability cases.

The guide is written by Tamara Lewis. This edition of the guide is especially revised and adapted for UNISON.

The law is as known at 1st August 2018.

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Overview of Equality Act

The Equality Act 2010 ("EqA") forbids discrimination against people because of various protected characteristics, including race, sex, age, sexual orientation, religion and belief as well as 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 EqA, 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 (see bibliography at the end, page 151).

There are two important documents which a UNISON representative needs access to:

- **The Guidance**. This deals with the definition of "disability" and therefore who is covered by the EqA. Its full name is the *Guidance on matters to be taken into account in determining questions relating to the definition of 'disability'*.

- **The EHRC Employment Code**. The Code covers discrimination in employment in relation to all the protected characteristics under the EqA, not just disability. Its official name is *Employment: Statutory Code of Practice.* Chapters 5 and 6 focus particularly on disability and give useful guidelines and illustrations of the law, including the kind of adjustments which employers should make to their workplace and when discrimination may be justified.

- These documents do not set out the law in themselves, but employment tribunals ("tribunals") must take into account any relevant provisions when deciding cases. Both documents can be downloaded from the Equality and Human Rights Commission website at **www.equalityhumanrights.com** Alternatively, an easier way to find them on line is to google the full title, but make sure you get the latest (11 May 2011) revision of the *Guidance*, eg as an attachment to **www.gov.uk/government/publications/equality-act-guidance**
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It's useful to have a hard copy of each document in the branch office.

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The wide scope of 'disability' under the EqA

A disability discrimination case can be brought by existing employees, job applicants, workers employed on a contract personally to do work, apprentices and contract workers, eg many 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 EqA 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.

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

Vastly greater numbers of workers have impairments within the wide definition of disability under the EqA than would qualify for statutory sick pay or Employment and Support Allowance because of disability.

The legal definition of disability is difficult to apply and sometimes defies common sense. This Guide aims to help reps identify when a member is covered by the EqA and to find the necessary evidence. The general legal principles are set out at pages 5 - 22. Then a number of specific disabilities are considered in the Directory starting at page 54.

Disability discrimination under the EqA

There are several different forms of disability discrimination under the EqA. The following is only a brief summary and not a full guide to the scope of each concept.

1. **Failure to make reasonable adjustments – s20 – s21**
   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, union reps and employers do not realise quite how far employers must go to meet this duty.
   Pages 23 - 46 of this Guide set out the law on reasonable adjustments. Pages 30 - 39 suggest adjustments which may be equally relevant to a variety of different disabilities. Pages 40 – 46 look specifically at issues arising from sickness or medical absence. The Directory, starting at page 54, suggests adjustments for individual impairments.

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2. **Direct discrimination – s13**
It is unlawful for an employer to treat a worker less favourably because of their disability than the employer treats or would treat a person without that particular disability. For example, an employer dismisses a disabled worker because they have 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 member's disability, there is no defence. This concept is equivalent to that of direct discrimination because of race, sex, sexual orientation, religion and belief under the EqA.

It is not disability discrimination against a non-disabled worker to treat a disabled worker more favourably because of their disability

Direct discrimination by association
It is also unlawful to treat the member less favourably because of the disability of someone else, eg someone with whom they are associated. For example, an employer refuses to take on a non-disabled worker because the worker has a disabled child, but is quite happy to take on non-disabled workers who have children of a similar age who are not disabled.

It is important not to misunderstand this. It appears that there is no legal right under EU law or the EqA for a non-disabled worker to have reasonable adjustments to take care of disabled relatives. Members with caring requirements, whether for disabled or non-disabled children, are most likely to rely on indirect sex discrimination law.

Direct discrimination due to perceived disability
Due to the wording of the EqA s13, it is thought to be unlawful to discriminate against a non-disabled worker because they are wrongly perceived to have a disability. It is unclear exactly what circumstances would fit such a claim.

3. **Discrimination arising from disability ("DAFD") – s15**
It is unlawful to treat the member unfavourably because of something arising in consequence of their disability.

For example, if a partially-sighted worker was dismissed for making computer-entry errors, when those mistakes were because they could not see the computer screen properly.

The questions to ask are:

a. Why has the employer disciplined / dismissed / failed to promote or otherwise treated the member badly?

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b. Is the reason – eg the member is too slow, off sick too much, unable to multitask, unable to work overtime etc – something which arises from the member's disability?

There is a potential defence to DAFD, ie if the employer can prove that the treatment of the member is a proportionate means of achieving a legitimate aim.

4. **Harassment – s26**

Harassment takes place where, for a reason that relates to the disabled worker's disability or the disability of someone else, the harasser engages in unwanted conduct which has the purpose or effect of violating the worker's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the worker. This concept is the same as for harassment relating to race, sex, age, sexual orientation, religion and belief.

5. **Indirect discrimination – s19**

Indirect discrimination occurs where the employer applies a provision, criterion or practice generally, which puts a disabled worker and others who have the *same* disability at a particular disadvantage. It is not unlawful if the employer can prove that applying the provision, criterion or practice was a proportionate means of achieving a legitimate aim.

Indirect discrimination will only in limited circumstances be needed, given the more flexible concept of reasonable adjustment, which applies only to disability.

6. **Victimisation – s27**

This concept is the same in respect of all the protected characteristics. Essentially it occurs when the member is punished or treated differently as a result of complaining about disability discrimination or complaining that the employer has not made reasonable adjustments. For example, the member raises a grievance about disability discrimination and is dismissed as a result.

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

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

7. **Pre-employment disability or health enquiries – s60**

The EqA 2010 introduced a new ban on enquiries about health and disability before a job has been offered.

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Such enquiries were thought to be the main reason why disabled job candidates often failed to reach the interview stage and were also a disincentive in them applying for jobs. With certain exceptions, employers are now not allowed to ask job candidates questions about their health or whether they have a disability until they have offered a job (on a conditional or unconditional basis) or put the candidate into a pool of successful candidates to be offered a job when one becomes available.

Employers are allowed to ask questions to find out whether the candidate will be able to undergo an interview or other job assessment or will need reasonable adjustments to that process. However, questions about reasonable adjustments needed for the job itself should not be asked until after a job offer is made (unless relating to a function which is intrinsic to the job).

The Equality and Human Rights Commission (EHRC) can bring proceedings against an employer who makes unlawful pre-employment health enquiries. Individuals can't bring a claim based on the enquiry, but they can claim disability discrimination if they are refused the job and believe it is due to their disability. In any such direct discrimination claim, if the employer made an unlawful enquiry, it will shift the burden of proof.

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Who is “disabled” under the EqA?

To gain the protection of the EqA, members must prove they meet the legal definition of disability in the Act.

Whether or not a member is recognised as disabled in other contexts, eg for the purpose of social security benefits, is a different legal test. Members are not automatically covered just because they are in receipt of a Personal Independence Payment (formerly Disability Living Allowance) or because they had a statement of Special Educational Needs as a child.

The EqA 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 apparently obvious impairments do not fall within the EqA.

The only disabilities which are explicitly covered by the EqA are cancer, HIV infection, multiple sclerosis and certified visual impairment.

In every other case, the definition must be applied. The question is not, for example, whether ‘diabetes’ is considered a disability, but whether the particular member with their particular level of diabetes 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 6(1) of the EqA says:

> "A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

▪

Schedule 1 part 1 provides guidance, and further clarification can be found in the Equality Act 2010 (Disability) Regulations 2010, SI No. 2128 and in the *Guidance on matters to be taken into account in determining questions relating to the definition of ‘disability’*. The *Guidance* can be found in various places on-line including as an attachment to **www.gov.uk/government/publications/equality-act-guidance**

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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 member's ability to carry out normal day-to-day activities? 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 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.

Certain impairments are explicitly excluded, eg seasonal allergic rhinitis (eg hay fever) unless it aggravates the effect of another condition, 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.

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 EqA. This is because it does not matter how an impairment is caused (see *Guidance*, A7 and A14).

The member may have both liver damage and an addiction to alcohol. If, for example, the member is dismissed, the question is whether the dismissal was because of their alcohol addiction or because of their liver damage. The latter reason would be covered by the EqA but the former would not.

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2. Substantially affecting normal day-to-day activities

(a) What are normal day-to-day activities?

The impairment must have substantial adverse effect on the member's ability to carry out **normal day-to-day activities**.

The *Guidance* explains what is meant by "normal" activities in section D. It means activities carried out by most people fairly regularly, eg shopping, reading, writing, having a conversation, watching TV, getting washed and dressed, cooking and eating, housework, walking, travelling including public transport, and taking part in social activities. An activity need not be carried out by the whole population for it to be a normal daily activity. For example, it is normal to travel on the tube or by aeroplane, put on make-up or use hair rollers.

You may find it helpful to check whether the impairment has an effect on activities within these categories –

- Mobility (eg walking, using transport, climbing stairs)
- Manual dexterity (eg opening a tin can)
- Physical coordination (eg using a knife and fork; driving)
- Continence
- Ability to lift, carry or move everyday objects
- Speech, hearing or eyesight
- Memory or ability to concentrate, learn or understand
- Perception of the risk of physical danger.

That list used to be officially in the DDA, but it was abolished when the EqA came into force because it was too limited. Nevertheless, it can be a useful starting point when discussing with members what the effects of their impairment are.

Hobbies

Workers are not necessarily disabled simply because they can't do a particular hobby (*Guidance* D8 – D10) The *Guidance* gives as examples inability to play a musical instrument to a high level of achievement or to play a particular sport to a high level of ability, such as would be required for a professional footballer.

This suggests that playing a piano or guitar, or engaging in tennis, swimming or park football at a basic hobby level should be considered a normal day-to-day activity. Indeed, it is hard to see how such activities are not normal for many people. Presumably also normal day-to-day activities would be affected if, because of an impairment such as depression, a worker lost enthusiasm for doing any kind of hobby at all.

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However, to be safe, members should give as many examples as possible of the effects of their impairment and not restrict these to the effect on hobbies. In many cases, the impairment which restricts the member's ability to engage in such hobbies, also affects other normal day-to-day activities.

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 EqA.

The best evidence of disability is if the member has difficulty carrying out day-to-day non-work activities such as dressing, travelling, shopping, housework, using a mobile phone.

In most cases, if members are having difficulty carrying out work activities, they are probably having difficulty carrying out similar or other activities outside work. For example, sitting for long periods, standing for long periods, using a computer, reading, speaking on the telephone.

But what if the only activities which are affected are work ones? The European Court of Justice[1] has said the definition of disability under the EU Directive is this:

> 'a limitation which results in particular from physical, mental or psychological impairments and which in interaction with various barriers may hinder the participation of the person concerned in professional life on an equal basis with other workers'

This suggests people are still disabled, even if the only effect on their day-to-day activities is the ability to carry out day-to-day work activities. That would include the ability to take professional exams.

However, there is still some uncertainty whether someone is disabled if the only effect is on ability to carry out very specialised work activities. The *Guidance* says that inability or difficulty carrying out a highly-specialised work activity would not amount to an adverse impact on 'normal' day-to-day activities, eg playing football at a professional level .

But is the *Guidance* right on this? It is not the law. It is only statutory guidance. And what kind of work activities are 'highly-specialised'? Would it apply for example to ability to do fine work on hospital corsets where the member had no other difficulty using their fingers?

[1] **Chacón Navas v Eurest Colectividades SA** [2006] IRLR 706, CJEU; **HK Danmark (on behalf of Ring) v Dansk almennyttigt Boligselskab and another** C-335/11 [2013] IRLR 571, CJEU

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A good example is *Banaszczyk v Booker Ltd*.[2] Mr Banaszczyk, a picker, was dismissed because as a result of a spine injury, he could not meet the company's picking rate targets. He was slow lifting and moving cases which weighed up to 25kg. The employer said he was not disabled because this was a very specialised activity and he was unaffected in his day-to-day life. He could lift and move normal weights. The EAT disagreed. It said he had a disability. The EAT said it was doubtful whether the *Guidance* was correct to exclude specialised work activities. However, it did not need to decide that point, because lifting and moving cases up to 25 kg was a normal day-to-day type of work activity anyway for many people across many occupations.

Until there are further cases, the position for members if the only affected activities are work activities remains unclear – are they disabled only if the affected activities are common to many jobs (eg taking tests and exams or moving 25 kg cases) or also if they are only unable to carry out very specialist activities (eg making hospital corsets)? To be safe, it is recommended that, where possible, the member provides evidence of a substantial adverse impact on both work and non-work day-to-day activities. In most cases this is possible.

On a different point, members will also be covered where conditions at work exacerbate their inability to carry out day-to-day activities there. For example, smoke or chemicals in the work environment make it impossible for a worker with asthma to carry out ordinary tasks, even though they recover when they remain at home.

(b) What is a 'substantial adverse effect'?

The impairment must have a **substantial adverse** effect. This must go beyond the normal differences in ability which may exist between different people. It is relevant to compare the way the member carries out the activities in question with how they would carry them out if they were not impaired.

A "substantial" adverse effect simply means an effect which is something more than minor or trivial. (EqA s212(1))

Only able to do the activities with difficulty

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

- the activity causes pain (*Guidance, D22*)
- the activity causes fatigue, either on doing the activity once, or on repeating it over a period of time (D22)

[2] UKEAT/0132/15

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- the member has been medically advised to refrain from the activity or only do it in a certain way or under certain conditions (D22)
- the adverse effect only emerges under stress (B10-11), eg a severe stammer
- the effect is worse at certain times of day or at certain temperatures, or when the member is tired or under stress (B11)
- the member 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
- the member avoids doing the activity (B9 -10).

Examples in the Guidance

The Appendix to the *Guidance* lists examples of circumstances where it would and would not be reasonable to regard the adverse effect on a person's ability to carry out day-to-day activities as substantial.

For example, it **would be reasonable** to regard an impairment as having a substantial adverse effect on day-to-day activities if the worker had:

- difficulty getting dressed, preparing a meal or eating
- difficulty using transport, whether because of physical restrictions or as a result of a mental impairment
- difficulty using steps, or ability to walk only a short distance without difficulty, eg because of pain or fatigue
- difficulty carrying objects of moderate weight with one hand, eg a shopping bag or small piece of luggage
- difficulty hearing and understanding another person speaking clearly on the telephone
- persistent and significant difficulty reading or understanding written material, eg because of a mental impairment or learning difficulty or visual impairment
- difficulty understanding or following simple verbal instructions
- difficulty operating a computer, eg because of a physical impairment or a learning disability
- behaviour which challenges other people, making it difficult for the person to be accepted in public places
- persistent general low motivation or loss of interest in everyday activities
- persistent difficulty taking part in normal social interaction
- compulsive activities or behaviour; difficulty adapting after a reasonable period to minor changes in a routine
- difficulty concentrating
- intermittent loss of consciousness.

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Examples given in the *Guidance* where it **would not be reasonable** to regard the effect as substantial include:

- inability to move heavy objects, eg a large suitcase or heavy piece of furniture
- experiencing some discomfort as a result of travelling, eg by car or plane, for more than 2 hours
- experiencing some tiredness or minor discomfort as a result of walking unaided for one mile
- minor problems with writing or spelling
- inability to reach typing speeds standardised for secretarial work
- inability to concentrate on a task requiring application over several hours
- inability to hold a conversation in a very noisy place, eg a factory floor or alongside a busy main road
- inability to undertake activities requiring delicate hand movements, eg picking up a pin or threading a small needle.

The examples given in the Appendix to the *Guidance* are only indicators, not rigid tests. Members can also give their own examples.

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 member's ability to carry out normal day-to-day activities." (*Guidance* D13)

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 sometimes referred to as the "deduced" effect. (*Guidance* D23 – D24)

For example:

- The member's ability to hear should be assessed without the benefit of any hearing aid they wear.
- Where the member's depression is alleviated by counselling sessions with a clinical psychologist, the effect should be assessed as it would be if they were not receiving such counselling.
- Where the member's ankle is receiving continuing support from plates and pins inserted many years previously, the effect on their mobility should be assessed as it would be if that support were removed.

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

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Focus on what the member cannot do

Legally, it does not matter that the member can generally cope with life and can carry out most normal activities. It is enough that there is substantial adverse effect on some normal day-to-day activities. However, where it is disputed whether the member has a disability, it helps if there are many 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 they can do."

Unfortunately the law requires a rather negative approach in this way and if you are advising someone, you need to be sensitive. You should also be aware that many disabled people "play down" the effect of their disability.

Progressive conditions

If a member has a progressive condition, they are 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' simply means 'could well happen', as opposed to 'more probable than not' (which is a higher threshold).

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 B18 – B23.

3. Long-term effects

The substantial adverse effect must also be long-term, ie 12 months or for the rest of the member'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.

Again, 'likely' simply means 'could well happen'.

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.

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

Special cases – where disability is automatically covered

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.

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

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 B25 of the *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 episodes 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 episode once a month or even once a year, each occasion lasting anything from a few minutes to a few days. Assuming that during the episode, the person is experiencing substantial effects, there are two questions: (1) does the impairment 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 EqA explicitly states that recurrent conditions can be long-term (see above). Paragraph C5 of the *Guidance* states that “conditions with effects which recur only sporadically or for short periods can still qualify”.

The first question is less clear. Obviously if episodes 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.

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Managing the effects of an impairment

Paragraph B7 of the *Guidance* says 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. The point is that, in some instances, a coping or avoidance strategy can alter the effects of an impairment to the extent that it is no longer a disability.

So for example, a person with a back impairment might have very few symptoms as long as they don't go skiing. They might not be considered disabled if all they have to do is avoid skiing.

On the other hand, if someone has to avoid normal and routine parts of life, they surely must be considered disabled.

An employer may try to suggest that "modifying behaviour" should include finding alternative ways to perform normal activities, eg a person with RSI should employ a cleaner to do housework. This cannot be a correct interpretation of the law.

The idea that someone is not disabled if they can reasonably be expected to modify their behaviour is rather dangerous. 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 and they are disabled.

What about a person with diabetes? If they can manage their diabetes so that it is symptom free simply by avoiding sugary drinks, are they disabled? There has been a rather controversial case[3] which suggests they might not be, if that is all they have to do. Many commentators think that case is wrong. Anyway, people with diabetes often have to do far more to manage their condition than avoid sugary drinks. We discuss this more in the section on Diabetes in the Directory.

Supposing a person has a nut allergy? Are they disabled? It might seem reasonable that they avoid eating nuts, but it is rarely as simple as that. Trace elements of nuts or nut oils are found in so many ordinary food products, that it is very difficult to avoid accidentally eating nuts and, in any event, it entails a major disruption to the routines of normal life, eg having to check food in restaurants, when going to friends, when shopping in the supermarket etc.

Note also that if the member 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 page 16).

[3] **Metroline Travel Ltd v Stoute (debarred)** [2015] IRLR 465, EAT.

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Past disabilities

The EqA also forbids discrimination against someone because they had a disability in the past.

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CHECKLIST ON PROVING THE MEMBER 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 activities are affected?
- Is the effect substantial? This only means more than minor or trivial.
- If the effect is minor, is it likely to become substantial in the future? 'Likely' means 'it could well happen'.
- Is it a condition which is deemed to have substantial adverse effect, ie severe disfigurement?
- When considering the adverse effect, focus on what the member cannot do or can only do with difficulty or tiredness, as opposed to what they can do.
- Consider the effect on normal activities, not highly-specialised hobbies; Include both work and non-work activities.
- If necessary, consider the deemed effect without any medication or aid.
- Is the substantial adverse effect long-term (12 months) or recurrent?

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Good practice for UNISON reps

- Make sure the location, timing and form of advice and assistance is accessible.
- Do not make assumptions about the effects of an impairment. The member is the person who best knows the effect of their condition.
- Where the member does not identify themselves as having a disability, raise the possibility of them falling within the EqA with sensitivity. Explain the broad coverage of the Act.
- Ask questions sensitively. Explain why the law requires a negative approach.
- Be aware that many workers may "play down" the effects of their disability. Do not rely on the member to provide lots of examples. Make gentle suggestions.
- The member may only give examples of their inability to do their job or a favourite, but specialised, hobby. It is essential to find out what "normal" activities they cannot do. This can include "normal" work type activities.
- Do not simply ask what the member is unable to do at all. Ask them if there is anything that is painful or tiring to do.
- It helps to know something about the relevant disability before interviewing the member. There are specialist organisations for many disabilities which give useful information. Some key websites are listed in the Directory starting at page 55.

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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 that, where workers are disadvantaged by workplace practices because of their disability, employers must take reasonable steps, eg by adjusting hours or duties, buying or modifying equipment or allowing time off, so that they can carry out their job.

The duty is set out in sections 20 and 21 of the EqA. Section 21 says that a failure to comply with the first, second or third requirement set out in section 20 is a failure to comply with a duty to make a reasonable adjustment.

Section 20(3) says:
"**The first requirement** is a requirement, where a **provision, criterion or practice** of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take in order to avoid the disadvantage."

Section 20(4) says:
"**The second requirement** is a requirement, where a **physical feature** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take in order to avoid the disadvantage."

Under s20(9), this includes removing the physical feature, altering it or providing a reasonable means of avoiding it.

Section 20(5) says:
"**The third requirement** is a requirement, where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to provide the auxiliary aid."

Under s20(7), employers are not allowed to require the disabled person to pay any of their costs in making the adjustment.

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

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Employers are expected to act positively and constructively. In the key case of *Archibald v Fife Council*, 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 'DDA' has now become the EqA, but the point remains. 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.

Paragraph 6.33 of the Employment Code lists the following possible adjustments, giving an example for each.

- making adjustments to premises
- providing information in accessible formats
- allocating some of the worker's duties to another person
- transferring the worker to fill an existing vacancy
- altering the worker's hours of working or training
- assigning the worker to a different place of work or training or allowing home working
- allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment
- allowing the worker to take a period of disability leave
- giving, or arranging for, training or mentoring (whether for the disabled worker or any other person)
- acquiring or modifying equipment
- modifying procedures for testing or assessment
- providing a reader or interpreter
- providing supervision or other support
- employing a support worker to assist a disabled worker

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- modifying disciplinary or grievance procedures
- modifying performance-related pay arrangements
- adjusting redundancy selection criteria
- participating in supported employment schemes such as Workstep

The Code points out that it may sometimes be necessary for an employer to take a combination of steps.

Where a member becomes so disabled that they are no longer able to do their job at all, a reasonable adjustment may be to move them to another job, even at a slightly higher grade, without competitive interview.

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

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 them.
- Providing transport to and from work (as opposed to making car park spaces available; allowing the member to transfer to a closer workplace if one exists; assisting the member with travel while at work).
- Offering ill-health retirement.

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 Employment Code, paragraph 6.26 and Appendix 3.)

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.

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What kind of adjustments?

At paragraph 6.28, the Employment Code lists factors which a tribunal may take into account when deciding whether an adjustment would have been reasonable:

- whether taking any particular step would be effective in preventing the substantial disadvantage
- the practicability of the step
- the financial and other costs of making the adjustment and the extent of any disruption caused
- the extent of the employer's financial or other resources
- the availability to the employer of financial or other assistance to help make an adjustment, eg advice from Access to Work
- the type and size of the employer.

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 Employment Code, paragraph 6.25).

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. 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; help with interviews and additional travel costs to work.

The employer or worker then purchases the equipment, etc and reclaims the grant from Access to Work. The employer may have to make contributions.

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The member can make an on-line application or speak to Jobcentre Plus on 0800 121 7479 or 7579. Access to Work will then usually speak to the worker first and then, with permission, to the employer.

For latest details on levels and eligibility for grants, it is important to check directly with an Access to Work Adviser. Contact details are at **www.gov.uk/access-to-work**

It is very easy for matters to drift once Access to Work has been contacted. Meanwhile, the workplace relationship is often deteriorating and tribunal time-limits can be missed. If you are helping the member, make sure you diarise and chase matters up.

What if the employer doesn't know the member is disabled?

The employer is not under a duty to make reasonable adjustment if they do not know and cannot reasonably be expected to know that:
1. the worker has a disability and
2. the worker is likely to be placed at a substantial disadvantage as a result.

It is necessary that the employer was aware (or should have been aware) of facts which would satisfy the legal definition of a 'disabled' person, ie that the member has an impairment which has a substantial and long-term adverse effect on their ability to carry out day-to-day activities. It is not necessary that the employer realises those particular facts meet the legal definition of disability.

For example, an employer knows that the member is sleeping badly, frequently crying at work for no apparent reason, not eating and showing no enthusiasm for projects which she used to enjoy. This has gone on for over a year. It never occurs to the employer that the member might be depressed or that she would be considered to have a disability under the law. However, a tribunal may later decide that those symptoms do amount to a legal disability and that, as the employer knew about them, the employer therefore had the necessary knowledge of disability.

The employer can rely on occupational health or other medical advice to provide the facts, eg to answer questions as to how long the adverse effects are likely to last.
But the employer cannot just rely on a bald statement from occupational health that the member is not disabled, especially where there are certain indications otherwise and where the employer has not asked for precise information from occupational health which keys into the wording of the definition.

The legal position is uncertain where HR or occupational health are aware of the member's disability and the need for adjustments, but the actual decision-makers, such as the member's managers, are not.

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The Employment Code (at paragraph 6.21) says if information is gained by an agent or employee of the employer, such as an occupational health adviser, HR officer or recruitment agent, the employer will not 'usually' be able to claim they do not know about the disability. One interpretation of the case-law is that an employer has the necessary knowledge where the occupational health adviser is part of the decision-making process because line managers rely on their recommendations. This is particularly so where members knows they have been asked to see occupational health in order to help their manager make a decision regarding the work situation.

Members are not generally obliged to tell their employer that they have a disability. But for the above reasons, if they need adjustments to be made, they would be wise to tell a manager clearly in writing that they are disabled, the nature of the problem and any adjustment they know would help.

Although employers have a duty to make reasonable enquiries based on information given to them, there is no absolute onus on them to make every enquiry possible.

The Employment Code deals with the issue of knowledge at paragraphs 6.19 – 6.22. It gives as an example where an employer ought to ask questions to establish if a worker has a disability, if they keep crying at work.

With regard to job applicants, the wording in the Equality Act is slightly different regarding the required knowledge. Employers are under no duty to make reasonable adjustments if they do not know and could not reasonably be expected to know that a disabled person was or might be a job applicant.

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 member is a contract worker, eg employed by a contracted-out company or an agency.
  Obviously the reasonableness of any adjustment by the 'principal' (eg the contracting authority) will be linked to how long the member will be working for the principal.

- The tribunal will reach its own decision on what adjustments would have been reasonable. Unlike unfair dismissal law, it is the tribunal's own decision regarding what is reasonable. It is an objective test.

- When running a case, members must give at least a broad idea of what adjustments would have been useful, so that employers know what allegation they have to meet.

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The amount of detail which a member needs to give to reverse the burden of proof depends on the nature of the disability and how obvious any adjustments might be.

- It is not essential that the proposed adjustment was identified at the time. It might not be identified until the tribunal case.
- It is not necessary that a particular step is guaranteed to work or even that there is a *good* prospect of it working. It is enough if there is 'a' prospect of it working. But if the chances of it working were low, the member may get less compensation from the tribunal.

TRIBUNAL CLAIMS: STAGES WHICH MUST BE FOLLOWED IN PROVING THERE HAS BEEN A FAILURE TO MAKE REASONABLE ADJUSTMENT

- Identify the provision criterion or practice ('pcp') applied by or on behalf of the employer or the physical feature of the premises, or the lack of an auxiliary aid, which is causing the difficulty.
- Identify the nature and extent of the substantial disadvantage experienced by the member because of their disability as a result of the pcp.
- If appropriate, consider whether a hypothetical non-disabled comparator would be disadvantaged by such a pcp, all other things being equal. This is what highlights whether it is the member's disability which is causing the difficulty as opposed to unrelated factors.
- Decide, in sufficient detail, what adjustments would have been reasonable to prevent such a pcp disadvantaging the member.

Pitfalls

Where people sometimes go wrong is in failing to follow these stages. The fact that a disabled worker is under stress at work or unable to do what is required is not necessarily connected with their disability.

For example, a disabled member may be unable to achieve targets set by the employer, but is this because of their disability? Maybe they are just not very good at that particular job. Or maybe the targets are unrealistic for everyone.

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In this example, the provision, criterion or practice causing the difficulty is the requirement to achieve certain targets. But the extent of the member's disadvantage is not because of their disability. A non-disabled worker who otherwise had the same skills, knowledge and ability as the member would also be unable to meet that target. The duty to make reasonable adjustments therefore does not arise.

The other thing that goes wrong is not making a proper connection between the suggested reasonable adjustments and the nature of the member's disability. In order to establish what sort of adjustment should be made, it is necessary to understand the effects of the member's disability and exactly what it is about the employer's requirements or workplace set-up which is causing the difficulty. For example, if a member with a severe back impairment wants to work at home, the relevant provision, criterion or practice could be the employer's insistence that the member work at the workplace. But what is it about working at the workplace which causes difficulty and which could be resolved by working at home? Is it the travel in and out? Is it the type of office furniture? Is it the lack of anywhere to lie down? Is it insufficient breaks? Let's say it is the office furniture. Can the member prove the furniture is causing them back problems? Is there the possibility of different furniture at work? Why does the member need to work at home? Is the furniture at home any better? All this needs to be examined in detail.

Reasonable adjustments: some ideas appropriate to many disabilities

The Employment Code lists possible reasonable adjustments (see above), 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 in the Directory of Impairments in the second half of this Guide. Remember that any of the options could be carried out on a temporary, occasional or permanent basis.

Avoiding false assumptions

As most conditions vary greatly in their severity and in the symptoms for every individual, it is essential that reps ask the member what areas of difficulty they have 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.

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Farnsworth v London Borough of Hammersmith & Fulham and another
Ms Farnsworth had undergone treatment for depressive illness for 6 years. She was offered a post as residential social worker subject to medical assessment. The offer was withdrawn on grounds that she had not obtained satisfactory medical clearance.

The employment tribunal found this was unjustifiable discrimination. The employers had made an assumption, without good reason, that her attendance would be poor. This assumption was contradicted by a reference, which the employers had ignored and by the fact that Ms Farnsworth had been in good health for 17 months.

Winton v NV Tools Ltd
Mr Winton worked for a medium-sized engineering company for over 30 years. He developed MS, which by 1997, began significantly impair his capacity to do his full duties. Initially the employer made appropriate adjustments. But in 2000, the employer obtained a medical report, which said Mr Winton was unlikely to be able to continue working much longer. The employer did not show this to Mr Winton. Senior managers had increasing concerns about his ability to do the job, but they didn't take up the issues with him, as they normally would have done with other workers, because of his disability. Eventually, after the employer decided to make a significant pay cut in 2002, Mr Winton resigned.

The tribunal found this was unjustified disability discrimination. The employer had decided Mr Winton was unable to do his job based on stereotyped assumptions. There was no up-to-date medical advice or occupational health assessment, no meaningful discussion with Mr Winton, and no objective consideration of what adjustments could be made so that he might continue to be employed.

Once reasonable adjustments might be necessary, someone who understands disability should take over management of the situation.

In the *Pousson* case (page 86), the employment tribunal said this:

> "As soon as (the occupational health) report had been issued, someone with the necessary authority, competence and understanding of disability should have taken over the management of this situation and issued the necessary advice and guidance to the line managers. It is this fundamental failure on the respondent's part which has in the main given rise to many of the unhappy consequences that followed."

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Flexible hours, work schedules and breaks

This may entail allowing a member to work part-time, fewer hours or to job share, or to alter hours, eg to avoid rush-hour travel or because they feel less well in mornings or evenings. A member 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). In some situations, it is useful to arrange shifts so that there is recovery time. For example, compressing five days into four with a day off between each set of two days.

Whether an employer should continue to pay the full rate of pay, even though the member is working shortened hours, is a matter of what is reasonable in every case. If the member is working fewer hours in total and has less output as a result, it is probably unlikely a tribunal would think that it was reasonable to retain pay at the same level.

Bear in mind that if the member is likely to be dismissed in the near future anyway, eg for redundancy or capability, going onto shorter hours with less pay in the meanwhile could affect the amount of notice pay, redundancy pay and pension which they might receive. Having said that, if there is a good chance that reduced hours will enable the member to remain in employment, it may still be the best option.

Employers should be relatively receptive to the idea of allowing flexible working. According to a CIPD survey in 2012, all large employers offer some form of flexible working, as do 95% of medium-sized organisations and even 85% of micro-sized companies.

Moreover, employers have got used to the idea in the context of the statutory right to request flexible working for childcare or to care for older relatives, which was extended in June 2014 so that employees can ask for flexible working even if they have no caring responsibilities.

The government, HR publications and numerous employers have recognised the benefits of flexible working to employers, including:

- Improvement of recruitment and retention
- Increasing engagement, motivation and loyalty
- Reducing stress and fatigue
- Increasing productivity
- Reducing absences and lateness

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The Employment Code gives these suggestions at paragraph 6.33:

- Allowing the worker to work flexible hours so they 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. However, home working is on the rise. There are currently at least 4 million people who usually work from home, plus many millions more who occasionally do so.

Personnel Today has pointed out that benefits for employers include reduced overheads (office space), increased productivity (removes travel time; allows for flexibility during the day), and increased motivation and retention. It says employers' fears of loss of control and that the worker will not be pulling their weight is misplaced as many homeworkers find themselves doing more than they should.

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 Employment Code at paragraph 6.33 and by the Employment Appeal Tribunal in several cases.
In one case, it was said that a worker should be allowed to work from home on a temporary basis to maintain their skills, even if the job could not permanently be done from home.

Reallocation of some duties

The Employment Code suggests some of the worker's duties could be allocated to another person and gives an example at paragraph 6.33. It may also be possible for the member to swap certain duties with a colleague on a temporary or permanent basis.

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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.

The Employment Code lists transferring a worker to fill an existing vacancy as one of its examples.
In paragraph 6.33 it points out that this may entail reasonable adjustments in the new job, eg retraining or provision of special equipment or transfer to a position on a higher grade.

The duty to make reasonable adjustments may go further than enabling the member 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.

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 page 24). 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.

It will not necessarily be a reasonable adjustment to maintain members' pay at the same level when they have been transferred to lower grade jobs. However, there may be circumstances where temporary or even permanent pay protection would be considered reasonable.[4]

Acquiring or modifying equipment

This is a fairly obvious suggestion and is listed at paragraph 6.33 of the Employment Code. 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 in the Directory of Impairments in the second half of this Guide. 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 equipment (see above). Also, if employers take a worker on, knowing adjustments will be needed, they should see these through.

[4] **G4S Cash Solutions (UK) Ltd v Powell** UKEAT/0243/15.

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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 member starts the new job, even though the employer knew when they recruited the member 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 the member for the equipment to be supplied. Delays often occur in getting an appropriate assessment or in following up on an assessment and recommendation. The member often has to make repeated requests.

- When the equipment eventually arrives, there are delays in getting it installed and further delays in training the member on its use.

- All the above delays lead to stress for the member, which can exacerbate their disability and work performance, and lead to tensions or worse in the working relationship.

Hot desking often causes problems and should be avoided. Even if the member has their own dedicated space and that space is used by others only when the member has days off, work station adjustments can be interfered with.

Training of managers and co-workers

The Employment Code suggests giving or arranging training for the disabled worker or anyone else. An example could be 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. In certain circumstances, one would think that compulsory training, at least of supervisers and managers, would also be a reasonable adjustment.

Linked to this is the need in some circumstances to ensure the co-operation of co-workers with any adjustments. The Employment Code discusses this at paragraph 6.35.

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Redundancy

Redundancy selection criteria may need to be adjusted. Usually the employer uses a combination of several criteria, but some of these may disadvantage workers because of their disability. For example, points for 'leadership ability' might disadvantage a person with autism who found it difficult to interact with others. Deducting points for sickness absences may be particularly unfair for some disabled workers who have had slightly higher absences levels due to their disability.
The EHRC Code gives an example of an employer discounting disability related absences when scoring for redundancy at paragraph 6.33. There is another example at paragraph 19.17.

It may also be necessary to make reasonable adjustments to the selection process, eg if any testing is involved. In one local authority case, an employee was not allowed to apply for a post under an agreed restructuring policy, even though she demonstrated relevant skills and competencies, because it was two grades higher than her current post. Yet the reason she was working at the lower grade was because she had taken demotion in the past in order to obtain a suitable alternative job when she became disabled. The tribunal said it would have been a reasonable adjustment to allow her to apply.

In another local authority case, the employee was unable to attend an interview for a ring-fenced alternative post for reasons to do with his disability. The tribunal said that the employer should have assessed him without interview, especially as it was a lower grade post.[5]

It is also important to make adjustments to available alternative employment.

Modifying disciplinary or grievance procedures

This suggestion is made in paragraph 6.33 of the Code. The Code suggests a worker with learning disability be allowed to bring a friend outside work to act as an advocate at a grievance meeting.

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.

[5] **LB Southwark v Charles** UKEAT/0008/14.

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- 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 their 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.

Individually tailored reasonable adjustment agreements (Passports)

A common difficulty is that when line managers change, members have to explain all over again what adjustments they need and why. Sometimes the new line manager will not want to continue with the adjustment.

Something which may help is if the employer provides an individually tailored reasonable adjustment agreement. This can provide a written record of:

- The work duties or arrangements at work which cause the member difficulties because of the barriers they face due to their disability.
- What reasonable adjustments have been agreed and on what date.
- The agreed method of contacting the member when they are off sick: who makes contact, in what form, how regularly, what may be discussed.

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- What will be discussed at return to work meetings.

This individually tailored type of agreement is referred to in some workplaces as a ‘Passport’.

The passport is also a helpful record for the employer about what has been agreed and what might be needed in certain situations. It is a reference point which can focus discussions and it is particularly useful where there is a change of line manager.

To ensure confidentiality, the passport should record who can be told or shown its contents.

Employer excuses – common misunderstandings

Employers sometimes respond to requests for reasonable adjustments with arguments which would not be legally acceptable. Here are some common myths in employers’ minds:

- An adjustment can’t be made because it is treating the member more favourably than their colleagues.

  Comment: That is the whole point of the law on reasonable adjustments. The member is supposed to be treated differently and if necessary, more favourably, because they are at a disadvantage.

- The adjustment can’t be made because the member’s contract says they must work certain hours, on certain duties etc

  Comment: Discrimination law overrides what the contract says. The question is only whether the adjustment is reasonable.

- The adjustment can’t be made because it is not allowed in the employer’s policies and procedures.

  Comment: A tribunal decides what reasonable adjustments the employer should have made. The fact that the employer’s policies do not envisage a particular adjustment or even allow for it is not in itself a defence.

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- It is necessary to put the member into a dingy corner in order to make the necessary adjustments.

  Comment: Not necessarily. It may be perfectly possible to make the adjustments at a desk in the middle of the floor with some imagination. Obviously it depends what the adjustments are.

- The member does not need adjustments because some days they seem perfectly fine.

  Comment: Managers need to understand that with many disabilities, people have good and bad days.

- The member can't be disabled because they are able to live alone.

  Comment: The fact that the member can manage at home doesn't mean they don't have workplace difficulties or doesn't use certain 'work arounds'.

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Disability-related sickness absence

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

The member may be penalised in various way because of disability-related absence, eg

- Failing to get a job or having a job offer withdrawn when the reference refers to their sickness absence record.
- Being deprived of a bonus.[6]
- Increased chance of redundancy because of low scores on attendance if it is a redundancy selection criterion (see page 36).
- Difficulty getting time off for medical appointments or treatment
- When absence levels reach certain trigger points, being subjected to meetings and warnings under an absence management policy.
- Running out of sick pay.
- Being dismissed for poor attendance.
- Being thrown back into work after a period of absence without a properly managed and staged return.

There is no absolute rule that says this kind of treatment is or is not allowed. It all depends on what adjustments a tribunal would think are ‘reasonable’ for an employer to make. Or, if the member’s treatment amounts to discrimination arising from disability under section 15, it depends on whether the employer can justify the treatment.

Members often feel that the real question is whether their absence is ‘genuine’. Unfortunately it is not the only question. Even if the member has done everything possible, the tribunal will also look at how much can be asked of the employer.

[6] For example, see **Land Registry v Houghton and others** UKEAT/0149/14.

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References and withdrawal of job offers

As explained at page 9, employers are not generally allowed to make pre-recruitment enquiries about the health or disability record of job applicants. However they can make a job offer conditional on a reference. If the reference then shows the member had a poor attendance record, then the job offer might be withdrawn.

Whether or not it is disability discrimination to withdraw a job offer because of the member's previous attendance record depends on factors such as:

- How bad was the previous attendance record?
- What is the member's attendance likely to be in the future?
- Has the future employer has bothered to discuss all this with the member or just made assumptions?
- How much absence can the employer realistically accommodate?

Time off for medical appointments and treatment

The Employment Code suggests allowing workers to be absent during working or training hours for rehabilitation, assessment or treatment. It says 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.

If the member needs regular time off on an ongoing basis, eg for physio, audiology checks, blood tests or dialysis, the employer should allow what a tribunal would consider reasonable. This depends on factors such as:

- How much time is required and how often.
- Is the appointment in the middle of the day or the end of the day?
- Does the member have some control over timing? Could the member go outside work hours? Could the member use flexi time?
- How long will this arrangement be necessary for?
- How hard is it to cover the member's absence?

The Employment Code gives examples at paras 17.23 and 17.24 of what might or might not be considered a reasonable amount of time off. It says a short period of time off once/week over several months is likely to be reasonable, but several days/week over several months may not be reasonable, depending on the circumstances. Unfortunately these examples don't consider lots of other possibilities, eg a short period of time off once/month on a permanent basis.

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On the whole, reps should negotiate on the basis that such time should be allowed. In general, tribunals would probably expect employers to be accommodating of this kind of time off, provided the member has made reasonable efforts to fix appointments at one end of the day rather than unnecessarily right in the middle.

Attendance management policies

Many employers have a sickness attendance policy whereby workers are monitored, counselled, disciplined and eventually dismissed, as their absence level reaches certain levels.

Being put through an attendance management policy, with meetings and uncertainty about the future, is stressful in itself. Although all workers find this upsetting, it is recognised to be a particular problem for disabled workers if their disability means they are more likely to hit the trigger points. Employers therefore can't just respond by saying 'No one likes the sickness absence procedure'. This was established by the Court of Appeal in a very important case called *Griffiths v The Secretary of State for Work and Pensions*.[7]

However, this does not mean an employer is never allowed to put a disabled worker through the attendance procedure. As always, it comes down to what is justifiable and what reasonable adjustments a tribunal would think should have been made.

An employer would usually be expected to make some kind of reasonable adjustment in respect of disability-related absences. For example:

- Permitting all disability-related absences.
- Taking disability-related absences out of the absence management scheme with all its triggers, but having a separate process for managing disability-related absences.
- Treating disability-related absences within the usual attendance management scheme, but setting higher total trigger points or allowing a specified number of additional days for disability-related absence.

With most options, it is necessary to have a process whereby the employer accepts the member is disabled and for deciding whether absences are disability-related.

Unfortunately the law does not say that a disabled worker must be allowed to have any specified amount of disability-related absence, whether intermittent or in one long period. Once again it depends on what the tribunal would think was a reasonable adjustment.

[7] [2015] EWCA Civ 1265.

There is no clear guidance in the Employment Code as to how much extra absence it would be reasonable for an employer to allow. It all depends on the circumstances.

Relevant factors would be:

- For long-term absence, how long has it been so far?
- What is the prognosis, short and long-term?
- How is the member's absence covered?
- For intermittent absences, what is the member's non-disability-related absence record?
- What is the member's disability-related absence record and how does it compare with any additional allowance given to the member for disability-related absence?
- For how long has the member had this level of absence and what is likely to happen in the future?
- What difficulties are caused for the employer by the member's absences?

Pay while off sick

It will rarely be a reasonable adjustment to pay the member for disability-related absence, if they have no general contractual right to paid sick leave. But if the whole reason the member is off sick is because the employer has failed to make the reasonable adjustments which would enable them to return to work, there is a good argument that they should receive full sick pay.

Nottinghamshire County Council v Meikle

Ms Meikle, who has a deteriorating eye condition, worked as a schoolteacher for Nottinghamshire County Council. Her requests for the time-table to be enlarged and to have more non-contact time, so she could prepare written work in daylight hours, were ignored. As a result, she went onto long-term sickness. In accordance with the Council's sick pay policy, her pay was reduced to half after her absence exceeded 100 days.

The employment tribunal said the failure to enlarge the time-table and allow more non-contact time were failures to make reasonable adjustments. The case eventually went to the Court of Appeal, which said the failure to pay full pay during Ms Meikle's leave was unjustified discrimination because the whole reason she was off sick was the failure to make reasonable adjustments to her working conditions.

Managing the member's return to work

Where the member has been absent for some time due to their disability, a phased return to work is likely to be a desirable option.

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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. However, the tribunal is unlikely to accept that this is a reasonable adjustment if the member cannot suggest a date when they will be ready to start the phased return. There is no duty on an employer to provide non-productive work by way of rehabilitation.

The Employment Code at paragraph 6.33 says a phased return to work with a gradual build-up of hours might be appropriate in some circumstances.

Bear in mind that the member may never be able to get back to 100% duties. A gradual increase in duties can be misleading. Just because the member gets to the stage where they can cope with, say, 80% of their former duties, doesn't mean that they will be able to do the final 20%. If this is misjudged, the member may break down entirely.

Management of the member's return is very important. If the member's skills have become outdated due to a lengthy absence, it is likely to be a reasonable adjustment to provide retraining.

The Chartered Institute of Personnel and Development (CIPD) makes some useful recommendations to managers in its guide – "Recovery, rehabilitation and retention: maintaining a productive workforce".[8] It makes these key points, especially in the context of mental ill health and stress:

- The importance of effective case management for employees who require retention and rehabilitation cannot be over-emphasised. A dedicated case manager is best.
- One of the strongest factors in a successful outcome is the active involvement of a supervisor or manager from the beginning in the recovery or rehabilitation process.
- It is often helpful for the worker to select or be provided with a peer or mentor who can be available to provide support on a daily basis.
- The first day back to work can be a big hurdle. There must be someone to welcome the worker back and provide support. A small investment in support can make the difference between success and failure.
- It is essential to set realistic targets and to get the worker's commitment towards them. A lot of problems can be avoided if the worker is consulted about the rehabilitation programme.

  Presenting a developed programme can be daunting, whereas a discussion of options can be a more acceptable approach.

[8] Available at **www.re-integrate.eu/resources/recovery-rehabilitation-and-retention---maintaining-a-productive-workforce-a-guide.pdf**

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- If an employee is nervous about returning to work, it may help to come in first to meet his or her colleagues for a coffee.

- The process of rehabilitation can have setbacks. Management should focus on positive achievements rather than failures.

- Where cost-benefit analysis has been undertaken, the saving on sick pay and on recruiting a replacement has more than covered the costs of the interventions, there is the added benefit for the morale and image of the organisation.

There is a danger that staged adjustments which are initially agreed on the member's return to work are faded out too quickly. This can happen by employers putting pressure on the member to come back to full duties more quickly, or taking advantage of the member's good nature or vulnerability, by continually asking the member to carry out the odd extra task until it builds up to a habit. This next case illustrates what can happen.

United First Partners Research v Carreras [2018] EWCA Civ 323

Mr Carreras was employed as an analyst in a brokerage and research firm. He used to work very long hours, starting at 8 or 9 am and staying till 9 – 11 pm to cover U.S. markets. But after a cycling accident in 2012, he became disabled and was no longer able to do this.

He came back to work after only a few weeks, when he was still suffering serious symptoms of dizziness, headaches, tiredness and difficulties concentrating. This meant he could not work the same hours as before. For the first 6 months, he worked 8 hours/day. Then he extended that from 8 am – 6.30 or 7 pm.

From about October 2013, the employer started to ask Mr Carreras to work later in the evening. When he agreed to do so, an expectation started to develop. By the time he resigned in February 2014, there was an assumption that he would work late one or two nights/week. By then, the employer was asking him which nights he would work late – not whether he would agree to work late at all.

The employment tribunal rejected the claim. It said that Mr Carreras had not been 'required' to work in evenings. There had only been an 'expectation' that he did so. He might well have felt pressurised to do so to keep his job or gain career progression, but he had not been forced. The Court of Appeal allowed Mr Carreras's appeal. It said Mr Carreras did not have to go as far as showing he was forced to work evenings with no choice. He could also complain about a strong form of request.

The case now has to be decided again by an employment tribunal.

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Creating a supportive environment for disabled workers

There is evidence that disabled employees feel inhibited about discussing their disability with their employers, and employers can also feel awkward.

SCOPE has made recommendations to employers about how to create an environment where conversations take place.[9]

Recommendations include:

- Making it clear to all staff through different communication channels that support and adjustments are available, setting out examples of what this could involve.
- Creating opportunities for disabled employees in more senior roles to share their experiences through formal or informal initiatives.
- Developing opportunities for peer-to-peer support among disabled colleagues, such as a staff network or one-to-one mentoring.
- Ensuring line managers have access to information and resources to support conversations abound disability and requests for support.
- Equipping line managers to effectively challenge negative comments or behaviour towards disabled people at work.
- Outlining the next steps once an employee has shared information, including where appropriate, timings for follow-up activity.
- Signposting to available support once somebody has shared information.
- Exploring ways of developing processes for gathering information and sharing this at line manager handover

[9] 'Let's talk: Improving conversations about disability at work' (SCOPE: Nov 2017) available at **www.scope.org.uk/Scope/media/Documents/Publication%20Directory/Let-s-talk-improving-conversations-about-disability-at-work-Scope.pdf**

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The government commissioned Stevenson/Farmer review[10] recommends that all employers, regardless of workplace type, industry or size adopt the following mental health core standards:

- Produce, implement and communicate a mental health at work plan
- Develop mental health awareness among employees
- Encourage open conversations about mental health and the support available when employees are struggling
- Provide employees with good working conditions
- Promote effective people management
- Routinely monitor employee mental health and wellbeing.

The report recommends that all public sector employers, and the 3,500 private sector companies with more than 500 employees, deliver the following mental health enhanced standards:

- Increase transparency and accountability through internal and external reporting
- Demonstrate accountability
- Improve the disclosure process
- Ensure provision of tailored in-house mental health support and signposting to clinical help
- Identify employees at higher risk of stress or trauma and produce a national framework which coordinates support for these employees and establishes clear accountability for their mental health.

The government responded positively to the Stevenson/Farmer review in 'Improving lives: the future of work, health and disability'. [11]

All these documents are worth reading and bringing to employers' attention.

[10] 'Thriving at work: The Stevenson/Farmer review of mental health and employers' (October 2017) available at **www.gov.uk/government/uploads/system/uploads/attachment_data/file/658145/thriving-at-work-stevenson-farmer-review.pdf**

[11] Available at **www.gov.uk/government/publications/improving-lives-the-future-of-work-health-and-disability**

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Bringing a tribunal claim

Information in this section is provided so that reps can advise members on what to expect and steps in the process of bringing an employment tribunal claim. Reps should act in accordance with UNISON's internal procedures for providing advice and legal assistance at all times. In particular, please see the terms of service set out in the current ET Representation Scheme Protocol Guidance and CASE form.

The Questions Procedure

In all discrimination claims including disability discrimination claims, workers can send their employer a formal written questions asking for information to help establish whether they evidence to bring or prove their case. Until 2014, there was a statutory 'questionnaire' procedure with strict time-limits and a specific power for the tribunal to draw an adverse inference if the employer did not answer within 8 weeks or gave an evasive answer. This has now been replaced by a voluntary procedure, accompanied by an ACAS Code of Practice: 'Asking and responding to questions of discrimination in the workplace'. This can be found at **www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf** The voluntary procedure has many similarities to the previous statutory procedure and it is important that it is still used. It is best that experienced discrimination lawyers write the member's questionnaire. If UNISON take on a case for a member, a questionnaire would probably be considered at that stage.

Early conciliation

Workers must send an Early Conciliation form to ACAS before starting any tribunal claim. There is an on-line form available on the ACAS website or workers can telephone ACAS instead. A 'potential claimant' only has to put their own name and address and that of the 'potential respondent' on the form. If there might be more than one respondent, eg in a discrimination case, both the employing organisation and an individual discriminator, two separate forms must be submitted.

It is then entirely optional for both potential claimant and potential respondent whether they want to try and negotiate through ACAS to settle any possible claims. ACAS allows up to 1 calendar month, with an additional 14 days if settlement is close. If negotiations fail at that stage or sooner, ACAS sends out a certificate with a unique reference number which must be quoted on the tribunal form.

This process affects time-limits for lodging a tribunal claim. The time-limit is 'paused' while the matters is in ACAS's hands and the days are added on to what would otherwise be the time-limit. As a minimum, one month is usually added after the member receives, or is deemed to receive, the ACAS certificate. This is just a summary.

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The effect on time-limits is complicated and full of pitfalls. It is not described in detail here. It is absolutely essential to be aware of the exact rules and calculate carefully.

Time-limits

Section 123 of the Equality Act 2010 sets out time-limits. A claim must not be brought after the end of 3 months starting with the date of the act to which the complaint relates.

If there are several independent acts of discrimination, each separate action must be kept within time. So count the time-limit from each of the separate actions.

Conduct extending over a period is treated as if it was done at the end of the period. So if a discriminatory action continued from 23 February until 19 May, the 3 months would be counted from 19 May. This is often referred to colloquially as “continuing discrimination”, though that expression is a little misleading, as it suggests this concept has wider application than is the case.

Under s123(3)(b), a failure to do something is treated as taking place when the relevant person decides not to do it. Under s123(4), unless there is any other evidence indicating when the person decided not to do something, it is taken to occur when the person did something inconsistent with doing it. Or if the person never does something inconsistent, it occurs on the expiry of the period when the person might reasonably have been expected to do it.

Given the wording of s123(3)(b), it is dangerous to rely for time-limit purposes on the failure to make a reasonable adjustment being ‘continuing’. It is safest to bring a claim within 3 months of the employer’s decision not to take action or in the absence of such decision, within 3 months of the circumstances described in s123(4).

For example, due to the member’s visual impairment, Access to Work recommend to the employer on 9 January 2017 that the employer obtains a particular computer programme, to enable the worker to read the screen. The employer does nothing about this. Eventually, the worker becomes ill and goes off sick with stress on 20 November 2017. What is the time-limit to bring a claim in respect of the employer’s failure to make that reasonable adjustment?

First consider whether there is evidence that the employer has decided not to obtain the software, eg the employer has instructed its IT department not to source the specialist software or has told the member to buy it herself. If so, count the time-limit from the date of that decision.

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If there is no such evidence, consider whether the employer has done anything inconsistent with making the adjustment, eg the employer has instructed its IT department to install the same new software for all staff and has not referred to any specialist software for the member. If so, count the time-limit from the date of the employer's inconsistent action, ie the instruction to the IT department.

If there is no evidence of any inconsistent action, count the time-limit from when the employer might reasonably have been expected to obtain the software. This can only be an estimate based on how long the suppliers usually take to supply such software plus reasonable time for making arrangements to order and install it.

If the member in this example has still brought no claim for failure to make reasonable adjustments by 20 November 2017, she risks being out of time.

If the time-limit is missed, tribunals have a discretion to allow in a late claim if it is just and equitable to do so.

To be safe: if employers do not promptly make reasonable adjustments, do not let the situation drag on and on. Not only is there a high risk of missing tribunal time-limits, it is not good for the member. The longer the workplace situation continues without the needed adjustments in place, the more likely it is that work relations will break down.

Remember that these time-limits are subject to extensions resulting from use of the Early Conciliation procedure.

Note also that, even if the claim is already out of time and needs the tribunal to exercise its discretion to allow it to proceed, it is still necessary first to make the ACAS Early Conciliation notification.

Given that calculating time-limits is not an easy or straightforward task, reps are urged to seek legal advice and guidance at the earliest opportunity.

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The public sector equality duty

Section 149 of the EqA imposes a public sector equality duty (PSED) on public authorities. It came into force on 5th April 2011, replacing the previous disability equality duty.

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

The general duty

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

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the EqA
- advance equality of opportunity
- take steps to foster good relations between those sharing a relevant protected characteristic, eg disability, and others

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 then disability equality duty 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.

Specific duties

Many public authorities are also subject to specific duties. These are different for England, Scotland and Wales. For details of the specific duties, the best starting point is the website of the Equality and Human Rights Commission.

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Communication and language

A report by ENEI (the Employers' Network for Equality and Inclusion) in July 2014 alarmingly found that one in three people had an unconscious bias against people with visible disabilities. This Guide is focused on actions required by the law. Addressing attitudes is another matter. However, there are some good practice points regarding communication. We are sure you will be aware of these points, but it is useful for us all to remind ourselves how to communicate on an equal basis. You also want to ensure employers do not use unacceptable language, however unintentional.

- Talk to people as individuals. Concentrate on the member's personality and what they are saying.
- Where the member has an interpreter or helper, address yourself to the member. Don't pet a guide dog while it is working.
- Don't intrude on the member's personal space, eg by leaning on a wheelchair or grabbing the member's arm to guide them.
- Don't be embarrassed. Look at and talk to the member as you would any member that came to your for help. Be patient if necessary.
- Don't be patronising. Don't say, "Considering you are disabled … you have managed fantastically."

Language is important. It is not a question of being "politically correct". Many words have negative connotations, which can be hurtful to the member and cause others to see or treat them unfavourably and without respect.

Acceptable language tends to change and you need to keep yourself up-to-date. These are some key points:

- Refer to "disabled people" or "people with disabilities". Currently there is no consensus on which is the preferred term, although the latter is becoming less popular. UNISON prefers the term "disabled people" as it fits with the social model of disability. However, it is best to ask the individual which they prefer. Do not say "the disabled".
- Do not describe someone as, eg, "an epileptic". It is better to say it is "a person who has epilepsy".
- Refer to someone as "using a wheelchair" or a "wheelchair user". Do not say "wheelchair bound" or "confined" or "restricted to a wheelchair"
- Some old-fashioned terms are really upsetting and offensive nowadays. Say "a person with learning disability" or "difficulty" rather than "mentally handicapped".

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- Avoid other negative words such as “suffering from” or “victim of”. Instead say that a person “has” or is “living with” the relevant impairment. “Visually impaired” is better than “visually handicapped”.

- Do not use the word “normal” by way of contrast to disability. People without disabilities can be described as “non-disabled”.

- It is better to refer to “accessible” and “inaccessible” toilets, rather than “disabled toilets”.

THE MEDICAL MODEL v THE SOCIAL MODEL OF DISABILITY

The distinction between the medical and the social model of disability is an important issue for disabled people. It is helpful if you are aware of the difference.

The medical model focuses on the individual’s impairment or condition as being the primary cause of disability. The individual does not meet the accepted social “norms”. This approach looks for medical ways to overcome the worker’s disadvantage.

The social model views the individual as “disabled by society”. Individuals with impairments are excluded from the mainstream of social activities because contemporary social organisation takes little account of them. This approach looks at adapting society and social and economic institutions.

The law set out in the Equality Act has elements of each model. However, the central requirement on employers to make reasonable adjustments to remove barriers on a worker’s full participation, resembles the social model.

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Directory of impairments

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AGORAPHOBIA

It is estimated that up to 5 million people have 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, they will often have a panic attack, with severe physical symptoms (palpitations, chest or stomach pain, headache, fast breathing). They may become anxious even thinking about going to such places and they will tend to avoid them.

The Legal Definition

Impairment

Mental

Day-to-day activities

A mental impairment can have physical effects, as in this case. The *Guidance* gives an example involving agoraphobia at paragraph D15. It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty going out of doors unaccompanied, for example, because the person has a phobia
- Difficulty entering or staying in environments that the person perceives as strange or frightening
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction.

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.

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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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

No Panic (National Organisation for Phobias, Anxieties, Neuroses, Information and Care) is at **www.nopanic.org.uk** Tel: 0844 967 4848 (confidential helpline)

The Phobics Society is at **www.phobics-society.org.uk**

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ALLERGY

An allergy is an adverse reaction which the body has to a particular food or substance. The most common substances causing an allergy include pollen, animal hair and food. Allergies are very common. It is estimated that one in four people in the UK suffer from an allergy at some point in their lives.

Most allergic reactions are mild, but can still cause itchy eyes, sneezing, wheezing, skin rashes and swelling. Asthma, often caused by animal dander (tiny flakes of hair or skin), is listed separately in this Directory. A small number of people suffer a severe allergic reaction called ‘anaphylaxis’. This is usually caused by certain food, insect stings or drugs. Anaphylaxis can be life threatening.

In the UK, about 1 in 100 people have a peanut allergy and 1 in 200 have an allergy to tree nuts. Nut allergies tend to be particularly severe and people can react to tiny quantities, eg less than 1 nut. Some people react to only trace amounts or when standing next to a person eating nuts. Symptoms come on very quickly and can include swelling of the face, feeling of tightness around the throat, tingling mouth or lips, colicky pains in the abdomen, feeling sick, and nettle rash or hives. When the reaction is more severe and involves anaphylaxis, it can include swelling around the throat, wheezing, a sense of impending doom, a fast heart rate and low blood pressure causing faintness or light-headedness, and even loss of consciousness.

A mild allergic reaction can often be treated with anti-histamine medicine. A more serious reaction will require an adrenaline injection, and people with severe allergies usually carry an adrenaline injector around with them.

The Legal Definition

Seasonal allergic rhinitis, eg hay fever, is explicitly excluded from the definition of ‘disability’ in the Equality Act unless it aggravates the effect of any other condition, eg asthma. The rest of this section is concerned with other allergies.

Impairment

Physical.

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Day-to-day activities

Allergies with only very mild effects are unlikely to be covered by the definition of disability. It is necessary that there is an adverse effect which is more than trivial. More serious effects could have a substantial adverse effect, even if they are not as severe as anaphylactic shock. For example, if a worker cannot stop sneezing and their eyes keep running, that could interfere with their ability to read, look at a computer screen and concentrate.

Anaphylaxis clearly has a substantial adverse effect, potentially interfering with ability to breathe and remain conscious, and thus affecting all activities.

An individual who has to substantially modify their behaviour to avoid coming into contact with an allergen should be able to argue that this is in itself a substantial adverse effect on their ability to carry out normal day-to-day activities. For example, a worker who is severely allergic to even trace quantities of nuts will need to check food products all the time. This will have a substantial adverse effect on their ability to eat out with friends; buy take-away snacks; buy supermarket ready meals; and so on. They may also have to avoid travel in confined air-conditioned spaces. For a further discussion on this, see paragraph D22 of the *Guidance* regarding medical advice and “Managing the effects of an impairment” on page 18 above.

At paragraph D3 of the *Guidance*, normal day-to-day activities are said to include preparing and eating food, travelling by various forms of transport and taking part in social activities. The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty preparing a meal
- Difficulty eating
- Difficulty using transport
- Difficulty taking part in normal social interaction

Medical treatment: The likely effect of the allergy on the worker’s ability to carry out day-to-day activities without corrective treatment or measures should also be considered. As stated above, many individuals will use anti-histamine or even an adrenaline injection to counteract the worst effects of the allergy on occasions when it is triggered. Some people may use medication or creams to lessen skin reactions.

The *Guidance* says at paragraph B12 that corrective measures can include the need to follow a particular diet. It is therefore arguable that the effect of the allergy should be considered as if the person were not taking steps on medical advice to avoid the cause of the allergy, eg by avoiding food with any trace of nuts or nut oils.

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Long-term effect

Once a person has developed an allergy, it is likely to be long-term and will very often be life-long. Recurring or fluctuating effects are considered long-term if they are likely to recur (see pages 17 - 18).

There is no reason why the effects of an allergy cannot be considered substantial and long-term in the same way as for other potential disabilities with intermittent effects, for example, asthma, epilepsy and migraine.

Reasonable adjustments

Always consult the worker. Adjustments depend on the severity and nature of the worker's condition. The most obvious adjustments are to ensure the worker does not come into contact with the relevant allergen during their work or on work-related activities outside the workplace such as training course or outings.

Where the allergy is nut related:

- Put up signs stating that nuts must not be eaten in the workplace and explain why (with the worker's permission)
- Allow the worker to eat at their desk rather than in the canteen
- Allow home working
- Have an emergency action plan if the worker accidentally comes into contact with nuts and becomes ill

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Real tribunal cases

It is possible for a latex allergy to be a disability if it is sufficiently severe. This was agreed in one case[12] where latex caused asthma-type symptoms, nausea, palpitations, difficulty swallowing, and conjunctivitis. The employee (a trainee Consultant Anaesthetist) said that she suffered some of these symptoms mildly or severely every day because latex is a common substance in daily life and that the only way to avoid them altogether was to avoid latex. She described many day-to-day difficulties arising from her allergy, including the need for special arrangements to be made so she could attend the doctor and dentist.

[12] **County Durham and Darlington NHS Foundation Trust v (1) Dr E Jackson (2) Health Education England** UKEAT/0068 - 9/17

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Wheeldon v Marstons PLC [2003] EqLR 859, ET
Mr Wheeldon was employed as a joint head chef at the Whittington Inn and his duties involved preparing food. In October 2011 he suffered an allergic reaction to nuts at work and he did not go back to work after that.

Mr Wheeldon had been diagnosed with a severe allergy to peanuts or traces of peanuts. A preliminary hearing at the tribunal was held to decide whether this was a disability within the meaning of the Equality Act. The judge decided that it was.

On medical advice, Mr Wheeldon had to carry two adrenaline auto-injectors with him at all times. He had to avoid direct or indirect contact with nuts. Even inhaling or touching nut dust could trigger a reaction. Mr Wheeldon was advised to avoid parties where peanuts were out on display, avoid oriental restaurants, to drink from a straw or the bottle or can in busy public places, to avoid public transport with air conditioning and when flying in an aeroplane, to inform the airline so that other passengers were asked not to eat nuts. Mr Wheeldon only went to restaurants where he was familiar with nut free dishes.

Mr Wheeldon's life was 'ruled by' the allergy since the merest contact could set off a life-threatening reaction. He had been hospitalised for suspected anaphylactic shock on seven occasions in the past. The doctors said that the nut allergy, which had started at age 18, would be a lifelong problem, but as long as he worked in a nut free environment, Mr Wheeldon did not need to take any medication and was perfectly well.

The employer accepted Mr Wheeldon suffered from a permanent physical impairment. The question for the tribunal was whether the effect on his day-to-day activities was 'substantial'. The judge noted that the *Guidance* said disabilities with intermittent effect could be a disability. Mr Wheeldon gave evidence as to the effect on his social activities, food preparation and travel.

The tribunal noted that to minimise the risk of anaphylactic shock, Mr Wheeldon's day-to-day activities were substantially affected. He was restricted in his diet, in the way he prepares meals and in the way those around him prepare meals. He had to modify routine activities such as shopping for groceries. He could not socialise like others. His domestic life and personal relationship with his partner and son, were limited. His freedom to choose the way he earned his living was also restricted.

The effect also had to be considered without the creams and medication he used to ameliorate the worst of his symptoms, ie his skin flare up and itching, interruption of sleep and the intensity of an anaphylactic attack.

Note: this case does not set any legal precedent, because it was only at employment tribunal level.

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Sources of further information

Information on different allergies can be obtained on the website of Allergy UK at **www.allergyuk.org**

An American site, the Job Accommodation Network, has a fact sheet on latex allergy with suggestions for adjustments at **https://askjan.org/disabilities/Latex-Allergy.cfm**

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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. Gout affects small joints, especially the big toe. Ankylosing spondylitis affects the spine. There is a separate Directory entry for lupus.

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.

People with arthritis often also have fibromyalgia (see separate Directory entry), which requires different treatment.

The legal definition

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers to arthritis at paragraphs A5, B11 and C6.

Medical treatment: if the worker's pain is controlled by medication, the test is the effect on them 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 page 18).

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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, Shoulder, Arm or Hand Impairment, Back Impairment or Mobility Impairment (all listed below in the Directory).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

***Real tribunal cases**:*

In one case,[13] a reasonable adjustment was allocating an employee with osteoarthritis a permanent car parking space. The EAT agreed it was not reasonable to expect the employee to arrive earlier so she could find a non-dedicated space. She was entitled to choose when to start under the flexi-time system just like everyone else.

Sources of further information

Useful websites: Arthritis Research UK at **www.arthritisresearchuk.org/** and Arthritis Care on **www.arthritiscare.org.uk** are full of information. See also the National Rheumatoid Arthritis Society at **www.nras.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 accommodations are two American sites: the Arthritis Foundation at **www.arthritis.org**, and the Job Accommodation Network at **http://askjan.org/media/Arthritis.html** (factsheet on Arthritis).

[13] **The Environment Agency v Donnelly** UKEAT/0194/13.

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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

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* explicitly refers to asthma at paragraphs A5, C8 and D21.

Paragraph D22 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.

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The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty in going up or down steps, stairs or gradients; for example because movements are fatiguing
- An ability to walk only a short distance without difficulty, eg because of fatigue (but not experiencing only minor discomfort as a result of walking for about one mile)

If the worker only has asthma at work, eg because of a smoky atmosphere, but recovers when at home, this may nevertheless amount to a substantial impact on their day-to-day activities.[14]

If there is any suggestion that the worker has behaved in a way which aggravates their asthma, eg by owning a cat, see comments at "Managing the effects of an impairment" (page 18 above).

See also "episodic effects" (page 18 above).

Medical treatment: A worker may have asthma attacks only rarely, but this may be because they are 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.
- 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.

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

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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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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 available at **www.hse.gov.uk/pubns/asthma-at-work-your-charter.pdf** 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.

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AUTISM 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. Many autistic people are methodical and logical and demonstrate strengths in the areas of problem-solving, attention to detail, and creative thinking. Despite this, according to the National Autistic Society, only 16% of autistic people are in full-time employment and 43% have said they have left or lost a job because of their condition.

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. People with autism may find it hard to adapt to change or understand new instructions unless communicated in clear concrete terms. They may also find it hard to understand verbal instructions, especially if these use figurative (non-literal) speech or rely on non-verbal cues. Some people are hypersensitive to lights, noise, temperature and/or touch.

Historically, concepts such as 'high-functioning' and 'low functioning' autism have been used. However, thinking in these terms can be unhelpful as an autistic person who is 'high functioning' may still have high support needs in different situations.

An autistic person may show their anxiety by apparently aggressive body language, raising their voice or 'stimming'. Stimming is a coping mechanism which involves fidgeting, scratching, picking, humming, coughing etc..

Many people have never had their autism diagnosed. This is partly due to the levels of autism awareness and understanding in society and amongst health professionals. Many people will not have been diagnosed as a child over 15 years ago. It is not uncommon for people to be diagnosed with autism later in life following events such as redundancy or pending retirement, when the stresses trigger anxiety and demonstrably autistic behaviour. It is extremely common for women to be misdiagnosed or not diagnosed at all. This is most likely due to the fact that women are better able to mask or 'hide' their autism and will often mimic others.

In addition, people may have been brought up in other countries where tests for autism are less advanced or where there is a great deal of stigma attached to autism, so that it is rarely admitted.

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The legal definition

Impairment

Mental

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers explicitly to autism at paragraphs A5, D17 and E2.
The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty entering or staying in environments that the person perceives as strange or frightening
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships
- Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places
- Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.

For a case concerning Asperger's syndrome, see *Hewett v Motorola Ltd*, although that case was under the more restricted definition of disability in the DDA, where affected activities had to fit into categories.[15]

***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; explicitly requesting any necessary action.
- Maintaining consistency with rules and procedures.
- Giving feedback during work.
- Identifying priorities; breaking down tasks into smaller tasks and stages.

[15] [2004] IRLR 545, EAT

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- Giving more time to learn new tasks; providing a colleague to work alongside in early stages; clear and structured training.
- Avoiding unexpected last minute tasks.
- Flexible hours if rush hour travel is stressful.
- Adjustments to noise, light or heat in the working environment.
- Fixed desk in a quiet corner.
- A mentor to ensure the member is integrated into the team.
- In interviews, specific and closed questions, eg about the worker's experience; no abstract questions; interpreter in interview to re-word questions.
- Where the member has to attend a new location for training, interview or work, meeting them at the entrance and guiding round the building.

- An example given by the Employment Code at paragraph 6.34 is ensuring that a worker with autism has a structured working day and that other employees cooperate with this.

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

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

'Untapped talent: a guide to employing people with autism' can be found at several locations if you google the title, including **www.hao2.eu/pdf/Untapped_Talent_-_English.pdf**
It explains the key effects of the disability and is full of useful tips for recruitment and workplace adjustments.

The TUC's guide, 'Autism in the Workplace' (May 2014) can be downloaded at **www.tuc.org.uk/sites/default/files/Autism.pdf**

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‘Autism Equality in the Workplace’ by Janine Booth (Jessica Kingsley Publishers, 2016) is a really excellent little book.

Neurodiversity

'Neurodiversity' is a relatively new umbrella term that refers to people who have dyslexia or dyspraxia (see separate entry in this Directory), autism, attention deficit disorders, and other neurological conditions. These are 'spectrum' conditions, with a wide range of characteristics, but which nevertheless share some common features in terms of how people learn and process information.

In the context of an employment tribunal case, an individual will still need to identify a specific disability, eg ‘autism’ or ‘ADHD’. Also in practical terms, it is important to understand the exact needs of the member because of the nature of their disability, and not think in general terms. Nevertheless, it is important to understand what the term means as it is being increasingly used in policy discussion.

ACAS has an informative page on Neurodiversity at **www.acas.org.uk/index.aspx?articleid=5858**

There is also an ACAS Research paper ‘Neurodiversity at Work’ (Ref 09/16) at **www.acas.org.uk/media/pdf/2/m/Neurodiversity_at_work_0916(2).pdf**

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BACK IMPAIRMENT

NHS England said in 2016 that back pain was the largest single cause of disability. 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 EqA very much has to be assessed on a case-by-case basis.

The legal definition

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* It is particularly important with back impairments to assess the severity of the effects. The Appendix to the *Guidance* gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty in getting dressed, eg because of physical restrictions
- Difficulty waiting or queuing because of pain or fatigue when standing for prolonged periods
- Difficulty using transport, eg because of physical restrictions, pain or fatigue (as opposed to discomfort after 2 hours in a car or plane).
- Difficulty going up or down steps or gradients.
- Ability to walk only a short distance without difficulty. 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 and carrying objects of moderate weight with 1 hand, eg a shopping bag or small piece of luggage. But inability to carry heavy luggage is not in itself an indication of disability.

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?

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- 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 "that good industrial relations, job satisfaction and partnership between employers and employees are key elements in the successful management of back pain problems". 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.
- Voice-activated software to avoid need to use keyboard and mouse.
- (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 Employment Code at paragraph 17.87 is reallocating lifting duties to colleagues.

Where the back is damaged by repeated movements, see also RSI (see listing in Directory, below).

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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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

The Health & Safety Executive provides advice for employers and for workers on management of back pain at **www.hse.gov.uk/msd/backpain/**

There is a special section on musculoskeletal disorders which often affect cleaners at **www.hse.gov.uk/cleaning/backpain.htm**

Although an American website, the Job Accommodation Network site at **http://askjan.org/media/Back.html** has useful suggestions on its fact sheet about back impairments.

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CANCER

The legal definition

Cancer is deemed a disability as soon as it is diagnosed. This includes non-invasive and early stage cancers. The term 'pre-cancer' might or might not mean cancer is already present. In one case,[16] an employee with lentigo maligna was automatically covered. Although sometimes referred to as a pre-cancer, it was a stage 0 melanoma where cancer cells were present in the top layer of skin.

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 (see listing in Directory, above).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

There is a cancer fact sheet on the American website, the Job Accommodation Network at **http://askjan.org/media/Cancer.html**

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 hard to find, but should still be available on the CIPD website via a link at **www.cipd.co.uk/hr-resources/guides/cancer-working-guidelines-employers-hr-line-managers.aspx**

Macmillan Cancer Support has a variety of tools for employers at **www.macmillan.org.uk/information-and-support/organising/work-and-cancer/if-youre-an-employer/policies-and-resources.html**

[16] **Lofty v S Hamis t/a First Café** UKEAT/0177/17.

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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

Whether the effect is substantial depends on the individual case, judging the effect without any medication or medical treatment. 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 their ability to carry out day-to-day activities. The *Guidance* refers to cerebral palsy in two places, but the examples relate to children.

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.

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Reasonable adjustments

Always consult the worker. Suitable reasonable adjustments will vary but could include some of those suitable to people with MS, Visual impairment, Hearing impairment, RSI, Learning difficulties, or Mobility (all listed in the Directory, below).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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.[17]

Sources of further information

Useful websites are Scope at **www.scope.org.uk/support/families/diagnosis/cerebral-palsy**, the National Institute of Neurological Disorders and Stroke (cerebral palsy section) at **www.ninds.nih.gov/Disorders/All-Disorders/Cerebral-Palsy-Information-Page#disorders-r3** and the cerebral palsy fact sheet on the Job Accommodation Network site at **http://askjan.org/media/CP.html**

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

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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 Fit Note 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, Bipolar Depression and Seasonal Affective Disorder. For related conditions, see Mental Health Issues in the Directory, below.

The legal definition

In the key case of *J v DLA Piper UK LLP* [18] the EAT set out guidelines on how to decide whether a person’s depression falls within the legal definition. It distinguished between ordinary ‘low mood’ triggered by a reaction to adverse circumstances such as a poor work appraisal, and a mental condition. The EAT accepted the line between the two is not always clear, and that it is made more confusing because some GPs and most lay people speak loosely when using words like depression, anxiety and stress. The EAT suggested that the usual legal approach, ie to consider first whether there is an impairment and then which activities have been affected, should possibly be reversed.
The best indication of an impairment may be the extent to which normal day-to-day activities are affected.

[18] UKEAT/0263/09; [2010] IRLR 936.

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In particular, if the reaction lasts more than 12 months, it is in most cases likely to be the result of 'clinical depression' rather than simply a reaction to adverse life circumstances.

However, a long period off work does not always mean there is a mental impairment, especially where the cause of the problem is the member's unhappiness about the way they feel they have been treated at work. The member might have become entrenched over a situation at work and can't face returning to the job, but is otherwise unaffected in carrying out day-to-day activities. Often a doctor will call this situation 'stress' or 'work-related stress' rather than 'anxiety or depression'. In *Herry v Dudley Metropolitan Council*[19] the EAT said this reaction might not be a disability at all. A tendency to nurse grievances, unhappiness with colleagues, or refusal to compromise may reflect the employee's personality, but those characteristics are not a mental impairment in themselves.

On the other hand, it might be that the member does have depression which affects them in work and also in the rest of their life. Even if that depression was initially triggered by work problems, it can still become a disability if it affects other day-to-day activities, eg the member stops talking to friends and going shopping.

Impairment

Mental. Originally the legislation required workers with a mental illness 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 or disorder, eg Post-Traumatic Stress Syndrome.

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers explicitly to depression in paragraphs A5, A14, B5, B14, C2 and C6.

Depression can affect virtually all normal activities because of the overriding effect of extreme tiredness.

[19] UKEAT/0100/16

A good illustration of this is found in the case of *Leonard v Southern Derbyshire Chamber of Commerce*, although that case was under the more restricted definition of disability in the DDA, where affected activities had to fit into categories.[20]

Where a worker has a mental illness such as depression account should be taken of whether, although they have the physical ability to perform a task, they are, 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 they can do or to weigh up what they can do against what they cannot do.

The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty in getting dressed, eg because of poor motivation
- Persistent general low motivation or loss of interest in everyday activities
- Persistently wanting to avoid people eg because of a mental health condition
- Persistent difficulty concentrating

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?
- Do they lose co-ordination due to tiredness, eg by tripping over pavement edges?
- Do they find it exhausting to carry shopping for as far as they usually would when not depressed?
- Do they step in front of cars without thinking?
- Do they find it hard to concentrate, eg following a recipe, listening to a whole television programme, reading a book for half an hour?
- If they are taking medication, has the dose had to be increased? Have they noticed the difference if they stop 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. The *Guidance* at paragraph C6 gives examples.

[20] [2001] IRLR 19, EAT.

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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 Employment Code gives as an example allowing private telephone calls during the day to a support worker.

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.

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- 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.
- For cases illustrating reasonable adjustments in the context of an anxiety or stress disorder, see under Mental Health Issues (in Directory, below).

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

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**

MIND has a useful website at **www.mind.org.uk**

See also section on Mental Health Issues in the Directory, below which has a lengthy list of further resources.

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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. There are also various complications, such as eye disease, or foot or leg ulcers.

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The legal definition

Impairment

Physical

Day-to-day activities

Someone with diabetes may or may not be disabled. There is no simple rule that, for example, type 1 diabetes is covered but type 2 diabetes is not.

It is important to remember that, even if the member's diabetes does not yet have any substantial adverse effect, the member will still be covered if it is likely that it will in the future have a substantial adverse effect.

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. Where the member would have substantial adverse effects if they were not taking medicine or having insulin injections, they should be considered disabled.

But what if the member is not taking any medication, but is controlling their diabetes by a restricted diet? There is a strong legal argument for saying that this also counts as a 'measure' if it is on medical advice, and therefore the member's health should be considered as it would be if they were eating a normal diet. This is confirmed by paragraph B14 of *The Guidance.*

On the other hand, what if the member only needs to avoid excessively sugary drinks? *The Guidance* suggests at paragraph B7 that if a person can reasonably be expected to avoid certain behaviour which causes the adverse effect, they are not disabled. In *Metroline Travel Ltd v Stoute (debarred)*,[21] the EAT said the worker was not disabled because he only needed to avoid sugary drinks. However, a lot of commentators think that case was not correct. There has been a later case, *Taylor v Ladbrokes Betting and Gaming Ltd*,[22] which shows that the analysis in *Stoute* was too simplistic.

We talk more about this difficult issue in the section on "Managing the effects of an impairment" on pages 19- 20 above.)

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.

[21] [2015] IRLR 465, EAT.
[22] UKEAT/0353/15.

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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 their desk so they 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 see Directory entries for Visual Impairment, Heart Impairment, neuropathy / nerve damage (see RSI).

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.

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.

British Telecommunications PLC v Pousson

Mr Pousson, who is diabetic, was employed as a customer services adviser, answering telephone calls from the public. Although management knew he had to test his blood and inject himself with insulin, they did not ask how, when or where he undertook these matters. No suitable location was offered for testing and injecting and no facilities for disposing of needles. No risk assessment was carried out. Mr Pousson was not allowed to exceed his break times and had to meet minimum log-on times. As a result of pressure not to leave his desk to test and inject himself and reluctance to do so publicly at his desk, he eventually stopped testing altogether.
This caused a hypoglycaemic episode leading to a severe injury, after which Mr Pousson left.

Mr Pousson had also been warned under the attendance policy, which had not been modified in his case, despite the recommendation of occupational health that an allowance regarding sickness absence should be made.

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Two occupational health doctors had advised that diabetes can make a person more prone to general viruses and infections, and these can take longer to clear up.

The employment tribunal found Mr Pousson had been discriminated against when disciplinary action was taken against him for poor attendance and also in being spoken to about absences away from his desk. His absences from work or from his desk were for disability-related reasons. Moreover, the company had failed to make a number of reasonable adjustments, in particular in relation to offering facilities for testing and injecting. The key failure was the "quite inexplicable" failure to give adequate guidance or training to line managers and to have the occupational health reports assessed by someone with suitable training and knowledge of managing persons with disabilities.

The Employment Appeal Tribunal upheld the tribunal's judgment.

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

Diabetes UK has a good website at **www.diabetes.org.uk**
It has an 'Employment and diabetes: your rights at work page at **www.diabetes.org.uk/how_we_help/helpline/your-rights/advocacy-packs/employment-and-diabetes---your-rights-at-work**
Diabetes UK has also produced a fact sheet, 'Supporting people with diabetes in the workplace' at **www.diabetes.org.uk/resources-s3/migration/pdf/Diabetes%2520in%2520the%2520workplace%2520support%2520Feb%25202017.pdf**

Also informative is a website run by the West Suffolk Hospitals NHS Trust: DiabetesSuffolk.com at **www.diabetesuffolk.com/index.htm**

Although an American website, the Job Accommodation Network site at **http://askjan.org/media/Diabetes.html** has useful suggestions on its diabetes fact sheet.

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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 paragraph 3 of the EqA 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 paragraph B25 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, depending on its nature, size and prominence. It may be also be relevant to take account of where the disfigurement is, eg on the back as opposed to on the face.

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. 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 appearance aspect of the worker's impairment which is automatically 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.)

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Tattoos and decorative body piercings are explicitly excluded from the definition of disability by the Equality Act 2010 (Disability) Regulations 2010.

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 they feel 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.

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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 or 0207 391 9270. There is a useful resource catalogue for employers including advice how to recruit, communicate with and support workers with disfigurements at **www.changingfaces.org.uk/adviceandsupport/self-help-guides/work/a-guide-for-employers** and employees at **www.changingfaces.org.uk/adviceandsupport/self-help-guides/work/a-guide-for-employees** There are also free on-line self-help guides for individuals.

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.

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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 their 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

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers explicitly to dyslexia at A5 and B10. Paragraph D19 may be particularly useful in the effects it describes. The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty understanding or following simple verbal instructions
- Persistent and significant difficulty in reading or understanding written material
- Difficulty concentrating

Depending on the circumstances, you could ask the worker whether they:

- Take longer than average to read a document.
- Find it hard to remember what they have just read.
- Find forms confusing.

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- Have difficulty writing a cheque.
- Find it hard to take telephone messages and pass them on correctly.
- Find it hard to do mental arithmetic, eg adding up change in a shop.
- Mix up numbers when they dial or note down a telephone number.
- Mix up bus numbers, eg reversing 28 and 82.
- Mix up dates and miss appointments.
- Find it hard to follow a series of verbal instructions or a long explanation.
- Need longer than average to pick up new procedures.
- Find it hard to take written notes of a meeting.
- Have difficulties banking, shopping or using a cashpoint.

It is relevant if they can do these tasks but only at a slower than average pace (*Guidance*, D19), or with great effort causing tiredness (D22), or only if they are not under stress (B10).

If they 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 their 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.

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- 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.

Some adjustments relevant to Visual Impairment (listed in the Directory, below) 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.

Sylvia's case
Sylvia, a dyslexic worker who unsuccessfully applied for a post in a nursery school, took up the school's standard offer of oral feedback to unsuccessful candidates. She asked for written feedback or, if this was not possible, to be permitted to bring someone with her, to ensure she remembered and absorbed the verbal feedback. The school refused on the basis that this was not their policy and not offered to any other candidate. The tribunal found this refusal to be a failure to make reasonable adjustments. It said:
"This illustrates with crystal clarity the need for the school to have taken advice as to how to deal with the case of a dyslexic applicant. There were perfectly easy ways in which this feedback interview could have been conducted, and to say simply "it is not our policy to do it that way; because we do not do it with anybody else" is not an answer. The whole essence of reasonable adjustment is that you do something in a different way from your normal standard policy in order to overcome a disadvantage to a certain persons, which would otherwise be suffered."

Regarding the school's requirement for a written test as part of the procedure, the tribunal said:
"The Respondents were running a substantial risk in requiring a known dyslexic applicant to undergo the same written application procedure and to produce the same kind of written work as all other candidates, without even considering whether some reasonable adjustments might have been called for."

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.

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See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

The British Dyslexia Association, helpline: 0033 405 4567, web: **www.bdadyslexia.org.uk**

This website also advertises a Code of Practice for Employers at **www.bdastore.org.uk/books/bda-code-of-pratice-for-employers-7th-edition-pdf/**

For advisers, it is worth taking into account the section on difficulties in coping with court hearings and case preparation at **www.bdadyslexia.org.uk/common/ckeditor/filemanager/userfiles/Justice_guide_to_SpLDs.pdf**

Dyslexia Scotland has a range of leaflets at **www.dyslexiascotland.org.uk/our-leaflets**

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 (ed.3, 2014). Order for £15 from the TUC at **www.tuc.org.uk/publications/category/disability-work**

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 and website: **www.abilitynet.org.uk**

Neurodiversity

'Neurodiversity' is a relatively new umbrella term that refers to people who have dyslexia or dyspraxia, autism (see separate entry in this Directory), attention deficit disorders, and other neurological conditions. These are 'spectrum' conditions, with a wide range of characteristics, but which nevertheless share some common features in terms of how people learn and process information.

In the context of an employment tribunal case, an individual will still need to identify a specific disability, eg ‘autism’ or ‘ADHD’. Also in practical terms, it is important to understand the exact needs of the member because of the nature of their disability, and not think in general terms. Nevertheless, it is important to understand what the term means as it is being increasingly used in policy discussion.

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ACAS has an informative page on Neurodiversity at
www.acas.org.uk/index.aspx?articleid=5858

There is also an ACAS Research paper 'Neurodiversity at Work' (Ref 09/16) at **www.acas.org.uk/media/pdf/2/m/Neurodiversity_at_work_0916(2).pdf**

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 EqA. However, experience suggests that employers may require a worker to prove that their particular condition falls within the EqA

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 experiences 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 they were not taking the medication should be assessed.

The legal definition

Impairment
Physical

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* Epilepsy is specifically mentioned in the Guidance at A5 and C6. The day-to-day activities most likely to be affected during a seizure will depend on its type. Loss of consciousness would affect all normal day-to-day activities. Indeed, the *Guidance* in its

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Appendix lists intermittent loss of consciousness as a factor which it would be reasonable to regard as having a substantial effect on normal day-to-day activities.

It is uncertain what number and nature of seizures would amount to "substantial" adverse effect under the law. 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 they start doing so? What has happened and what would happen if they stopped taking the medication?
- Is there anything which specifically triggers seizures?
- Does the worker get any forewarning?
- Does the worker experience any interference with vision, hearing, thoughts or concentration?
- If the worker has myoclonic seizures, do these cause the worker to spill drinks and have similar accidents?
- Has the DVLA disqualified the worker from driving? During the day or at night only?
- What safety precautions does the worker take at home and in everyday life?

Medical treatment: The worker is likely to be taking controlling medication. If so, the test is the effect on them if they 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 page 19 above and *Guidance*, C6). Occasionally, however, a person can undergo a one-off seizure (not necessarily epileptic), eg induced by drugs or an accident.

See also 'episodic effects' (page 18 above).

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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.

Warner v Sunseeker International (Boats) Ltd
Mr Warner worked as a carpenter. He had epilepsy. His seizures were controlled by medication. Side-effects were day-time sleepiness and problems getting up in the morning. He was dismissed mainly for his time-keeping.

The tribunal found the employer had failed to make reasonable adjustments, eg allowing greater flexibility with his hours or later shifts.

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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Sources of further information

Epilepsy Action, the working name of the 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. It has a wide range of booklets and fact sheets at **http://shop.epilepsy.org.uk/cat/advice-and-information/400/**

You can get a free copy of 'Epilepsy in the Workplace' (2015) from the TUC website at **www.tuc.org.uk/publications/category/disability-work**

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 and website: **www.abilitynet.org.uk**

Although an American website, the Job Accommodation Network site at **http://askjan.org/media/Epilepsy.html** has useful suggestions on its epilepsy fact sheet.

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FIBROMYALGIA

Fibromyalgia is a long-term condition characterised by widespread and variable pain all over the body. The exact cause is unknown, though one of the main theories is that there are changes in the way the central nervous system processes pain messages.

It is hard to know how many people are affected by the condition, because it is difficult to diagnose, with symptoms similar to other conditions. Nevertheless, it is thought to be relatively common, affecting perhaps 1 in 20 people to some degree.

Symptoms vary from person to person and can fluctuate according to factors such as stress and changes in the weather. The main symptoms are:

- Widespread continuous pain, which can fluctuate in intensity, and be worse in certain parts of the body at different times, eg back or neck. The pain might be an ache, burning sensation, or sharp and stabbing.
- Extreme sensitivity, eg a very light touch can be painful, or pain from, say, stubbing a toe, will last much longer than usual. There may also be sensitivity to other things, eg bright lights or temperature.
- Stiffness and muscle spasm, especially after being in the same position for a long time.
- Profound fatigue, which can range from mild tiredness to sudden onset ‘flu-like exhaustion, when the individual cannot do anything at all.
- Poor sleep quality.
- Headaches and migraines caused by the above factors.
- Cognitive problems (‘fibro-fog’), eg difficulty remembering things, limited concentration and slow or confused speech.
- Powerful painkillers which affect concentration.

Other symptoms which people with fibromyalgia sometimes develop include dizziness, clumsiness and IBS. It can also lead to depression.

Most medical experts agree that Fibromyalgia and ME / Chronic Fatigue Syndrome are similar and probably related disorders, although views differ as to how closely they are related and even whether they are the same thing. Some people feel very strongly that there is no relationship. It is not the role of this Guide to resolve this issue. The key point is that pain appears to be the predominant symptom of Fibromyalgia, whereas tiredness is the predominant symptom of ME / CFS (see separate entry in this Directory).

Treatment can include painkillers, anti-depressants (which can help with pain), muscle relaxants, anticonvulsants (again can help with pain), cognitive behavioural therapy, acupuncture and gentle exercise. Some of these medications have unwanted side-effects.

People with arthritis or lupus, often also have fibromyalgia, which requires different treatment.

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The legal definition

Impairment
Potentially physical and mental

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty waiting or queuing because of pain or fatigue when standing for long periods
- Difficulty using transport because of pain or fatigue
- Difficulty in going up or down steps, stairs or gradients, because movements are painful, fatiguing or restricted in some way
- Ability to walk only a short distance without difficulty because of physical restrictions, pain or fatigue
- Difficulty concentrating

Medical treatment:
The test is the effect on the worker without any treatment such as painkillers.

Long-term effect
Fibromyalgia is likely to last at least 12 months.

Reasonable adjustments

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

- Flexible shifts, later start times, hours so rush hour travel can be avoided
- Shorter hours
- Flexible break schedules
- Home working
- Adjusting lighting
- Temperature control: fans, heaters, portable air conditioning, allowing gloves to be worn
- Adjustable work station
- Alternative keyboards
- Noise-cancelling headsets
- Minimising distractions

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- Making allowance for the time it takes to get used to new painkilling medication

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

Fibromyalgia UK has a detailed explanation of what fibromyalgia is and latest research at **http://ukfibromyalgia.com/what-is-fm.php**

Fibromyalgia Action UK has useful information on coping with fibromyalgia while working and tips for adjustments at **www.fmauk.org/useful-information/553-coping-with-the-symptoms-of-fibromyalgia-whilst-working**

Although an American site, the Job Accommodation Network has a useful fact sheet at **https://askjan.org/disabilities/Fibromyalgia.cfm**

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HEARING IMPAIRMENT

The RNID (now using the name 'Action for Hearing Loss') estimates that there are about 3.7 million people of working age who are deaf or hard of hearing, of whom 135,000 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. In a 2011 report, Action for Hearing Loss said that severely and profoundly deaf people are four times more likely to be unemployed than the general population, even when there are low levels of unemployment. Of people with hearing loss who are in employment, 55% said they felt socially isolated at work and 26% felt they had been harassed at work. Only 37% of people who lost their hearing at work told their employer and not many more told colleagues.

The legal definition

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The most obviously affected activities is hearing, but it may be accompanied by an effect on other activities eg concentration or speech. Whether a worker is covered by the definition will depend on the degree of their hearing impairment.

In the Appendix to the *Guidance*, it is likely to be considered a substantial adverse effect if the worker has difficulty hearing someone speaking clearly over the voice telephone.

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This is as opposed to inability to hold a conversation in a very noisy place, eg a factory floor, pop concert, sporting event or busy main road. There is also an example concerning the effect of tinnitus at paragraph D20.

Medical treatment: Where the worker's hearing is improved by a hearing aid or cochlear implant, the test is the level of their 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 they use BSL and their 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).
- Training other employees on conducting meetings in a way which enables the worker to participate effectively.
- Speech recognition software (software is trained to recognise speaker's voice and turn words into computer text).
- For lip-reading in meetings or interviews, 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.
- Sub-titles on training videos.
- 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; no hard flooring.
- Positioning worker in office where they 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)).

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- 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.

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.

Wynn v Multipulse Electronics Ltd
Mr Wynn, who is profoundly deaf, applied for a job as 'wire person'. He was offered an interview but it had to be cancelled as the company had not arranged for a sign language interpreter. The company said the interview would be rearranged but Mr Wynn heard nothing further. Eventually he received a letter saying that the company could not, for health and safety reasons, employ a person who requires a sign language interpreter to communicate.

Mr Wynn brought a tribunal case for disability discrimination. The company admitted that Mr Wynn's skills and abilities were sufficient, but said that it did not have enough resources to employ Mr Wynn. However, it had not made any enquiries about funding from Access to Work.

The tribunal found direct discrimination and failure to make reasonable adjustments. The company had made no assessment of Mr Wynn or of the work environment and had not consulted Mr Wynn over what adjustments would be needed. In fact the adjustments could have been made free of charge under the Access to Work scheme. The tribunal awarded loss of earnings plus £7500 for injury to feelings. It said:
'All of the respondent's actions were predicated on ignorant, erroneous, stereotypical assumptions of the claimant's abilities.'

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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Sources of further information

A 'Deaf jobseeker and employee experiences survey' by TotalJobs in 2016, which you can read at **www.totaljobs.com/insidejob/deaf-jobseeker-employee-report-2016/** showed over half of deaf or hard of hearing employees had experienced discrimination at work and one quarter had left their job because of a difficult environment.

The RNID is now using the name, 'Action on Hearing Loss'. Its website is at **www.actiononhearingloss.org.uk/**
Fact sheets including communication tips are available at **www.actiononhearingloss.org.uk/how-we-help/information-and-resources/publications/communication/**

There is also guidance on assistive technology.

'Unlimited potential: a research report into hearing loss in the workplace' by Laura Matthews gives useful insights into practical problems facing employees. It can be found by googling the title, eg at **www.city.ac.uk/__data/assets/pdf_file/0009/165195/Laura-Matthews-seminar.pdf**

Although an American site, the Job Accommodation Network at **http://askjan.org/media/Hearing.html** has a detailed and useful fact sheet.

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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

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers to heart disease as a possible disability at paragraph A5.

Unfortunately, heart disease often does not fit easily into the artificial definition of disability. In severe cases, a person may find various activities such as mobility or ability to lift things substantially affected. Examples in the Appendix to the *Guidance* could be those involving difficulty going up steps or gradients; ability to only walk a short distance without difficulty (but not necessarily if difficulty sets in only after 1 mile); difficulty carrying objects of moderate weight. 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 such activities at the time of the discrimination against them. It is worth remembering in this context that discrimination against someone because they have had a disability in the past is also unlawful.

Questions for the worker could include:

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

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Remember that workers with a progressive disease will be protected even if the effects are not initially substantial. On the other hand, someone who has had a heart attack may have experienced 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 they 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 they 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 experiencing from fatigue, breathing difficulties, mobility or lifting difficulties. For ideas, see suggestions for Asthma, Back and ME (listed in the Directory).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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 **http://askjan.org/media/Heart.html**

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HIV / AIDS

It is estimated that 89,400 people were living with HIV in the UK in 2016. Of these, about 10,400 were undiagnosed. Since 1999, heterosexually acquired HIV has led to a steep increase in the number of HIV diagnoses.

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 diarrhoea).
- 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 (see Directory, above).
- For any visual impairment or light sensitivity, see adjustments suggested for Visual impairment or Migraine (see Directory, below).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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Sources of further information

Information is available from AVERT, an international AIDS charity, on **www.avert.org** , NAT (the National Aids Trust) at **www.nat.org.uk/** and to a lesser extent, the Terrence Higgins Trust at **www.tht.org.uk/**

NAT has a guide on 'HIV @ work' at **www.nat.org.uk/publication/hiv-work-advice-employees-living-hiv**

Although an American website, the Job Accommodation Network site at **http://askjan.org/media/HIV.html** has useful suggestions on its HIV fact sheet.

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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.

Drugs used to treat IBD include steroids, immunosuppressants, biologics and antibiotics. About one in five people with ulcerative colitis will find that medication does not help and may need surgery. About 60 – 75% of people with Crohn's disease will have surgery at some point. At present, there is no cure, but these measures can give long periods of relief from symptoms.

Irritable bowel syndrome (IBS) is a different condition altogether and not within the heading of IBD. However, certain symptoms may be superficially similar, eg a need to rush to the toilet. IBD is much more common, but far less serious. We hesitate to mention IBS in this section at all, but we do so precisely because IBD and IBS are sometimes wrongly confused.

The legal definition

Impairment
Physical

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* Colitis is referred to explicitly in the *Guidance* at paragraphs B22 and D22. The Appendix also gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence
- Difficulty waiting or queuing
- Difficulty using transport, eg because of a frequent need for a lavatory

Most obviously, IBD and, if sufficiently severe, IBS, would have a severe effect on continence. However, 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 they were not taking the medication.

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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. This can include a car park space near the office entrance. 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 or 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.

At the tribunal hearing:

Appropriate adjustments could be:

- Toilet breaks as and when requested by the worker. Not asking the worker if they 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, they may refrain from eating to avoid needing to go to the toilet.

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

Crohn's and Colitis UK has links to practical information sheets for employers and for employees with tips for adjustments at **www.crohnsandcolitis.org.uk/about-inflammatory-bowel-disease/publications/filter/employment-education**

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LEARNING DISABILITY OR LEARNING DIFFICULTIES

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.

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. MIND says 6% of people in England with learning disabilities are in employment, and 6.7% in Scotland (there are no statistics for Wales), whereas 60% want to work and are capable of doing so. The government is keen to address the difficulty people with learning disability have in finding and keeping jobs.

The legal definition

Impairment

Learning difficulty is a recognised mental impairment, although it will need to be proved by expert evidence.[23]

[23] **Dunham v Ashford Windows** [2005] IRLR 608, EAT.

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Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* explicitly refers to learning disabilities at paragraphs A5 and A7. At A8 it warns that it may be less easy to identify learning disabilities as an impairment.

Although a mental impairment, learning disability may well have physical effects. (*Guidance*, paragraph B6.)

The level of learning difficulty can vary enormously from mild to severe, so it is crucial not to make assumptions. The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty in getting dressed, eg because of a lack of understanding of the concept
- Difficulty preparing a meal, eg because of inability to follow a simple recipe
- Difficulty going out of doors unaccompanied, eg because the person has a learning disability
- Difficulty waiting or queuing, eg because of a lack of understanding of the concept
- Difficulty using transport as a result of a learning disability
- Difficulty entering or staying in environments which a person percvs as strange or frightening
- Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places
- Persistent difficulty in crossing a road safely, eg because of a failure to understand and manage the risk
- Difficulty operating a computer, eg because of a learning disability
- Persistent and significant difficulty in reading or understanding written material, eg because of a learning disability
- Significant difficulty in forming social relationships[24]
- Persistent distractability.

Long-term effect

The effect will be long-term.

[24] **Hewett v Motorola Ltd** [2004] IRLR 545, EAT – a case under the more restricted definition in the DDA.

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.
- Training co-workers on effective communication and support.
- 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.
- Giving extra training when changing the worker's role on any reorganisation.

The Code gives these examples:

- Rather than providing instructions in manuals, conveying these orally or by easy read. (Code, 6.33)
- Allowing more time and giving personal support and assistance on induction. (Code, 17.67)
- Allowing the worker to take a friend from outside to any grievance or disciplinary meeting. (Code, 6.33)
- Conducting a grievance meeting in a way which does not disadvantage or patronise the worker. (Code, 6.33)
- Allowing the worker to start later so as to enable a friend to accompany them to work. (Code, 17.12)

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At the tribunal hearing:
In two cases reported by the former Disability Rights Commission in its Legal Bulletin[25], 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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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**

MIND has a series of fact-sheets for employers at **www.mencap.org.uk/learning-disability-explained/resources-employers**

'Employing people with learning disabilities: a handbook for employers', written by Susan Hemmings and Jenny Morris for the Joseph Rowntree Foundation in 2004 can be downloaded free on line at **www.employabilityinscotland.com/media/131676/Employing%20people%20with%20learning%20disabilities.pdf**

[25] Issue 3, December 2002

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LUPUS

Lupus (systemic lupus erythematosus) is an autoimmune disease. It causes inflammation to joints, skin and other organs. It can vary from mild to severe and even life-threatening. No two people have exactly the same effects. Common symptoms can include extreme tiredness, joint pain, stiffness and swelling, fever, Raynaud's (see separate Directory entry), dry eyes, shortness of breath, chest pain, rashes including butterfly shape rashes on the face, skin lesions, headaches or migraine, short-term memory problems and sensitivity to light. Complications can lead to blood problems, including anaemia. People with lupus are also more prone to infection.

Lupus tends to have periods when symptoms flare up and periods of remission when they settle down again and may not be present at all. Flares occur with no forewarning. Some people experience constant symptoms.

Treatment includes anti-inflammatory medicines, hydroxychloroquine and steroid tablets or injections.

People with lupus, often also have fibromyalgia (see separate Directory entry), which requires different treatment.

Lupus can affect anyone, but in the UK, it is more common in women and particularly Black and Asian women.

The legal definition

Impairment
Physical

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The Appendix gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty in getting dressed
- Difficulty waiting or queuing because of pain or fatigue when standing
- Difficulty in going up or down steps, stairs or gradients because movements are painful, fatiguing or restricted in some way

Medical treatment: if the worker's symptoms are controlled by medication, the test is the effect on them without the medication.

Long-term effect
Lupus has long-term effects although these may fluctuate. As the effects are recurring, they can be treated as long-term (see page 18).

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Reasonable adjustments

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

- Adjusting working hours so the worker can travel at less busy times on public transport
- Allowing shorter hours
- Allowing the worker to arrive a little later or leave a little earlier when they need to visit their GP for regular blood tests if taking strong medication
- Reducing the amount of moving the worker needs to do while at work or providing a mobility scooter
- Allowing a degree of home working
- Locating the worker where it is not necessary to climb many stairs
- Providing a large ergonomic chair

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

Lupus UK has an informative website, including guides for employees and for employers, which can be downloaded at **www.lupusuk.org.uk/working-with-lupus/**

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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 above).

See also the Directory entry for Fibromyalgia.

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*.[26] 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.

[26] [2002] IRLR 711, CA.

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Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* explicitly refers to chronic fatigue syndrome at paragraphs A5 and D22. It is relevant to take account of where a person can only do an activity with pain or fatigue (*Guidance*, D22). Effects of the environment should also be taken into account, ie if adverse effects depend on temperature, stress or other environmental conditions. The symptoms of CFS/ME can be exacerbated by infections, mental or physical stress, temperature extremes.

The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty in get dressed
- Difficulty carrying out activities caused by frequent minor incontinence
- Difficulty preparing a meal
- Difficulty waiting or queuing, eg because of fatigue
- An ability to walk only a short distance without difficulty, eg because of fatigue
- Difficulty picking up objects of moderate weight with one hand
- Significant difficulty taking part in normal social interaction
- Difficulty concentrating

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.)

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.

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- 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, Depression, for some forms of muscle weakness, see RSI (all listed in the Directory).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

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

Action for M.E. has produced 'An Employer's Guide to M.E' with practical suggestions at **www.actionforme.org.uk/uploads/pdfs/employers-guide-to-me-booklet-2016.pdf**

The section on CFS/ME on the Job Accommodation Network website, even though an American site, is extremely useful: **https://askjan.org/disabilities/Chronic-Fatigue-Syndrome.cfm**

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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 under 'Depression' (above).

The government commissioned Stephenson/Farmer Review ('Thriving at Work: The Stevenson/Farmer Review of Mental Health and Employers' (October 2017))[27] is important to read for its strategic recommendations. It looks at the full range of mental health and ill-health at work.

Mental health issues include:

- **Bi-Polar Disorder.** This is a mood disorder, where a person's mood swings from depression to euphoric. About 1 in 100 people have bipolar disorder, 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 under 'Depression' in the Directory, above. 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.

- **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.

[27] Available at **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658145/thriving-at-work-stevenson-farmer-review.pdf**

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- **Generalised anxiety disorder**. Although everyone feels anxious on occasions, G.A.D. involves anxiety about a wide range of situations. The person feels anxious most days. As soon as one anxious thought is resolved, another arrives. It can cause difficulty concentrating and sleeping, restlessness, nausea, increased need to go to the toilet, raised blood pressure, dizziness and heart palpitations. It is often liked to depression.

- **Panic Disorder.** This is another form of anxiety 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.

- **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 is a debilitating condition which affects 1.2% of the population, over 50% of them severely. It 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. The severity of OCD is often misunderstood by the general public. Counselling and therapy is the usual treatment and the worker may also take medication.

- **Agoraphobia.** See separate listing in Directory, above.

- **Seasonal affective disorder (SAD).** See separate listing in Directory, below.

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.[28]

[28] See **McNicol v Balfour Beatty** [2002] IRLR 711, CA and page 11 above.

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* at A5 refers to mental illnesses such as schizophrenia and depression, and mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar effective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder; and some self-harming behaviour. The *Guidance* explicitly refers to bipolar disorder at D17 and D19. B8 refers to phobias, eg agoraphobia. A16 is a reminder that it is discrimination to discriminate against a person because they had a mental illness in the past.

The *Guidance* stresses that mental impairments can have physical effects (and vice versa). So, for example, a worker may be unable to sustain ordinary activities under the heading of 'Mobility' (see Directory, below) because they are tired, in a manic phase, hallucinating or obsessively washing their hands.

The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty in getting dressed, eg because of low motivation
- Difficulty going outside unaccompanied, eg because the person has a phobia
- Difficulty staying in an environment that the person perceives as strange or frightening
- Behaviour which challenges people around the person, making it difficult for the person to be accepted in public cases
- Persistent difficulty in crossing a road safely
- Frequent confused behaviour, intrusive thoughts, feelings of being controlled or delusions
- Significant difficulty taking part in normal social interaction
- Compulsive activities or behaviour

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

For a case where paranoid schizophrenia was obviously covered, see *Goodwin v The Patent Office.*[29]

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.

[29] [1999] IRLR 4, EAT.

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Reasonable adjustments

Always consult with the individual regarding suitable adjustments. Many of the adjustments suitable to ordinary Depression (see Directory, above) will be suitable here.

Two interesting cases regarding reasonable adjustments required where the worker's mental impairment means that particular stress is caused by the failure to resolve ongoing work problems are:

- *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10 (stress)
- *Tameside Hospital NHS Foundation Trust v Mylott* UKEAT/0352/09 and UKEAT/0399/10 (situational anxiety)

In those cases, the employers failed to make reasonable adjustments such as

- resolving grievances quickly
- insisting on formal procedures being followed
- failing to understand the difference between saying that the worker's complaints are groundless, and addressing the worker's genuine anxiety about the matters in respect of which they are complaining.

However, it is important not to have unrealistic expectations of employers. The EAT in *Mylott* added these cautionary words:

> 'Employees with mental health conditions of the kind suffered by the Claimant can pose difficult management problems for employers. The question of what steps may be reasonable in order to adjust to their needs is a sensitive one, in which proper regard must be had to the interests of both parties, and tribunals should not set unreasonable standards.'

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 TUC's 'Representing and supporting members with mental health problems at work: Guidance for trade union representatives' can be ordered for £5 at **www.tuc.org.uk/extras/mentalhealth.pdf**

Another guide aimed at employers, but again useful for everyone, is ACAS's 'Promoting positive mental health at work' (2017 revision), available at **www.acas.org.uk/media/pdf/s/j/Promoting_Mental_Health_Nov.pdf**

ACAS also has short guidance for employers on how to have a conversation about workplace anxiety at **www.acas.org.uk/index.aspx?articleid=5880**

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See also SCOPE's 'Let's talk: Improving conversations about disability at work' (2017) at **www.scope.org.uk/Scope/media/Documents/Publication%20Directory/Let-s-talk-improving-conversations-about-disability-at-work-Scope.pdf**

There is an excellent publication, originally from Mind Out for Mental Health, but updated several times by different organisations, most recently by Mental Health First Aid England in 2013: "The Line Managers' Resource – a practical guide to managing and supporting people with mental health problems in the workplace" available at **www.lse.ac.uk/intranet/LSEServices/healthAndSafety/pdf/SHIFTpracticalGuideToManagingPeopleWithMentalHealthProblems.pdf**

The Shaw Trust has established a website at **www.tacklementalhealth.org.uk** to help employers support staff who are dealing with mental health issues.

MIND has a booklet 'Understanding Anxiety and Panic Attacks' at **www.mind.org.uk/media/1892482/mind_anxiety_panic_web.pdf**

The Job Accommodation Network, an American website, provides a very useful fact sheet on accommodating people with Anxiety Disorder at **https://askjan.org/disabilities/Anxiety-Disorder.cfm** and with Post-Traumatic Stress Disorder at **https://askjan.org/disabilities/Post-Traumatic-Stress-Disorder-PTSD.cfm**

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** See also the HSE's 'Work-related Stress, Depression or Anxiety Statistics in Great Britain 2017' at **www.hse.gov.uk/statistics/causdis/stress/stress.pdf**

OCD-action has a very informative website, which helps explain what OCD is and dispels myths: **www.ocdaction.org.uk/**

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MIGRAINE

The Migraine Trust says that nearly 8 million people in the UK get migraines and estimates that each working day, up to 90,000 people are absent from work or school due to migraine. More than 75% of people with migraines experience at least one/month and more than half say they experience severe impairment during attacks.

Over a third of people with migraine say they face difficulties or discrimination at work. Migraine is among the three most prevalent health conditions in the world. It affects considerably more women than men. 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 people with migraine get 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.

There is a factsheet: "Facts and Figures about Migraine" on the website of the Migraine Trust at **www.migrainetrust.org/factsheet-facts-and-figures-about-migraine-10860** This, and other factsheets on the site, may be useful where an employer thinks 'migraine' is just an exaggerated name for 'headache'.

The legal definition

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* refers to migraine at paragraph D15. The Appendix gives 'difficulty concentrating' as an example of a factor which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. Severe migraine is likely to cause difficulty regarding a number of day-to-day activities because of the pain and tiredness involved.

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.

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Regarding frequency, a survey of 4754 people with migraine conducted by the Migraine Trust in 2004 found only 30% had them infrequently. Of the remainder, 35% had monthly migraines, 27% had 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” (page 18 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 migraines happening altogether or to enable workers with less incapacitating migraine to work when they do occur. 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.
- Breaks
- Avoiding any identified trigger factors at work (long working hours without regular food breaks; night working; fan heaters).
- Allowing food at the work station.
- 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.

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A big problem is that migraines tend to occur intermittently and unpredictably on single days – exactly the pattern which many employers regard as suspicious evidence of malingering. Sickness policies with built-in triggers for a low number of single days' absence need adjusting for workers with migraine.

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

The Migraine Trust is very informative. It has a newsletter and website on **www.migrainetrust.org** and tel: 020 7631 6970.
There is a guide, 'Migraine: Help at Work' (2018) including suggested reasonable adjustments, available at **www.migrainetrust.org/employment-advocacy**

Although an American website, the Job Accommodation Network site at **https://askjan.org/disabilities/Migraines.cfm** has useful suggestions on its migraine fact sheet.

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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. Wheelchair users may have full, partial or no use of their upper limbs.

The legal definition

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The *Guidance* gives examples relating to disability at A7, B6 and F2. The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty going out of doors unaccompanied
- Difficulty using transport, eg because of physical restrictions
- Difficulty in going up and down steps or gradients
- Ability to walk only a shot distance without difficulty
- Difficulty accessing and moving around buildings

Medical treatment: Where a wheelchair, stick or crutches enable a worker to move around, the test is their mobility were they 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.

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- 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, photocopier, 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 (Directory, below).
- Widened doorways; ramps for wheelchair users.
- Relocating light switches, door handles and shelves within reach.

The Code gives these examples:

- Designated car parking space close to the office, even if this is normally reserved for senior managers. (Code, 6.10)
- Selecting a training venue with adequate access. (Code, 17.72.)

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

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

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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.

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 (below).
- If concentration difficulties, see suggestions for Dyslexia (above).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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Sources of further information

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

Although an American website, the Job Accommodation Network site at **https://askjan.org/disabilities/Multiple-Sclerosis.cfm** has useful suggestions on its MS fact sheet.

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OBESITY

Obesity has no consistent definition, but in most cases a person's BMI (body mass index) is a good indicator. This is the ration of height to weight. It can occasionally be misleading, where someone has a lot of muscle. A BMI of 25-29.9 is considered overweight and 30 – 39.9 is considered obese.

Levels of obesity in the population have increased considerably over the last 20 years. It is now estimated that one in four adults in the UK are obese. Obesity commonly causes physical problems such as difficulty walking, running and exercising; fatigue; breathlessness; increased sweating; poor sleep; and pain in the knees and back. Obesity can also lead to other impairments such as diabetes, heart problems, stroke, osteoarthritis, some types of cancer, depression and other psychological problems. In 2011, 53% of obese men and 44% of obese men had high blood pressure.

Obesity is covered as a 'disability' under the Equality Act if its effects are long-term and sufficiently severe. Although a 2012 UK case[30] was doubtful, the European Court of Justice confirmed it was potentially covered by the definition of disability under the General Framework Directive (sometimes known as the Equal Treatment Framework Directive) in *Fag Og Arbejde acting on behalf of Karsten Kaltoft v Kommunernes Landsforening acting on behalf of the Municipality of Billund* [2015] IRLR 146**.**

The legal definition

Impairment

Physical

Day-to-day activities

In paragraph D22, under the heading 'indirect effects', the *Guidance* points out that an impairment may not *directly* prevent someone carrying out certain activities, but it can have a substantial adverse effect on *how* they carry out those activities, eg because of fatigue. The example given for chronic fatigue syndrome could also be applied to severe obesity if this prevents a worker from normal social activity because they find travelling very tiring.

At B9, the *Guidance* says it should also be taken into account if a person avoids doing certain things because of a loss of energy or motivation or social embarrassment.

[30] **Walker v Sita Information Networking Computing Ltd** UKEAT/0097/12

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Applying this, it is possible that a worker avoids certain everyday situations through embarrassment and not because they are physically unable to carry them out, eg avoiding social or work activities where they might meet new people; only shopping for clothes on mail order; avoiding buses because of embarrassment about taking up too much of the shared seats. The *Guidance* says an avoidance strategy can indicate a person is disabled.

The Appendix to the *Guidance* gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect:

- Difficulty in getting dressed, eg because of physical restrictions or low motivation
- Difficulty waiting or queuing, eg because of fatigue when standing for long periods
- Difficulty using transport, eg because of physical restrictions, pain or fatigue
- Difficulty going up and down steps or gradients
- Ability to walk only a short distance without difficulty, eg because of pain or fatigue (but not minor discomfort after walking a mile or more)
- Persistent general low motivation or loss of interest in everyday activities
- Persistently wanting to avoid people

Long-term effect

A person can gain or lose weight fairly quickly, although in many situations a person who becomes obese will remain so for at least a year.

Reasonable adjustments

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

- Adjusting working hours so the worker can travel at less busy times on public transport
- Reducing the amount of moving the worker needs to do while at work or providing a mobility scooter
- Allowing a degree of home working
- Locating the worker where it is not necessary to climb many stairs
- Providing a large ergonomic chair
- Adapting uniform

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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RAYNAUD'S PHENOMEON

Raynaud's is a common disorder, affecting about 10 million people in the UK, and more women than men. The phenomenon is sometimes known as Raynaud's Disease or Raynaud's Syndrome or simply as Raynaud's.

Raynaud's causes a restriction in blood flow to fingers and toes and sometimes other extremities such as ears and nose. This is the result of a temporary spasm in small blood vessels. The effects are not continuous and tend to be triggered by cool temperatures as well as by anxiety and stress. Affected areas turn white, then blue and then red as the blood returns. For periods between a few minutes and several hours, a person may experience pain, numbness, swelling and pins and needles, all of which can cause difficulty moving their fingers and toes.

The Raynaud's and Scleroderma Association says many people with Raynaud's have not seen a doctor because they did not realise their condition had a name or that anything could be done about it. Raynaud's can develop on its own or as a secondary to another underlying condition such as lupus or rheumatoid arthritis. Where it is secondary, the effects can become more serious. Vibration white finger is where secondary Raynaud's develops because of exposure to vibration, eg power drills or hedge trimmers.

It is recommended that those with Raynaud's keep their whole body warm and especially their hands and feet. They should also try to minimise stress levels.

The legal definition

Impairment

Physical

Day-to-day activities

The *Guidance* points out at paragraph D20 that it is relevant to take it into account if environmental conditions have an impact on normal day-to-day activities, where people without the particular disability would still be able to carry out the activity without any adverse effect. In the case of Raynaud's, the obvious example is where cool or cold conditions create the adverse effects.

The Appendix to the *Guidance* gives these, potentially applicable examples, of factors likely to be seen as having a substantial adverse effect, taken together with cool or cold environmental conditions which trigger: the effects:

- Difficulty waiting or queuing
- Difficulty operating a computer
- Difficulty eating (use of a knife and fork)

However, it would probably not be a substantial adverse effect merely that a worker had difficulty undertaking activities require delicate hand movements.

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Whether or not the effect on a worker's day-to-day activities is more than trivial will very much depend on the severity of their condition. Primary Raynaud's can sometimes be relatively mild, although that may be because the worker has altered their behaviour to ensure it does not become a greater problem, for example by wearing gloves all the time, even indoors. Paragraph D22 of the *Guidance* says account must be taken of the indirect effect of an impairment, eg a person can still carry out activities but it is painful, or a person has been advised by a health professional as part of a treatment plan to limit certain activities or only do them in a certain way or under certain conditions. It may be that a worker spends as little time as possible outside in the winter.

The following could be examples of substantial adverse effects:

- Feeling severe pain when shopping in an air-conditioned supermarket or taking an item out of the freezer compartment; then being unable to take money out of a purse or tap in a pin number in order to pay.
- Triggering effects when opening the fridge at home.
- Having to constantly move table in a cafe or restaurant to find somewhere which is sufficiently warm in order to avoid having a painful episode which might also cause difficulty eating (use of cutlery) and paying.
- Using shoulder bags for shopping rather than bags with handles so as to avoid restriction to the fingers which can bring on an episode.
- Holding a pen and writing if in a cool area.

Medical treatment: if the worker's symptoms are controlled by medication, the test is the effect on them without the medication.

Long-term effect

Raynaud's can go away with time, but the condition will usually last more than one year. Its effects may well fluctuate, some people for example only experiencing symptoms in winter. Where the effects are recurring, they can be treated as long-term (see page 18).

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Reasonable adjustments

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

- Access to regular hot drinks and water, to keep hydrated
- Permission to wear warm clothes
- Protective gloves if it is necessary to remove stock from fridges
- Ability to regularly exercise hands and feet
- Warm working environment. Closed windows. Location near radiators.
- Small personal heater by desk.
- Avoiding cool (not just cold) temperatures.
- Avoiding air conditioning.
- Move desks if necessary.
- Ensuring meetings, training and office outings are held in suitable environments
- Avoiding the need to work outside or going regularly from cold to hot environments
- Reserved space in any on-premises car park during winter
- Avoiding stressful work situations

Appropriate adjustments may include the kind suited to conditions such as RSI (see below).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

Useful websites: RSA (Raynaud's and Scleroderma Association at **www.raynauds.org.uk/raynauds/raynauds**

Although an American website, the Job Accommodation Network site at **https://askjan.org/disabilities/Raynaud-s-Disease.cfm** has useful suggestions.

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RSI

The TUC estimates each year 400,000 people have upper limb or neck disorders.

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 listing for Back Impairment in the Directory, above).

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.

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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).

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*.[31] 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

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty in getting dressed
- Difficulty preparing a meal, eg because of restricted ability to do things like open cans or packages
- Difficulty operating a computer, eg because of physical restrictions in using a keyboard
- Difficulty picking up and carrying objects of moderate weight

The Guidance in its Appendix says the following factors would **not** indicate a substantial adverse effect:

- Inability to move heavy objects
- Inability to undertake activities requiring delicate hand movements, eg threading a small needle or picking up a pen

For further examples, see Shoulder, Arm or Hand Impairment (listed in Directory, below).

[31] [2002] IRLR 711, CA.

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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 their 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,[32] 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 had severe RSI for at least 12 months. A difficulty arises where the worker has not experienced the symptoms for 12 months, but has recovered through a period of sickness absence. However, it will recur as soon as they return to work. The worker's condition is thus only "recurring" if they return to the particular work. The *Guidance* says at paragraph C9 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?

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.

[32] **Cruickshank v VAW Motorcast Ltd** [2002] IRLR 24, EAT.

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- 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 their 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).

- Letting a job candidate with RSI take an administrative test using voice-activated software, if this is how they would carry out the job if they were appointed.

- Different or longer training on new machinery for workers with restricted hand or arm movements.

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

For further examples, see Shoulder, Arm and Hand Impairment (listed in the Directory, below).

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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.

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Sources of further information

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** (search 'RSI' or muscularskeletal disorder) There are various guides available at **www.hse.gov.uk/msd/information.htm** For example, you can download "Working with Display Screen Equipment" and "Aching arms (or RSI) in small businesses".

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 and website: **www.abilitynet.org.uk**

Although an American website, the Job Accommodation Network site at **https://askjan.org/disabilities/Cumulative-Trauma-Conditions.cfm** has useful suggestions regarding cumulative trauma disorders.

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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.

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The legal definition

Impairment
Mental and physical.

Day-to-day activities
Many 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 D22 and for the cumulative effects of an impairment, *Guidance*, B4.)

For suggestions as to further questions you could ask the worker, see Directory entries for Depression and for Mental Health Issues (above).

Medical treatment
The test is the effect on the worker if they 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.

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 (Directory, above).

Sources of further information

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

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SHOULDER, ARM OR HAND IMPAIRMENT

The Legal Definition

Impairment
Physical

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty in getting dressed
- Difficulty preparing a meal
- Difficulty moving around buildings, eg because of inability to open doors or grip handrails
- Difficulty operating a computer
- Difficulty picking up and carrying objects of moderate weight

The Guidance in its Appendix says the following factors would **not** indicate a substantial adverse effect:

- Inability to move heavy objects
- Inability to undertake activities requiring delicate hand movements, eg threading a small needle or picking up a pen

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

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The above examples are taken from the useful and important cases of *Vicary v British Telecommunications PLC*,[33] where the worker had a disability relating to the use of the right arm and hand, and *Epke v Commissioner of Police of the Metropolis*,[34]where the worker had a wasting of the intrinsic muscles of the right hand.

Long-term effect

This depends on the reason for the impairment.

Reasonable adjustments

Suitable adjustments are similar to those suitable for RSI or Back impairment (see Directory entries above).

Nimsiima v London Borough of Waltham Forest
Mr Ninsiima worked as a full-time financial assessment officer for the Council for 5 years until he resigned. He was a wheelchair user. His right arm was weak and his left arm could not be used in extreme situations. He had only limited ability to reach upwards or downwards. Mr Ninsiima was absent for 5 months with stress and pain caused by the lay-out of the office, which caused him difficulties. He worked on the 2nd floor, but the lift was not readily accessible to his workplace, which made him particularly anxious about what would happen if there was a fire.
Mr Ninsiima also found it awkward to reach the controls on the photocopier. There was an enormous amount of paperwork in his job which was all file-based. He had to constantly lift, open, move and write in files. This was all a strain.

The employment tribunal said the employers failed in their duty to make reasonable adjustments. Many adjustments could have been made by an employer with such big resources. The council also had access to outside funds to help make adjustments. Mr Nimsiima could have been provided with a desk-top photocopier which would have been more easily reached by him. His work could have been more computerised or alternatively, an unskilled person could have been assigned to help him lift and move files. Regarding the lift, he could have been allowed to work on the ground floor.

Sources of further information

See sources listed under Directory entry for RSI (above).

[33] [1999] IRLR 680, EAT.
[34] [2001] IRLR 605, EAT.

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SICKLE CELL

Sickle cell is the name for a set of inherited conditions which affect red blood cells. The most serious is sickle cell anaemia. About 15,000 people in the UK have sickle cell. It mainly affects people with African or Caribbean family background, although it is also found in people who originate in Asia, the Middle East or the Mediterranean.

The main effects of sickle cell are anaemia, which causes tiredness and shortness of breath; an increased risk of serious infections; and episodes of pain known as 'sickle cell crises' when small blood vessels become blocked. A sickle cell crisis can cause mild to severe pain in one part of the body. It is usually controllable at home with over the counter or prescribed pain killers, and warm pads, but in severe cases, hospital may be necessary. A crisis can last up to a week. Many people only have one bad crisis a year, but some people have them much more often, even every few weeks. The triggers are unclear, but dehydration, stress, strenuous exercise and bad weather may be factors.

Leg ulcers and inflammation of hands and feet are also common symptoms.

Treatment needs to be lifelong, and most people need to take antibiotics every day. A sickle cell crisis can be treated with over the counter painkillers, though sometimes something stronger including morphine is required. It helps prevent crises to drink plenty of fluids, keep warm and avoid sudden temperature changes.

People with sickle cell are at risk of serious complications including stroke. If anaemia is particularly severe, treatment with hydrocarbamide or even blood transfusions may be necessary.

The legal definition

Impairment
Physical

Day-to-day activities
It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Difficulty waiting or queuing because of pain or fatigue when standing
- Difficulty going up and down steps, stairs or gradients because movements are painful or fatiguing

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Medical treatment:
The test is the effects on the worker if they were not taking any medication or having any treatment.

Long-term effect

Sickle cell is a lifelong condition.

Reasonable adjustments

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

- Access to water and tea-making facilities
- Well-heated work environment
- Flexible working hours
- Home-working if necessary
- Allowing the worker to sit down
- Time off for hospital appointments

See pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

Sources of further information

The Sickle Cell Society has a useful website including guidance for employers at **www.sicklecellsociety.org/resource/employees-sickle-cell-disease-information-employers/**

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VISUAL IMPAIRMENT

The RNIB says that 66% of people of working age who are blind or partially sighted are not in work. 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. (Equality Act 2010 (Disability) Regulations 2010, SI No.2128.)

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

Impairment

Physical

Day-to-day activities

It is useful, although not essential, to include in the examples of the effects on the worker, some examples listed in the *Guidance.* The following examples given in the Appendix to the *Guidance*, if they apply, may amount to substantial adverse effect:

- Persistent difficulty crossing a road safely, eg because of physical restriction
- Difficulty operating a computer, eg because of a visual impairment
- Persistent and significant difficulty in reading, eg because of a visual impairment (except where this is corrected by glasses or contact lenses)

The following examples given in the Appendix to the *Guidance*, would probably **not** amount to substantial adverse effect:

- Inability to read very small or indistinct print without the aid of a magnifying glass

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- Inability to distinguish a known person across a substantial distance, eg the width of a football pitch
- Simple inability to distinguish between red and green, which is not accompanied by any other effect such as blurring of vision.

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

- If the worker is able to read a newspaper, are they only able to do so by holding it within a few inches of their eyes, or by reading very slowly?
- Is the worker unable to read the number of buses even when the buses 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 their 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 typefaces, 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.

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- 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, 6.12)
- Training in additional software so the worker can use a computer with speech output. (Code, 6.33)
- Providing a large computer screen for a visually impaired worker. (Code, 6.33)
- Arranging for a colleague to read out the mail to the worker at particular times of the working day. (Code, 6.33)
- Providing a support worker to accompany the worker if they need to make home visits. (Code, 6.33)

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 pages 30 - 39 for further suggestions as to reasonable adjustments generally and page 40 onwards for disability-related sickness absence.

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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. There is a 'Staying in work' page at **www.rnib.org.uk/information-everyday-living-work-and-employment/staying-work** with a fact sheet on various adjustments, particularly an introduction to various kinds of access technology.

An American Site, the Job Accommodation Network, has some ideas for adjustments at **https://askjan.org/disabilities/Blindness.cfm**

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 and website: **www.abilitynet.org.uk**

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Bibliography

Web-sites

UNISON **www.unison.org.uk**

Equality and Human Rights Commission **www.equalityhumanrights.com**

The Job Accommodation 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 ("accommodation" in the USA) on **http://askjan.org**

Ability Net is a charity providing free information and advice on computer technology for people with disabilities. Tel: Freephone 0800 269545 and website: **www.abilitynet.org.uk**

Resources relevant to specific disabilities are listed in the Directory in this Guide

Books

- **Employment Law - An Adviser's Handbook** by Tamara Lewis Published Legal Action Group. Tel: 020 7833 2931. Edition 12 (2017). Updated every two years. 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.

- **The Law and You: a UNISON guide to key employment rights** UNISON's employment law book, with large discrimination content and cross-references to other UNISON and general publications. 5th edition: 2012. ISBN: 978 0 904198 22 5

Updates and periodicals

- **UNIMAG**
  Popular quarterly electronic legal update for UNISON branch officials written in accessible and educational style. Now in its 10th year. Disability cases are reported in most issues. Published by Diversity Works Ltd. Case reports written by Tamara Lewis. For sample publicity copy and subscription details, branch officials can contact the editor, John Gordon, at 0207 431 1712.

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UNISON Guides:

- **Identifying Legal Cases in the Workplace**. (2017)
  Order through Learning and Organising Services email LearningAndOrganising@unison.co.uk and quote Code ACT172.

- **Race and Sex Discrimination: A practical guide to identifying unlawful discrimination** 4th edition (December 2013)
  Order through Learning and Organising Services email LearningAndOrganising@unison.co.uk and quote Code ACT152.

Legal materials

- **Equality and Human Rights Commission Employment Code of Practice**
  Available on the EHRC website.

- **Statutes and Regulations** are available on the Office of Public Sector Information website (formerly HMSO) at **www.legislation.gov.uk**

- **On the public sector equality duty:**

  - Equality Act 2010 (Specific Duties) Regulations 2011 SI No 2260

  Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 SI No 1064 W.155.

  Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 SI No 162

Other sources of assistance

Your UNISON officials. Ensure you follow the correct union procedures to get advice and help.

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