

## Ten years on: will the Disability Discrimination Act 2005 make life better for both employers and employees?

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In recent years, there have been a number of extensions (through parliament and the courts) to the protection the law affords people with disabilities. Some of these changes have merely aligned disability laws with the protection that already exists where individuals are subjected to other types of discrimination, whereas other changes have been more radical.

For example, the free-standing definition of harassment introduced by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003* mirror the definitions of harassment on grounds of race, sexual orientation and religion or belief and was therefore relatively uncontroversial. In contrast, the House of Lords' decision in *Archibald v Fife Council* ([2004] UKHL 32) represented a more radical development which indicated that, to comply with the duty to make reasonable adjustments, in certain circumstances employers will be obliged to positively discriminate in favour of disabled employees.

### **Disability Discrimination Act 2005**

Further expansion will come from the introduction of the *Disability Discrimination Act 2005*. It is anticipated that this will occur in December 2005. The DDA 2005 has been heralded as "major advance"<sup>1</sup> and is the final stage in the government's commitment to extending rights and opportunities for disabled people. It will introduce a number of measures such as the inclusion of people suffering from HIV, MS and most types cancer. These will be deemed disabilities under the DDA 2005 and protection will be afforded from the point of diagnosis. This will remove the need for such sufferers to show that these progressive conditions have any current or past effect on normal day-to-day activities.

Rather interestingly, the inclusion of recurrent short-term episodes of depression as a 'disability' was removed at the last minute (on the basis that such episodes were not regarded as long-term or permanent). The government has not, however, closed the door completely to such sufferers.

For employment law practitioners the most important change will be the removal of the current requirement that, for a mental impairment

to fall within the definition of a 'disability', it must be "clinically well-recognised".<sup>2</sup>

### **Definition of 'disability'**

Since the introduction of the *Disability Discrimination Act 1995* ("DDA 1995"), the onus has been on the claimant to establish, on the balance of probabilities, that the impairment from which he/she suffers is (amongst other things) either a physical or mental impairment. The latter must result from, or consists of, a mental illness which is 'clinically well-recognised'.

In *Morgan v Staffordshire University* ([2002] ICR 475), the Employment Appeals Tribunal considered how an individual claimant could establish the existence of such a mental impairment and identified four possibilities. Three of these are based on the recognition of the mental illness by a respected body of medical opinion, the World Health Organisation's International Classification of Diseases or an equivalent publication. The fourth route is "some other state recognisable as a 'mental impairment' which neither results from nor consists of a mental illness". This was considered recently in *Dunham v Ashford Windows* (EAT/0915/04) which confirmed that sufficiently serious learning difficulties can amount to a disability for the purposes of the DDA 1995. This is the first case to fall within the fourth category in *Morgan*. It will, however, only be applicable until the DDA 2005 comes into force, after which this will become irrelevant.

The historic effect of this restrictive interpretation of a 'clinically well-recognised illness' has been that a large number of individuals were unable to bring their claims within the ambit of the DDA 1995. For employers faced with an ever-increasing number of obligations to employees, this has been a welcome limitation on the scope of the DDA 1995. There were, however, a number of cases where individuals were denied protection, despite having quite severe mental illnesses, merely because, for example, they had received a different diagnosis at different times.

In future, it is likely that the focus will be on the effect that the

mental illness/impairment has on the individual's day-to-day activities, as is currently the case with physical impairments. The DDA guidance lists only two day-to-day activities which are likely to relate to mental impairments:

1. the effect on memory or ability to concentrate, learn or understand; or
2. the perception of the risk of physical danger.

It may be that, after the introduction of the DDA 2005, further guidance will be needed.

## Stress

The removal of this requirement is likely to have a particular impact on claims that involve work-related stress. As stress itself is not a 'clinically well-recognised illness', employees who claim to be 'stressed' or suffering from 'stress at work' are presently unable to bring DDA 1995 claims unless they can show a physical or mental impairment. Instead, a body of case law based on personal injury claims has developed.

Following the removal of this limb of the definition, it is expected that there will be a marked increase in the number of DDA claims based on 'stress'. The reasons for this are mainly two-fold:

### (a) Causation

It is now well established that, to bring a successful personal injury claim against his/her employer, an employee must establish among other things an element of reasonable foreseeability. The guidance given in *Sutherland v Hatton* (2002 ICR 263) presents further obstacles for claimants, such as the need to put the employer 'on notice' that his/her stress is likely to cause personal injury before liability will ensue. By contrast, *Laing v Essa* ([2004] EWCA Civ 02) makes it clear that claimants do not face such difficulties in bringing successful disability discrimination claims. In *Essa*, the Court of Appeal confirmed that damage does not need to be foreseeable to attract compensation. It must merely be caused by the alleged discrimination. To succeed, employees will therefore only be obliged to establish causation — not the more difficult test of whether the physical/mental damage was foreseeable. This is a much lower hurdle.

### (b) Compensation

Loss of earnings is the main head of claim in both types of 'stress' related cases. This is because mental injury is a very subjective assessment and GPs often simply recite what their patient has told them. Similarly in both, damages for personal injury are assessed on the same basis — the Judicial Studies Board guidelines. In DDA cases, however, claimants will

normally seek damages of between £5,000 and £15,000 for injury to feelings, but the amount could be up to £25,000 with aggravated damages in severe cases. This provides a further attraction to discrimination claims.

Another advantage for claimants that seek to bring DDA claims is the shifting burden of proof that has made it much more difficult for employers to defend such claims before employment tribunals. The forum under which each claim can be made is also a significant factor as to which claim is brought. DDA claims are more attractive because personal injury claims must be brought before the courts (county court or High Court) where the procedure is more complex, time consuming and costly.

## Conclusion

Ten years on, the law in this area continues to develop apace with a widening of the scope of protection afforded to disabled persons in the workplace. It should also be noted that the DDA 2005 also widens the scope of anti-discrimination measures in recruitment advertisements. Those who contract with public authorities should read the new legislation with interest to ensure they are fully aware of local authorities' broader duties in this area. Employers will need to put in place more training and processes to minimise and prevent 'stress' cases and to be able to defend them if they are brought.

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## Endnotes

1 From exclusion to inclusion — A report of the Disability Rights Task Force on Civil Rights for Disabled People. <http://www.disability.gov.uk/drtf/>

2 Schedule 1, *Disability Discrimination Act 1995*