

# Discrimination: Hints, Tips and Solution-Focused Answers for Employers

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**After you've made reasonable adjustments, what are your options if you see:**

- (1) no improvement in performance or**
- (2) improvement, but not that much?**

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# What am I going to talk about?

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1. Recap of the law

2. Potential options available

# 1. The law

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# What is the duty to make reasonable adjustments?

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The duty on employers to take such steps as it is **reasonable** to have to take to avoid a disabled person being placed at a **substantial disadvantage** compared to non-disabled employees as a result of:

- A **provision, criterion or practice**;
- A **physical feature** of the employer's **premises**; or
- An employer's failure to provide an **auxiliary aid**.

*(Equality Act 2010, Section 20)*

# What makes this duty unique?

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Directed at enabling disabled workers to secure and remain in employment, rather than simply protecting them from detrimental treatment.

Requires a degree of 'positive action' from employers

In contrast to other areas of discrimination law, the duty can require an employer to treat a disabled person more favourably than it would treat others.

Unlike direct or indirect discrimination - there is no requirement to identify a comparator/comparator group whose circumstances are the same/nearly the same as the disabled person's

# Reasonableness of the adjustments

Objective test to be determined by the tribunal

There is no duty to take measures that would impose a "disproportionate burden on the employer"

EHRC Code lists following factors which might be taken into account:

- Extent to which the adjustment would have **ameliorated the disadvantage**.
- Extent to which the adjustment was **practicable**.
- Financial and other **costs of making the adjustment**, and the extent to which the step would have disrupted the employer's activities.
- **Financial** and **other resources** available to the employer.
- Availability of **external** financial or other assistance
- **Nature** of the employer's activities and the **size** of the undertaking.

# Key question for reasonableness test: will the adjustment work?

If an adjustment does not alleviate the disadvantage in question - it should not matter how big/small or inexpensive the proposed step - the adjustment would be a futile gesture

An employee need not show there is a "good or real prospect" of the reasonable adjustment being effective, but only that there is "a prospect" that it will succeed (EAT in *Leeds Teaching Hospital NHS Trust v Foster*)

An adjustment might be reasonable even if it does not remove **all** the disabled employee's disadvantage (EAT in *Noor v Foreign & Commonwealth Office*)

# Interaction with indirect discrimination (s19) and discrimination arising from disability (s15)

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## Indirect discrimination

- Focus is on whether the **PCP itself is justified** and whether it puts/would put the claimant and those with the claimant's disability at a particular disadvantage.

## Discrimination arising from disability

- Did the claimant's disability cause, have the consequence of, or result in, "something"?
- Did the employer treat the claimant unfavourably because of that "something"?

If an employer has failed to make a reasonable adjustment it will be very difficult for them to show that the treatment was **objectively justified** (i.e. a proportionate means of achieving a legitimate aim) for the purposes of an indirect discrimination or discrimination arising from disability claim.

# Interaction with unfair dismissal

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The **five** potentially fair reasons for dismissal:

- 1 • Conduct
- 2 • **Capability** and qualifications
- 3 • Redundancy
- 4 • Breach of statutory restriction
- 5 • Some other substantial reason

# Most fair dismissals in this scenario will fall under “capability”

## Statutory definition of “capability”

- “assessed by reference to skill, aptitude, **health or any other physical or mental quality**”

## But, could also be SOSR or conduct:

- SOSR:
  - short-term intermittent absences, even if for genuine ill-health reasons, which have a significant detrimental impact on the employer's business and the employee's performance
- Conduct:
  - persistent unauthorised absences if no valid reason is given for the absence / employer's sickness reporting procedure is breached

# Dismissal for poor performance

Dismissal will generally not be fair unless the following key elements are present:

A **proper investigation** into the problem has taken place.

The employee has been made aware of the problem and been given an **opportunity to improve** within a realistic timescale.

The employee has been provided with **appropriate support** and possibly training.

The employee's **progress is reviewed** during the review period.

The employee is offered a **right of appeal** against the decision to dismiss

# So, assuming the following...

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1

You have made some reasonable adjustments

2

There is little or no improvements in performance

## What do you do?

# PANIC!!!

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# No, there are potential options...

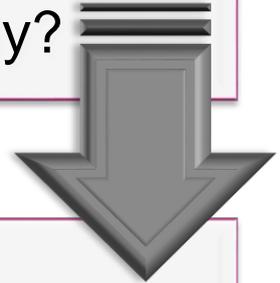
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## 1. Gather information

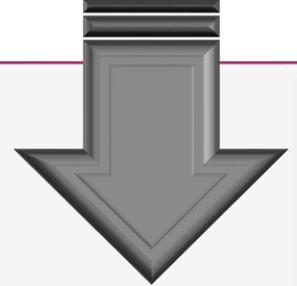
- What extra information do I need / can I get?
- When was the last OH report obtained?
- Would a discussion with the line manager be helpful?
- Would it be helpful to speak to the employee directly?

## 2. Consider further reasonable adjustments

- E.g. transferring employee to an alternative role or salary reduction
- Consider seeking advice from external specialist occupational health agencies



### 3. Consider whether such adjustments are reasonable



If **yes**

If **no**

Implement them  
& monitor  
performance

If still

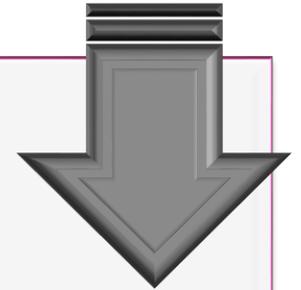
**no improvement**

Consider PHI if  
appropriate

**OR**

Coaching / mentoring  
guardian programme  
/ EAP

## 4. Still no improvement?



Dismissal

Capability

- Remember capability is one of the 5 fair reasons
- Ensure capability procedure is conducted in a way that does not disadvantage the disabled employee

Mutual Agreement

- WP conversation

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# Communication is key



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Ultimately, there are no risk free scenarios  
and the level of risk will depend on the  
personality of the employee and the  
situation

# Questions

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