



Disability in the Workplace

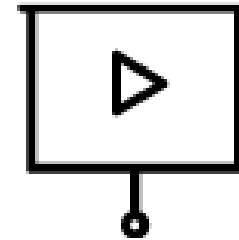
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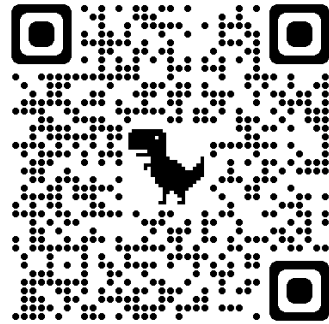


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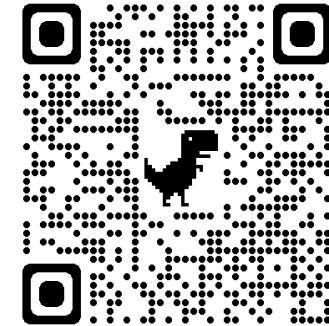


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Introduction & Connect with Us



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Disability in the workplace

The Equality Act 2010 protects disabled employees against discrimination, harassment and victimisation at work. Disability discrimination law is complex.

Protection from disability discrimination is a day 1 right! No qualifying length of service is required and it extends to job applicants.

Employers have a duty to protect their workforce from discrimination and take steps to prevent disability discrimination at work.

This can be increasingly difficult for employers to manage when there are many forms of “invisible” disability in the workplace.

Today, we will be providing practical guidance and advice as to how employers can proactively avoid discrimination complaints and how to deal with them.

What we will talk about today

1. What is a “disability” under the Equality Act 2010
2. The different types of disability discrimination – with examples of how discrimination can arise in the workplace
3. Reasonable adjustments
4. Handling a disability complaint
5. Preventing harassment and victimisation
6. Positive progress - putting policies and working practices in place

Disability under the Equality Act 2010

Test:

"A person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".



Four key questions

1. Does the person have a physical or mental impairment? *E.g. depression.*
2. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? *E.g. difficulties with concentration, memory, motivation, low mood, trouble sleeping, getting dressed and carrying out household chores. NB. Activities do not have to be work related.*
3. Is that effect substantial? *E.g. More than minimal.*
4. Is that effect long-term? *E.g. Have lasted or be likely to last 12 months.*

Deemed Disabilities and Excluded Conditions

- Some conditions are expressly deemed to be disabilities for EqA 2010 purposes. In cases where such conditions arise, the complexities of the EqA 2010 definition of disability are bypassed.
- Deemed disabilities e.g. Cancer, MS, Blindness and Severe disfigurements.
- Excluded conditions e.g. addiction to alcohol or any other substance.

Types of Discrimination

- Direct Discrimination
- Discrimination arising from disability
- Indirect discrimination
- Failure to make reasonable adjustments
- Harassment relating to disability
- Victimisation

Direct Discrimination

- Direct disability discrimination occurs where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others.
- It is not direct discrimination to treat a disabled person more favourably than a non-disabled person.
- Direct disability discrimination cannot be objectively justified.
- Less favourable treatment than a real or hypothetical comparator whose circumstances are not materially different.

E.g. B applies for a job. The prospective employer sees from the job application that B has a stammer. The employer does not look into B's abilities but simply discards the application.

Discrimination arising from disability

Discrimination arising from disability" occurs where: A treats B unfavourably because of something arising in consequence of B's disability; and A cannot show that the treatment is objectively justified as a proportionate means of achieving a legitimate aim.

E.g. F has cancer and is having chemotherapy. F needs to take time off for chemotherapy appointments which leads to her manager giving her a formal warning for too much absence under their disciplinary procedure.

Its not F's cancer but her absence which arises from her disability.

Indirect Discrimination

- Indirect disability discrimination occurs where: A applies to B a **provision, criterion or practice (PCP)**.
- **B** has a disability.
- A applies (would apply) that PCP to **persons who don't have B's disability**.
- The PCP puts (or would put) those with B's disability and B at a **particular disadvantage** when compared to other persons.
- A cannot justify the PCP by showing it to be a **proportionate (reasonably necessary) means of achieving a legitimate aim (a real business need)**.

Provision, criterion or practice

- The concept of a PCP is fairly wide.
- There does not need to be a formal policy in place for an employee to bring an indirect discrimination claim in respect of a management decision that affects them.
- *An employer must not have selection criteria, policies, employment rules or other practices that are ostensibly neutral (in other words, they apply to everyone regardless of disability issues) but have the effect of disadvantaging employees or job applicants sharing a disability, unless they can be objectively justified. E.g. inflexible working hours*

Indirect Disability Discrimination

- E.g. Jay has type 1 diabetes and works in a factory. The rest break policy says everyone has a lunch break at the same time, with no other breaks during the shift.
- Jay sometimes needs snacks between meals to help manage their diabetes.
- If Jay's employer does not make a 'reasonable adjustment' for Jay, for example more evenly distributing J's break times across the day, this is likely to be indirect discrimination unless it can be objectively justified.

Employer's knowledge of disability not required

- Employer does not need to know of disability to **indirectly discriminate**.
- The disadvantage experienced by employee simply has to flow from the PCP.

E.g. In *Bevan v Bridgend County Borough Council ET/1602784/12*, the employer was not constructively or otherwise aware of B's travel phobia until after her dismissal. Therefore no duty to make reasonable adjustments arose and B's claim for discrimination relating to disability could not get off the ground.

B's claim for indirect discrimination was however successful even though she had not brought her disability to the employer's attention. The tribunal held the damages awarded should be reduced by 20% due to her failure to speak up, but despite this and the employer's lack of knowledge, the employee was still awarded £53,473.62!

Reasonable Adjustments

- An employer has a duty to make reasonable adjustments to premises or working practices to help disabled job applicants and employees overcome a substantial disadvantage (more than minor or trivial) compared to those who are not disabled.
- Failure to comply with this duty is a form of discrimination.
- What is considered “*reasonable*” will depend upon whether it would have reduced the disabled person's disadvantage, the cost given the employer's financial resources, practicability and the disruption on the employer's business.
- Knowledge. NB. An employer will not be obliged to make reasonable adjustments unless **it knows or ought reasonably to know** that the individual is disabled and likely to be placed at a substantial disadvantage because of their disability.

Reasonable Adjustments

The [EHRC Employment Statutory Code of Practice](#) (contains a non-exhaustive list) of potential adjustments:

Examples:

- Making adjustments to premises;
- allocating some duties to another worker,
- relocating, home working, changing hours of work;
- modifying procedures for testing or assessment,
- Modifying disciplinary or grievance procedures, discounting absence,
- transferring to an existing vacancy, even at a higher grade, without competitive interview requirements.

Harassment

- **Harassment** occurs when a job applicant or employee is subjected to unwanted conduct related to their disability or perceived, which has the purpose or effect (from their subjective viewpoint) of violating their dignity or creating an hostile or offensive environment.
- E.g. H sometimes loses his balance and falls over because he has multiple sclerosis (MS). People at work regularly make comments and jokes about it, which makes H feel humiliated and uncomfortable.

Victimisation

Victimisation occurs where a person (A) subjects another person (B) to a detriment because B has done, intends to do, or is suspected of doing or intending to do a protected acts:

- Bringing proceedings under the EqA 2010 or doing something in connection with it;
- Giving evidence or information in connection with proceedings under the EqA 2010; or
- Alleging that the discriminator or any other person has contravened the EqA 2010.

E.g. A raised a grievance because their manager had not made the reasonable adjustments that had been agreed. As a result, A's manager has become increasingly critical of A, picking on him in front of other staff.

Claims to Employment Tribunal

Time limits:

A discrimination claim must normally be submitted before the end of **3 months** of the date of the act to which the complaint relates

NB. time extended for ACAS conciliation; and if “ **continuing act of discrimination**” or Tribunal considers “**just and equitable**”

Remedies:

- Compensation for financial loss NB. Unlimited!
- Award for injury to feelings - Vento Bands 2022-23:
 - lower £990-9,000;
 - middle £9,900-£26,900; and upper
 - £26,900 -£49,300

Case study 1

J has been employed as an office administrator for 10 years. He is 63. He was off with Covid for 4 months. Since then he has had a lot of sick leave but odd days here and there. He has nearly run out of sick pay. His team think he is just work shy. They complain that he constantly moans about his tiredness, aches and pains. They are resentful as they had to cover his work during lockdown as he said he could not work remotely.

He is slow and quite forgetful. They openly mock him as he naps at lunchtime and joke that he has already retired!

His manager puts J on a performance improvement plan.

J brings a grievance.

Case study 1 – Questions to consider

- How do you manage J' s performance?
- What do you need to take into account? Does J have a disability?
- How do you handle J's grievance?
- What about his colleagues' actions?
- What rights might J have ?

Case study 1 - Pointers

- What you are dealing with? Conduct or capability?
- Investigate when medical reasons raised where poor performance or attendance
- Establish the current medical position. OH report.
- Follow the appropriate process. ACAS compliant.
- If potential disability “gold plate” that process and make adjustments for additional support, flexibility and timelines.
- Investigate grievances independently, confidentially and promptly. Be careful of backlash from colleagues.
- J could claim disability discrimination; failure to make reasonable adjustments, harassment and victimisation, age discrimination and unfair dismissal.

Takeaways

- [Burke v Turning Point Scotland](#) [2022] ET held Long Covid a disability.
- TUC's report, "[Workers' experience of long Covid](#)" common symptoms: fatigue, concentration, joint and muscle pain and headaches.
- NB Test for disability is a legal one. OH in Burke case said no disability.
- Low threshold for finding disability – if risk then don't just rely on OH. Apply caution and make adjustments in performance management.
- Zero Tolerance. Make sure you have clear and transparent Equality and Non bullying and harassment policies in place . Raise awareness, train and monitor.
- **NB.** Be proactive you have a duty to all employees. Look after morale. Recognise workload. Promote open and inclusive culture. Provide forum for concerns to be shared.

Case study 2

Kayleigh joined the marketing team 12 months ago. She has years of experience, but its gone downhill since she passed her probationary.

Two big pitches were unsuccessful. Kayleigh blamed her inexperienced team. They are talented young creatives and were hard to recruit. Relations in the team are strained. They say Kayleigh is disorganised and unprofessional and its constant tantrums and tears. The atmosphere is toxic. The office is open plan as it's a creative hub, but Kayleigh complains about their noisy music and chat, the air con temp and fast food which Kayleigh says makes her feel nauseous. They laugh at her and call her Godzilla.

Kayleigh has been looking tired. She's had the odd day off sick and mentioned to one of the male directors that she hadn't been sleeping. She joked that it was women's problems and all change! He didn't ask any more.

Case Study 2 – Questions to Consider

- Can they dismiss K?
- Anything they should do or take into account before dismissing?
- Does K have a disability? What did her employer know?
- What adjustments could they make?
- What about her colleagues' actions?
- What rights might K have?

Case Study 2 - Pointers

- K has under 2 years' service but discrimination is a day 1 right!
- K may be Peri/ Menopausal which can be a disability
- K's employer may have "constructive knowledge"
- Risk if you don't investigate before you dismiss if K's performance/conduct related to this?
- Follow your policies: Equality and Anti bullying and harassment
- If potential disability consider any reasonable adjustments in managing K's performance
- Raise awareness in the team and mediate relationships
- K could have claims for sex, age and disability discrimination

Tribunal cases on Menopause

McMahon v Rothwell & Evans LLP (2019)

- M was reluctant to discuss her menopausal symptoms and provide information of the impact on her day-to-day activities.
- M had informed her employers that she was suffering from the menopause, but downplayed her symptoms as she thought she would lose her job.
- **Held:** M's employer did not have actual or constructive knowledge of her disability at the relevant time.

A v Bonmarché Limited (2019)

- A's manager joked she was 'menopausal', referred to her as a 'dinosaur' and blamed mistakes made on her menopause. No reasonable adjustments made. A resigned following sick leave due to anxiety and depression.
- **Held:** direct age and sex discrimination and harassment

Take aways

- Menopause can be a disability
- Knowledge can be constructive – risk if you ignore?
- Be proactive and head off claims
- Put a Menopause policy in place and revise exist procedures to support menopausal employees in the workplace
- Raise awareness and openness in your organisation
- Recent poll by Research Without Barriers:- *70% who took time off as a result of their symptoms (did not explain the real reason why), 73% did not feel able to talk openly about their symptoms with colleagues,24% lack of support at work, 63% no workplace policy.*

Positive progress

- Culture of the workplace – open, aware and inclusive
- Level playing field
- Recruitment- inclusive interview procedures, apprenticeships etc.
- Disability passports
- Flexible working
- Not enough to have Equal Ops and anti-bullying and harassment policies in place must actively and regularly train employees on these
- Specialist charities can provide advice and training on workplace awareness
- Access to Work can provide funding for reasonable adjustments

Resources

ACAS www.acas.org

CAB www.citizensadvice.org

ECHR www.equalityhumanrights.com/en

Disability Rights UK www.disabilityrightsuk.org/how-we-can-help/employer-

Macmillan www.macmillan.org.uk/Workandcancer

National Autistic Society www.autism.org.uk/what-we-do/employment

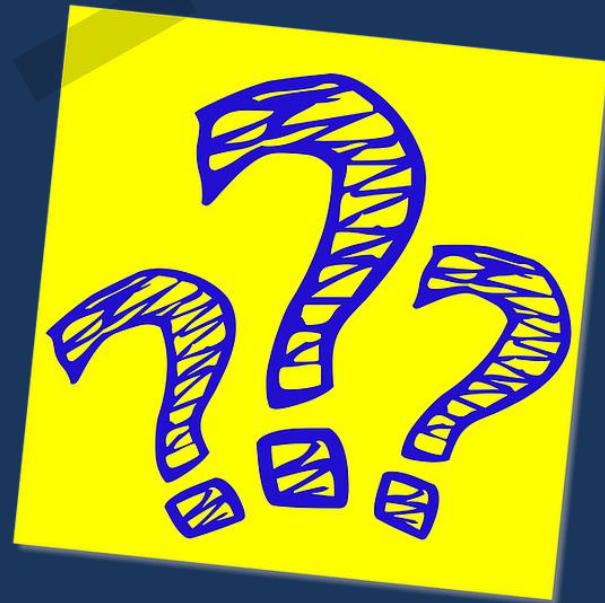
Access to Work www.gov.uk/access-to-work/

Workingfamilies.org www.workingfamilies.org

The Health and Safety Executive

<https://www.hse.gov.uk/coronavirus/index.htm>

Any Questions?



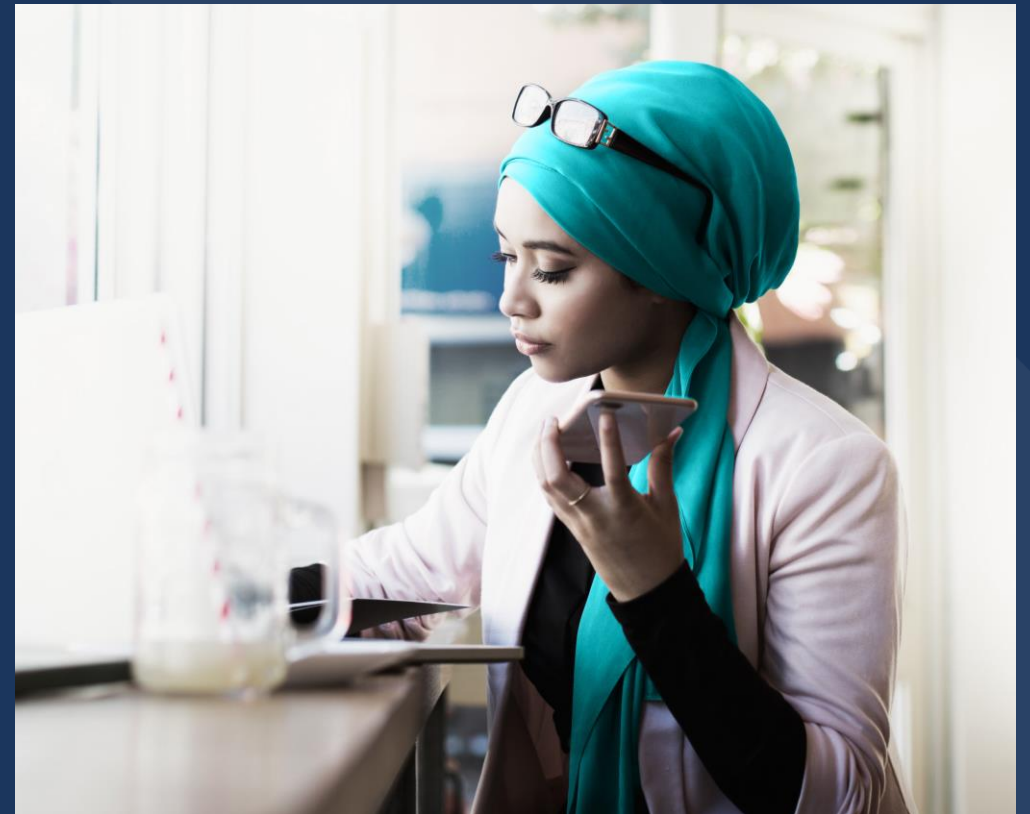
Webinars coming up

Constructive Dismissal – 14th September

<https://www.machins.co.uk/events/constructive-dismissal/>

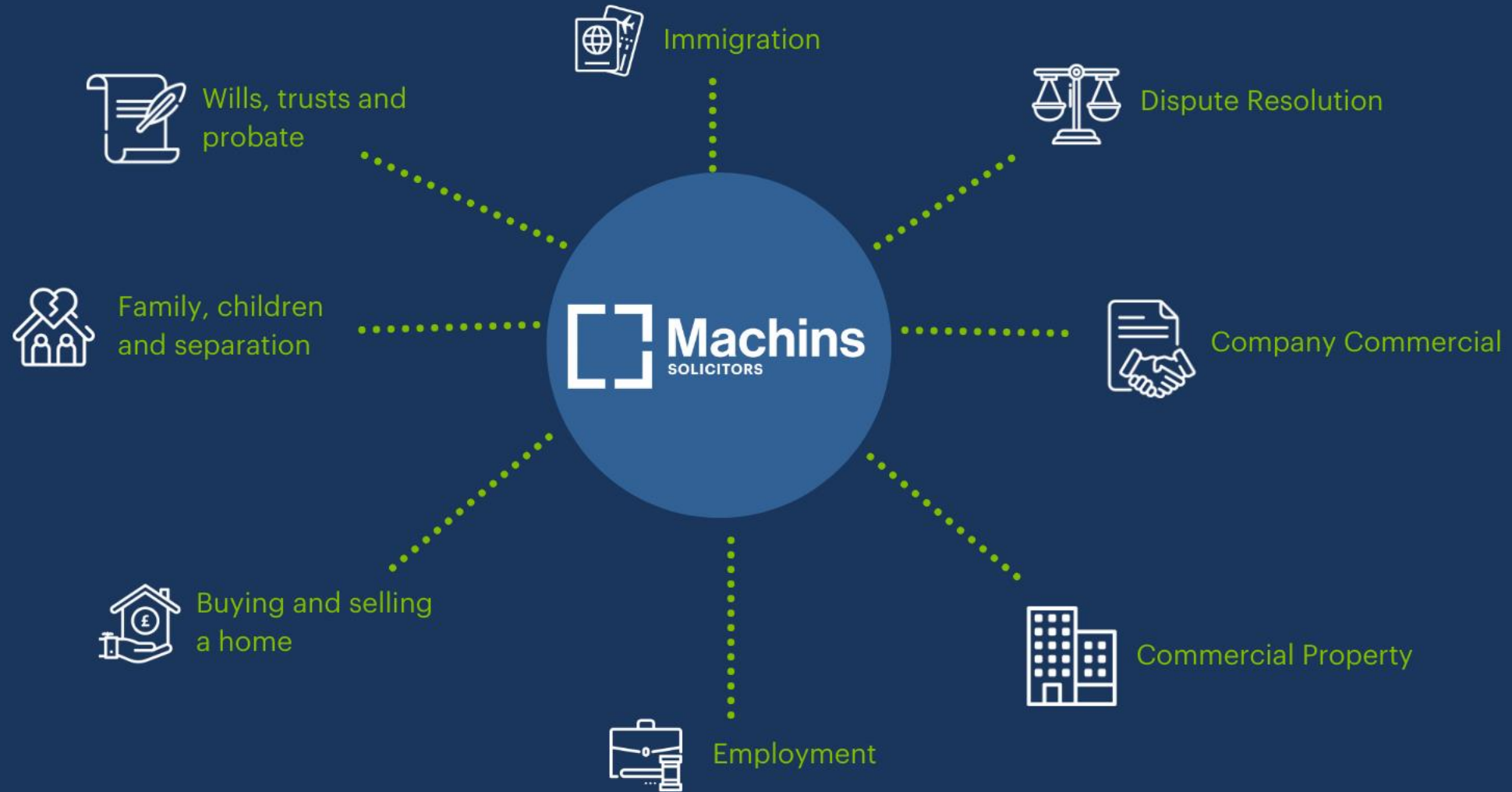
Positive Discrimination – 17th November

<https://www.machins.co.uk/events/positive-discrimination/>



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