

The logo for MACROBERTS, featuring the word in white, uppercase, sans-serif font on a dark blue rectangular background. The background has a slight gradient and a thin white border.

MACROBERTS

White Paper Employment Law Conference
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16th November 2022

Question

How do you handle employees who disclose a disability as part of a PIP or disciplinary but not in pre-employment forms or meetings with the manager (even after direct probing)?



Legislation

1. Part 10 of the Employment Rights Act 1996 (“ERA”), governing the employee’s right not to be unfairly dismissed; and
2. The Equality Act 2010 (“EqA 2010”), governing the right not to be discriminated against, particularly:
 - Section 15 (discrimination arising from disability); and
 - Section 20 (duty to make reasonable adjustments).



Part 10 of the Employment Rights Act 1996

The right not to be unfairly dismissed

- Apply if an employee has 2 years' continuous service with the organisation.
- The ACAS Code of Practice on Disciplinary and Grievance Procedures (the "Code") applies to disciplinary situations including misconduct and poor performance.
- Tribunals will also be able to adjust any awards made in relevant cases by up to 25% for unreasonable failure to comply with any provision of the Code.



Part 10 of the Employment Rights Act 1996 cont'd...

The right not to be unfairly dismissed

Although misconduct and performance management are separate issues, the processes are similar.

1. Informal discussion
2. Formal written warning
3. Final written warning
4. Consideration of dismissal

If at any stage of the process, an employee discloses any health concerns, this should be understood and considered in more detail.



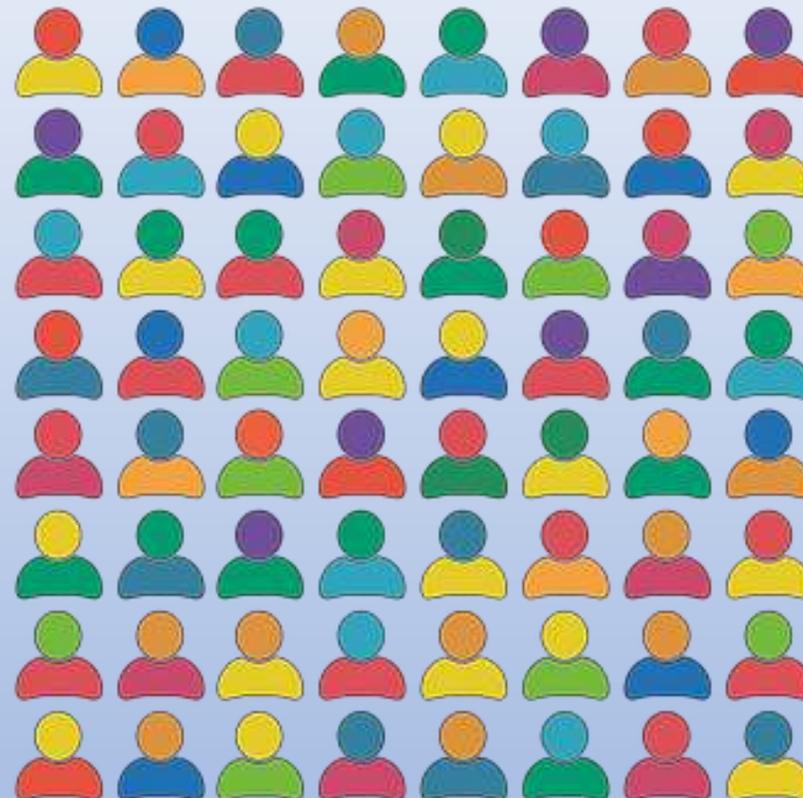
The Equality Act 2010

Discrimination which is prohibited under the Equality Act 2010 includes:

- direct discrimination;
- indirect discrimination;
- harassment; and
- victimisation.

Two types of discrimination which are specific to disability discrimination are:

- Section 15 EqA 2010 (unfavourable treatment arising from disability which can't be objectively justified); and
- Section 20 EqA 2010 (duty to make reasonable adjustments).



The Equality Act 2010 cont'd...

1. Identifying a disability

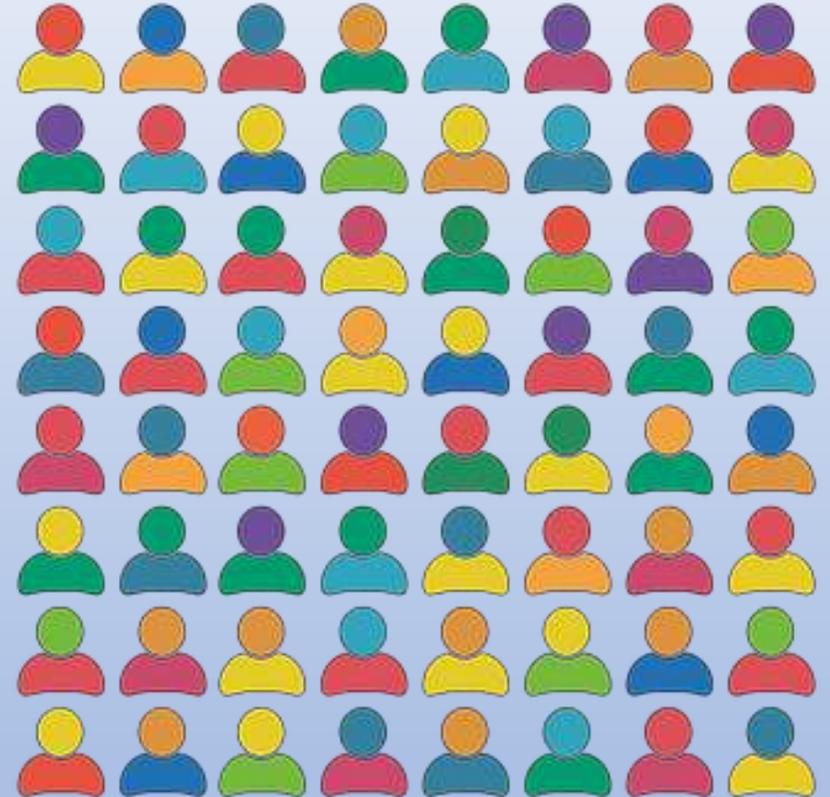
Section 6 of the EqA 2010:

“(1) 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.”

Automatically protected under disability discrimination law:

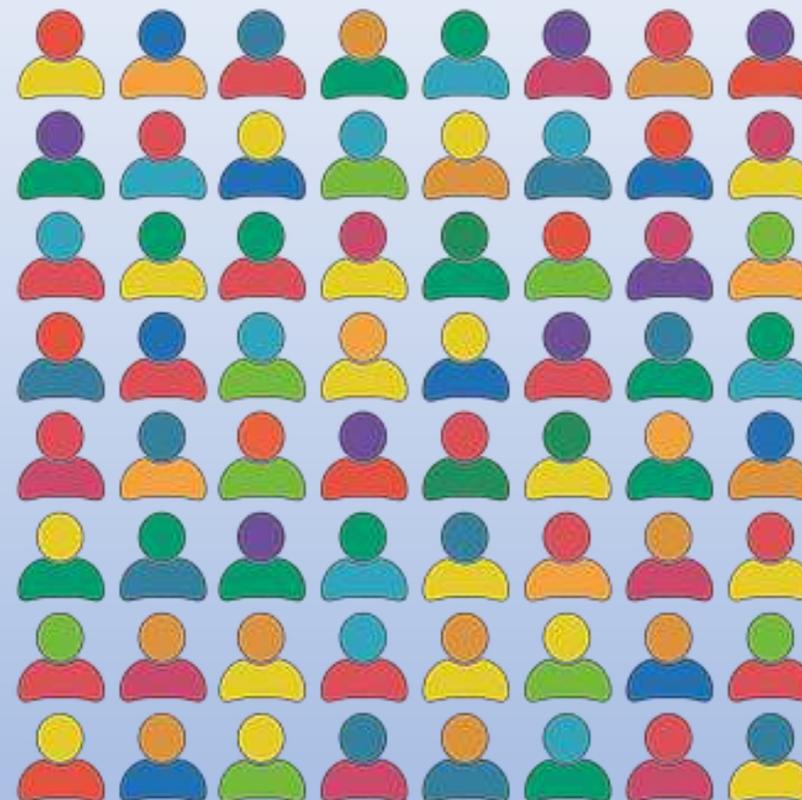
- Cancer;
- An HIV infection;
- Multiple sclerosis (MS);
- A visual impairment – if someone is certified blind, severely sight impaired, or partially sighted.



The Equality Act 2010, cont.

2. Knowledge of employer

- An employer cannot be liable for direct disability discrimination, discrimination arising from disability (under section 15 EqA 2010) or failure to make reasonable adjustments (under section 21 EqA 2010) unless it knew, or should have known, about the employee's disability.
- Pre-employment health checks
- When can an employer be assumed to know about disability?
 - EHRC Code – paragraph 5.14
 - EHRC Code – paragraph 5.17 and 6.21
 - EHRC Code – paragraphs 5.15 and 6.19
 - EHRC Code – paragraph 17.98



Section 15 Equality Act 2010

Discrimination arising from disability

- Discrimination arising from disability occurs where both:
 - a) “A [a person] treats B [a disabled person] unfavourably because of something arising in consequence of B’s disability;
 - b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”
- EHRC Code – paragraph 5.8 and paragraph 5.9



Section 15 Equality Act 2010 cont'd...

Discrimination arising from disability

Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14

- 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"?

EHRC Code Paragraph 5.8: "There must be a connection between whatever led to the unfavourable treatment and the disability." Paragraph 5.9 then states "the consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability."



Section 20 Equality Act 2010

Reasonable adjustments

- The EHRC Code, Paragraph 6.9: *“In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant.”*
- Section 20 Equality Act 2010:
 - 1) “The duty comprises the following three requirements.
 - 2) 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 to avoid the disadvantage.
 - 3) 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 to avoid the disadvantage.
 - 4) 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 take to provide the auxiliary aid.”

Section 20 Equality Act 2010 cont'd...

Reasonable adjustments

- ***What is the duty to make reasonable adjustments?***

- The EHRC Code - paragraph 6.5
- The EHRC Code - paragraph 5.20
- The EHRC Code – paragraph 5.21

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; [2016] IRLR 216

- ***Knowledge of the employer***

- Schedule 8 of the Equality Act 2010, Paragraph 20 deals with lack of knowledge of disability:

“A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”



Section 20 Equality Act 2010 cont'd...

Reasonable adjustments

What is meant by reasonable steps?

- The EHRC Code - paragraph 6.23
- The EHRC Code - paragraph 6.33 highlights a number of adjustments that might be reasonable including:
 - Providing information in accessible formats.
 - Allocating some of a disabled person's duties to another worker.
 - Transferring a disabled worker to fill an existing vacancy.
 - Altering a disabled worker's hours of working or training.
 - Allowing a disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment.
 - Giving, or arranging for, training or mentoring.
 - Modifying procedures for testing or assessment.
 - Modifying performance-related pay arrangements



Section 20 Equality Act 2010 cont'd...

Reasonable adjustments

Modifying policies, procedures or arrangements

- The EHRC Code - paragraph 17.98: don't discriminate in the way a process is invoked
- **Di Benedetto v Guy's and St Thomas' NHS Foundation Trust ET/2370562/11**: reasonable adjustment would have been facilitating the provision of an advocate for an employee with a debilitating learning difficulty
- **OCS Group Ltd v Taylor UKEAT/0803/04**: failure to make reasonable adjustments (e.g. provision of an interpreter) for a deaf employee who did not understand what was happening and was effectively unable to participate in the process leading to his dismissal
- The EHRC Code Paragraph 6.24: it is good practice for employers to ask



Section 13 Equality Act 2010

Indirect Discrimination

- An employer has a policy, criterion or practice which has the effect of disadvantaging people who share a particular protected characteristic (disability), unless it can be objectively justified as being a proportionate means of achieving a legitimate aim and the measures taken to achieve that aim were appropriate and proportionate.
- Knowledge of disability is not required.

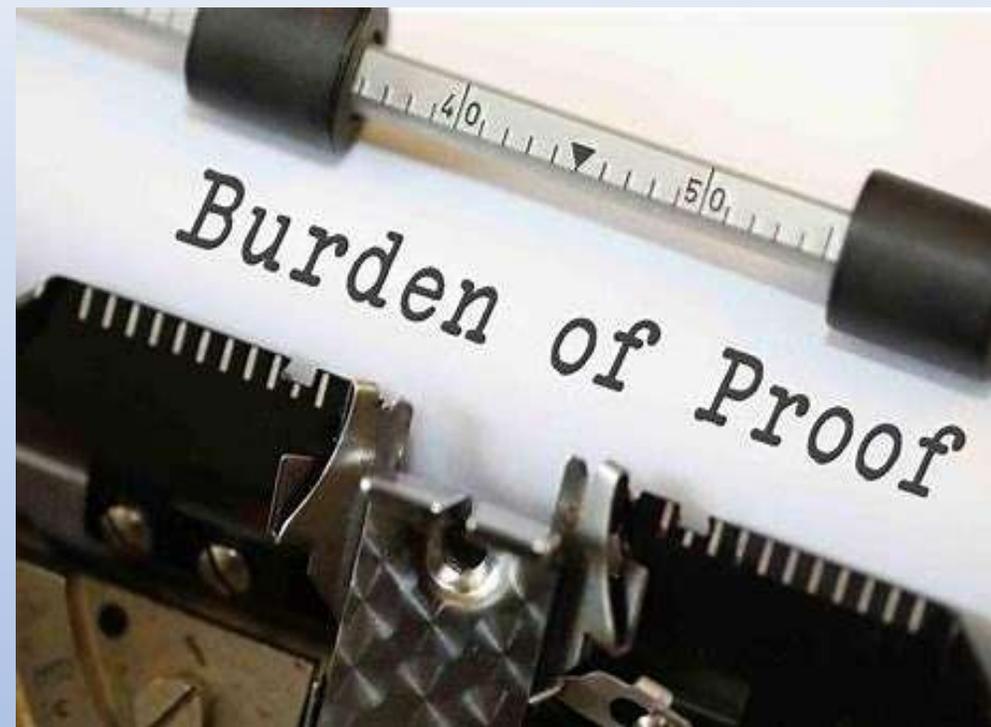


Burden of Proof

Section 136(2) Equality Act 2010:

“in any proceedings relating to a contravention of the Equality Act 2010, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Royal Mail Group Ltd v Efofi [2021] UKSC 33



Summary of steps for consideration

1. **Identify the medical impairment – understand if it is a disability** by instructing an Occupational Health specialist and obtaining up to date medical evidence about its effects on the employee's ability to carry out day to day activities, including their job;
2. **Identify the symptoms that flow from the effects of the disability** in order to assess whether any unfavourable treatment may arise from those;
3. **Identify whether a provision, criterion or practice (PIP or misconduct process), puts the employee at a substantial disadvantage compared to non-disabled employees such that there is a duty to make reasonable adjustments;**
4. **Assess the reasonableness of the adjustments.** The adjustment should be reasonable to address the disadvantage the employee is suffering.



Question:

How do you handle employees who disclose a disability as part of a PIP or disciplinary but not in pre-employment forms or meetings with the manager (even after direct probing)?

Answer:

With care.



Questions?



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