Guidelines on the Equal Opportunities Aspects of Employing People with Disabilities in the Health Service

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1. Introduction

A number of significant initiatives have been undertaken under the auspices of the HSE – Employers Agency in recent times to ensure equality and to accommodate diversity in the health service. As provided for in the Action Plan for People Management and the current national pay agreement Sustaining Progress, An Equal Opportunities / Diversity Policy and Strategy Objectives for the Health Service was produced and circulated to all health service employers in 2004. This document covers all aspects of employment including recruitment and selection, dignity at work and conditions of employment.

A Local Implementation Plan to assist employers in giving effect to the Policy was produced by the national Working Group, in consultation with all of the human resource groups within the sector, and circulated to employers in December 2004.

As part of the Implementation Plan, the Equal Opportunities Working Group prepared a set of tools to assist employers. An area of particular concern is the employment of people with disabilities. The purpose of this document is to assist employers to meet their obligations as set out in the Employment Equality Act 1998 and 2004 in terms of recruitment, retention and rehabilitation of people with disabilities. It also seeks to encourage employers to look beyond their legal requirement and use best practice to accommodate the needs of people with disabilities. It will be useful for recruitment and selection and human resource practitioners as well as line managers.

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1 The Code of Practice for the Employing People with Disabilities prepared by the former North Western Health Board on a partnership basis provided some assistance in the preparation of these guidelines.
2. Legislative Context

2.1 Employment Equality Act 1998 and 2004

The Employment Equality Act 1998 and 2004 prohibits discrimination on the following grounds:

- Marital Status
- Family Status
- Race
- Religion
- Age
- Disability
- Sexual Orientation
- Gender
- Membership of the Traveller Community

Discrimination occurs where, because of any one of these grounds, a person is treated less favourably than another person is, has been or would be treated in a comparable situation. The Act applies to all employees and to applicants for employment and training.

The legislation provides that all individuals should have equal access to job opportunities. Access covers all arrangements for filling a vacancy including placing the advertisement, shortlisting applicants and conducting interviews. Thus an employer must not discriminate in any arrangements made for selecting the employee or specify entry requirements that could discriminate against potential applicants. The Act also requires that employees should be provided with equality of opportunity to acquire the range of training, skills and experience necessary for their career development.

The Employment Equality Act 1998 and 2004 imposes specific obligations on an employer with regard to the employment of people with disabilities. This definition is quite broad as it includes a wide range of physical, psychological and social disorders as well applying to previous disabilities, current disabilities and those which may exist in the future.

**Definition of Disability under Employment Equality Act**

Disability is defined, under the Act, as:

a) “the total or partial absence of a person’s bodily or mental functions, including the absence of a part of the person’s body,

b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,

c) the malfunction, malformation or disfigurement of a part of a person’s body,

d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

f) and shall be taken to include a disability which exists at present or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.”
2.2 The Duty to Make Reasonable Accommodation

Under the Act the employer is required to take “appropriate measures” to enable a person who has a disability to have access to employment, to participate or advance in employment or to undergo training “unless the measures would impose a disproportionate burden on the employer”.

In practice “appropriate measures” means effective and practical measures, where needed in a particular case, to adapt the employer’s place of business to the disability concerned, including:
- the adaptation of premises and equipment;
- patterns of working time;
- distribution of tasks or the provision of training or integration resources.

This does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.

In determining whether the measures would impose such a burden “account shall be taken, in particular, of—
(i) the financial and other costs entailed,
(ii) the scale and financial resources of the employer’s business,
(iii) the possibility of obtaining public funding or other assistance.’’

The Act does not oblige an employer to recruit, retain, train or promote an individual who will not or is unavailable to carry out the duties of a position, or who will not accept the conditions under which the duties attached to a post are to be performed, or who is not fully competent to carry out the duties concerned. The Act stipulates that a person with a disability is to be considered fully competent and capable to undertake the duties attached to a job, if the person could do the duties with the assistance of special treatment and facilities. The provision of special treatment or facilities must result in the person being fully competent and capable of performing the duties attached to the job, otherwise there is no obligation to recruit or retain the person in employment.

2.3 Disability Act 2005

The Disability Act 2005, which came into law in July 2005, is a positive action measure designed to advance and underpin participation by people with disabilities in everyday life. It establishes a statutory basis for mainstreaming. Mainstreaming places obligations on public service providers to support access to services and facilities for people with disabilities to the greatest possible extent.

The Act contains several provisions to promote mainstreaming. They include an obligation on public service bodies to be pro-active in the employment of people with disabilities. The Act gives legal status to the 3% target for the employment of people with disabilities. It also provides:

- the scope for each Minister to expand the range of positive actions which public bodies, within his or her area of responsibility, must take for the employment of people with disabilities
- a special role to the National Disability Authority (NDA) in monitoring compliance and ensuring implementation.

The NDA may require employers, which are public bodies, to take certain measures if they are not meeting the compliance targets.

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\[2\] This section of the Disability Act 2005 is effective from 31\textsuperscript{st} December 2005
3. Attraction, Recruitment and Selection of Staff

Best practice at each stage of the recruitment and selection process helps to ensure that people with disabilities are given equal access to job opportunities in the health service. The following are the normal stages of the recruitment and selection process:

| Job analysis |
| Job description and person specification |
| Advertisement |
| Application forms/shortlisting |
| Interview |
| Pre-employment medical assessment |

3.1 Job Analysis and the development of the Job Description and Person Specification

When a vacancy arises the job should be analysed taking account of the following:

- Has the job content or workload changed since the previous employee was recruited?
- Could more flexible attendance arrangements, which better meet service requirements, be introduced (e.g. a number of part-time positions to cover extended opening hours)?
- Are there any changes anticipated which would require different skills from the jobholder, e.g. plans to introduce new technology?
- Should a person with similar qualifications be recruited or should the skill mix be changed?
- Would the vacancy provide a career development opportunity for another member of staff?

It may be helpful to discuss these options with the existing jobholder and other staff in the department and to seek advice from the HR department before reaching a final decision.

The job description sets out the main duties and responsibilities of the job.

For example: the main duties of a telephonist/receptionist post are: to operate a busy switchboard and forward calls appropriately; to undertake general receptionist duties, such as ensuring that all visitors sign the visitors book and are directed to the correct locations; to answer basic queries such as details regarding visiting hours and whether or not patients have been admitted.

The person specification sets out the qualifications, skills, experience and personal attributes necessary to carry out the job effectively.

For example: the person specification for a telephonist/receptionist post may include good interpersonal skills, experience of operating a busy switchboard, distinct speaking voice.

It is important to ensure that the criteria set out in the person specification clearly relate to the essential requirements of the job. For example, it may be unlawful to
specify requirements such as possession of a driving licence or particular academic qualifications if not deemed necessary to perform the job effectively.

When drawing up the person specification, it is important to focus on what is to be achieved in the job rather than how it is to be achieved as people with disabilities may carry out certain duties differently but just as effectively. For example, a requirement to possess a driving licence might discriminate against individuals with a visual impairment or who are not medically permitted to drive (e.g. due to epilepsy or arthritis) unless driving is an essential requirement of the job. This can be replaced with, “required to travel throughout the region”. The candidate may be able to fulfil this requirement by using alternative forms of transport.

Consider whether previous work experience is essential for the job. People with disabilities may not have had the same opportunity to acquire work experience but may have other relevant experience and skills or have undergone relevant training courses to equip them to do the work.

Do not specify attributes which are not relevant to the particular job, e.g., ‘good appearance’, which may deter people with disabilities from applying.

The job description and person specification form the basis for identifying selection criteria against which all candidates should be assessed. Managers therefore have a key role to play in drawing up or updating the job description and person specification to ensure that they accurately reflect the requirements of the job.

The terms and conditions that currently apply to the job should also be reviewed in order to identify the scope for greater flexibility. For example, it may be timely to review traditional attendance arrangements and consider whether requests to work part-time or atypical hours can be facilitated. This may better meet service requirements (e.g. a number of part-time positions to cover extended opening hours) and encourage applications from people with disabilities who do not wish to work full-time.

Summary Job description and Person Specification
- Set out the essential components of the job in the job description.
- Use these components to identify the essential criteria in the person specification
- Focus on what is to be achieved not how it is done

3.2 Advertisement
Advertisements for all posts should clearly state that people with disabilities are welcome and encouraged to apply. The job should be advertised as widely as possible to attract applications from a wide range of suitable candidates. It should appear in a wide range of media such as newspapers, specialist journals, staff notice boards, online recruitment agencies sites or may be circulated by e-mail.

Consideration should be given to proactively seeking applications from people with disabilities\(^1\). This is known as positive action. Advertisements can be placed with training placement officers, supported employment programme offices or specialist

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\(^1\) Employers can take measures to promote equality between employees and prospective employees on all of the nine grounds covered by the Employment Equality Act.
agencies where they are more likely to be seen or brought to the attention of people with disabilities who may be interested in applying.

The content of the advertisement should only specify the qualifications, skills and personal attributes relevant to the job as identified in the person specification.

The advertisement and relevant documentation should be provided in the format requested (e.g. large print, audiotape) provided it is reasonably practicable to do so.

Summary Advertisement

- Promote your organisation as an equal opportunities employer and indicate that people with disabilities are welcome to apply for positions.
- Ensure that the first contact with every candidate is positive.
- Ensure that the means by which you communicate with candidates are accessible to candidates with disabilities and where relevant that your message is accessible by alternative means.

3.3 Application Forms / Shortlist Applicants

Applicants may be required to complete a standard application form which may be used to shortlist candidates for interview. Application forms should only seek information that can be used to determine the suitability of the person to do the job.

Where possible the application form and any documentation on the job should be available on request in different formats such as large print, Braille, tape, disk or e-mail so that they are accessible to people with disabilities. The application form may also invite applicants to specify whether any special provisions or facilities are required at the selection process, for example, use of a signer or interpreter or car parking within close proximity to the building.

Employers should treat any information relating to the disclosure of an applicant’s disability in a confidential and respectful manner. It should be made clear to the applicant/employee that this information is being sought in order to accommodate the needs of people with disabilities.

Sample statement:

“_______ is an equal opportunities employer and is committed to accommodating the needs of people with disabilities to enable them to participate in the selection process. Please let us know if you have any particular requirements should you be invited for assessment/ interview or that you wish us to take into account when considering your application.”

A separate form should be used if requesting information on whether the person has a disability for equality monitoring purposes. This information should be sought on a voluntary basis and should not form part of the recruitment and selection process.
Summary Application Forms / Shortlist Applicants

- Application forms should only seek information that is relevant to the ability of the person to do the job.
- The structure and content of the application form should be clear and coherent.
- Information, application forms and job descriptions should, where possible, be made available in a range of formats on request e.g. Braille, audio, enlarged print, by telephone and email.
- Candidates should be requested to outline any accommodations required during the recruitment process.

3.4 Interviews

Claims of discriminatory treatment frequently arise in relation to the selection interview. The interview board should be briefed on the employer’s equal opportunities policy and the Employment Equality Act 1998 and 2004. The interview board should also be given clear guidance on how to conduct interviews in a non-discriminatory manner (see Appendix 1 - Disability Etiquette for examples).

It is also important to ensure that the necessary practical arrangements are made prior to the interview e.g. availability of designated car parking spaces, accessibility of the interview location etc.

Legal Case Study
Harrington v East Coast Area Health Board (DEC-E-2002-001)

Ms Harrington applied for a job with the respondent and notified the respondent of the need for wheelchair facilities. On the day of the interview her access to the building was restricted as the wheelchair ramp was blocked and the lift was broken. Ms Harrington alleged that this effected her performance at the interview and constituted discrimination on the basis of disability. The Equality Officer awarded compensation and ordered the employer to draw up a code of practice on accommodating people with disabilities and to revise the recruitment and selection policies to ensure it complied with equality legislation.

Interviews should focus on a candidate’s skills, qualifications and aptitude for the job. The interview board should review the job description and person specification in advance and ensure that the criteria for assessing candidates reflect the requirements of the job. Interview topics should be based on selection criteria and planned in advance to ensure consistency of treatment. This will help to avoid questions related, for example, to the person’s disability or other subject areas that could give rise to claims of discriminatory treatment.

The interview board may wish to check the ability of candidates to fulfill certain job requirements such as attendance hours, on-call liability, travel, etc. This should be done without reference to a candidate’s disability or other characteristics. It is useful to specify these requirements in the job description so that prospective applicants are clear from the outset about the conditions of employment. No assumptions should be made about the person’s ability to do the job. If there are concerns that the person’s disability may have an impact on their ability to do the job, this can be assessed at the pre-employment medical.
Selection Criteria and Marking Schemes
It is important to ensure that selection criteria are based on the job description and person specification in order to ensure that the criteria for assessing candidates reflect the requirements of the job. A formal marking system should then be drawn up. This must be done in advance of short listing/interview.

Candidates should be assessed against each of the selection criteria and awarded an appropriate mark under each category/heading. The marking sheet should also contain a section for comments in relation to each of the criteria. It is important that all of the criteria are used in evaluating the candidates to ensure consistency.

Interview Notes
Notes or ‘aide memoirs’ made during the course of the interview should be retained with the marking sheets as they form part of the record. While it is good employment practice to retain these notes, there must be an awareness that this information may be required if the selection decision is challenged. Care should be taken not to write comments which might have discriminatory connotations.

The practice of shredding interview notes and only retaining details of the candidates’ overall marks can suggest a lack of transparency in the interview process. The Equality Officers and the Labour Court have on numerous occasions made reference to the fact that the absence of such notes can call into question the transparency and objectivity of the assessment process.

All application forms, interview notes, marking sheets and any other documentation pertaining to the competition should be kept on file for at least 3 years.

Summary Interview
- Encourage candidates to state any specific adjustments or accommodations they may require in order to participate in the interview e.g. provision of sign language interpreter or readers.
- Where tests and assessments are being used as part of the selection process accommodations such as additional time; use of a separate room; use of a computer should be made available where appropriate.
- Enable each candidate to demonstrate how their skills and experience can add value to your organization
- Each candidate should be interviewed in a manner which focuses only their ability to do the job.

3.5 Pre-employment health assessment
The final stage of the recruitment process normally requires a candidate to undergo a medical/occupational health assessment to ensure that they are medically fit to undertake all of the duties of the job. The purpose of the pre-employment medical is to assess the capability of the person to perform the full range of duties of the job and not “fitness” in general. The Occupational Health Department or medical practitioner engaged to carry out the medical should be given a copy of the job description and details of the working conditions.

The assessment process may reveal medical conditions which do not necessarily have any implications for the capability of the person to carry out the job. Where the person has an impairment or disability which may impact on his/her ability to
do the job, the onus is on the employer to make “reasonable accommodation” to facilitate that person. The person must be able to render regular and efficient service and discharge the duties of the job albeit with “reasonable accommodation” provided by the employer.

“Appropriate measures” provided for under the Act may include the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources. The provision of such measures must result in the person being fully competent and capable of performing the duties attached to the job, otherwise there is no obligation to recruit or retain the person in employment.

Legal Case Study
A Computer Component company and A Worker (ED/00/08 - Det013-EED013)

The case of A computer component company and A Worker (ED/00/08 - Det013-EED013) concerned the issue of the discovery of a disability as the result of a medical examination. The employee was initially employed in a temporary capacity and was subsequently offered a permanent appointment subject to a satisfactory medical assessment. The medical assessment revealed that the employee had epilepsy and the company terminated her employment. The Labour Court found that the complainant was dismissed by the respondent by reason of her disability. In its decision the Court referred to the fact that the company did not consider undertaking any form of safety assessment which could have identified the extent, if any, to which the work environment presented danger to the worker and how any such danger could be minimised. Furthermore, the company did not discuss its concerns with the worker and did not advise her to obtain a second opinion from the neurologist as had been suggested by the company doctor.

The type of reasonable accommodation required must be determined on a case-by-case basis to meet the specific work-related needs of the individual. This may be done as part of the pre-employment medical assessment stage in consultation with the Department Head and prospective employee.

The Labour Court has applied a consistently high standard in cases where reasonable accommodation is concerned. The minimum requirement is that employers are “proactive in relation to the matter, in the sense of acquiring the material information and that different options be discussed with affected employees or their medical advisers” (O’Sullivan and Department of Justice, Equality and Law Reform (DEC - E2004- 076).

Legal Case Study
A Worker v A Company (ED051)

The case of A Worker v A Company (ED051) also illustrates the obligation on employers to reasonably accommodate employees with disabilities. The case concerns an individual who worked as a switchboard operator in a company for a number of years. The individual was diagnosed with Obsessive Compulsive Disorder and her employer facilitated her with time off to attend at medical appointments. Her manager informed her of some complaints about delays in answering calls and transferred her to another clerical position against her wishes. The new position was situated in a busy office with a high volume of noise which the complainant, with her particular disability, found distracting and stressful. The individual resigned from her position citing unhappiness with and inability to perform her new job and fearing the effect on her health given her disability.
The Court, in its findings, stated that the company made no effort when transferring the individual to different duties to assess her needs and/or to do all that was reasonable to accommodate those needs, or to provide her with special treatment or facilities. It recommended in such cases that the employer may seek professional assistance in assessing the situation and should consider the options for accommodation in consultation with the employee and his/her medical adviser.

Examples of reasonable accommodation include:

- Widening a doorway, providing a ramp or moving furniture for wheelchair user
- Relocating light switches, door handles or shelves for someone who has difficulty in reaching
- Providing an adapted keyboard, telephone or chair
- Allocating accessible car parking spaces
- Allowing absences during work hours for rehabilitation, assessment or treatment
- Making changes to work hours
- Making reasonable adjustments to the duties of the job
- Providing a reader or interpreter

The Act does not require an employer to:

- Fundamentally alter the job or eliminate aspects of the job which are essential
- Do anything that would result in a breach of any statutory obligations under health and safety legislation. (It should be noted that people with disabilities are not necessarily more of a health and safety risk than people without disabilities. However, adjustments may need to be made to health and safety policies and procedures to accommodate the needs of employees with disabilities)
- Provide personal use items if they are also needed off the job, e.g. eyeglasses and hearing aids
- Accept lower standards of performance from a person with a disability

Where work colleagues are likely to be affected by the accommodation, they should be fully consulted as to the nature and extent of the proposed changes.

A record should be kept of the accommodations provided to inform future actions. Employers should also seek feedback from the employee on the effectiveness of the accommodations in case modification is necessary.

**Summary Pre-employment Health Assessment**

- Provide the occupational health physician with full details of the requirements of the job and the working environment
- Only those aspects that relate to the capability of the person to perform the tasks involved in the job should be assessed.
- Where the occupational health physician conducting the medical is doubtful as to the person’s ability to carry out certain aspects of the job in light of their medical condition, these concerns should be discussed with the candidate themselves
- All options in relation to reasonable accommodation should be investigated by the employer and discussed with the candidate.
4. Induction and Probation

Once a suitable candidate has been appointed to the job, it becomes the responsibility of the Department Head to ensure that the person settles into the job in the shortest possible time and is given whatever assistance is required to achieve their full potential. The induction process is concerned with integrating new employees into the workplace and is a key Human Resource tool in achieving equality of opportunity and accommodating diversity.

It should be recognised that some people with disabilities may encounter a wider range of issues than other employees in adjusting to a new workplace. Line managers should be made aware of the importance of integrating a person with a disability and of being aware of their needs on an on-going basis. Induction is not purely about familiarising the individual with the requirements of the job. The social aspects of the work environment are equally important and every effort should be made to include the individual in lunch breaks and social activities. A buddy system, where experienced members of staff are responsible for integrating new members of staff is one method of achieving this.

Induction provides another opportunity to discuss with new employees any special needs which they may have and to explore how these needs may be accommodated.

It is important to create awareness amongst existing staff of their role in helping the new employee to settle in to the job and feel part of the team. Staff may also have to be informed about any relevant issues relating to a person’s disability so that they are sensitive to their needs and misunderstandings are avoided. For example:

- If the new employee has a speech impairment, staff should be patient and attentive while the person is speaking and resist the temptation to finish his or her sentences.
- If the new employee is a wheelchair user, staff should be aware of not leaning on the person’s wheelchair as this would be considered an invasion of body space.

(Refer to Appendix 1 - Disability Etiquette for further examples).

Disability awareness training for staff helps to promote good communications, challenge preconceived ideas and stereotypes and foster a positive working environment in which the person can realise their potential.

The majority of new employees are required to serve a probationary period to establish their suitability for continued or permanent employment. It is important that the probationary process is managed properly by the line manager to ensure that the employee is meeting the required standards in performance and conduct. Where performance issues arise they should be discussed with the new employee and a plan to address these issues should be devised.

**Legal Case Study**

An Employee and A Local Authority (DEC-E2002-0004)

The induction process should be regarded as the initial phase of an integration programme, which identifies particular needs and provides appropriate accommodations and ongoing support, as necessary. In this case the complainant, who suffered from a brain injury, alleged that during his time as a clerical officer with the respondent, it did not make a reasonable attempt to provide him with any
special treatment or facilities which would have rendered him fully competent and capable to undertake the duties attached to his job.

The Equality Officer found employer failed to notify complainant’s supervisor that he had a disability at the outset of his employment. Furthermore, there was no discussion between the complainant and his supervisor about his accommodation needs. When issues were identified with the complainant’s performance the complainant alleged that the respondent failed to explore the options in terms of reasonable accommodation. The complainant contacted FÁS who identified three initiatives which would be of assistance. They included undertaking a vocational assessment to identify whether the complainant’s work strengths and weaknesses, the provision of a Job Coach and the accessing financial support through the Employment Support Scheme. The complainant did not avail of these initiatives and decided that the complainant was not fully competent and capable of undertaking the duties attached to his job.

The Equality Officer found that this decision was not reached in a reasonable and objective manner as the respondent had not adequately examined the options available to it, including the three initiatives identified to it by FÁS/NRB as being of assistance.

The Equality Officer ordered the respondent to pay the complainant €15,000 as compensation for the distress suffered by him as a result of the respondent’s failure to provide reasonable accommodation for the complainant. She also ordered that the respondent provide all supervisory staff with appropriate awareness training in disability issues – the training to commence within four months of the date of the decision; that this training should specifically include the person carrying out the duties of Disability Liaison Officer in the local authority; that the person carrying out these function should attend on-going training/awareness

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**Summary Induction and Promotion**

- Discuss accommodation needs and facilities with the employee, where possible prior to commencement, to ensure the workplace is safe and accessible and the supports required (if any) are already in place.
- A record of adjustments made for employees with disabilities should be retained to inform future actions and allow for evaluation and review.
- Heads of services and line managers should be made aware of the importance of integrating a person with a disability and of being aware of their needs on an on-going basis.
- The co-operation and support of co-workers is essential to the successful induction and integration of any new member of staff. Existing staff should be briefed on disability/equality awareness.
- Performance issues should be discussed with the employees during their probation and appropriate assistance provided to address shortcomings.
5. Training/career development/ promotion

Employees with disabilities should enjoy the same opportunities as other staff to develop full and rewarding careers in the Health Service. Like all other staff they are entitled to be considered for more demanding work or greater responsibility based on clear and objective assessments of their aptitudes and abilities.

Employees should be provided with equal opportunities to acquire the range of training, skills and experience necessary for their career development, while paying special attention to the problems they may encounter in taking advantage of such opportunities. This includes ensuring that the venue for training courses, conferences or other work related activities are accessible to people with disabilities. Training material should, where appropriate, be available in an appropriate medium.

Career development and promotional opportunities can be enhanced by offering a broad range of experience in a variety of sections or job postings within the organisation. Care should be taken to ensure that employees with a disability are made aware of, encouraged and facilitated to maximise their experience in the range of activities within their employment.

Line managers are responsible for communicating performance expectations to their employees and monitoring and appraising their work. Performance issues should be discussed with the employees and appropriate assistance provided to address shortcomings. The importance of addressing performance issues, which may have implications for the person’s career advancement, is illustrated in the following cases:

**Legal Case Study**

**Mr C v A Distribution Company (DEC - E2002 - 093)**

The Equality Officer found that the complainant was discriminated against on the disability ground in the selection process for appointment to the post of full time permanent postal sorter. The selection process comprised of a competitive interview and performance assessment. The complainant had psoriatic arthritis and worked in a temporary capacity for the respondent for a number of years. The complainant received a low mark from his supervisor in his performance assessment which impacted his overall marks and consequently his ranking on the panel. Further investigation revealed that complainant’s supervisor considered that there was an issue with his performance but failed to apprise him of the matter, thus, failing to give him an opportunity to improve. He also treated the complainant differently relative to other persons without a disability as the supervisor stated in evidence that he had spoken to others who he considered had performance issues. The assessor also submitted that he had not received any disability awareness training. It appeared that the individual’s supervisor was aware of a performance issue but was afraid to discuss this issue with him because of his disability which ultimately deprived him of the chance to improve his performance and thus to gain promotion.
Legal Case Study
A Government Department and An Employee (ADE/05/16)

Another case which illustrates the importance of managing performance issues is A Government Department and An Employee (ADE/05/16). In this case the claimant, who suffered from a serious eye condition, claimed that she had been discriminated against on the disability ground in contravention of Section 8 of the Employment Equality Act 1998 when she was not appointed to the post of staff officer.

When the claimant was first assigned to the department in 1990 her disability had a limited affect on her capacity to carry out the full range of a clerical officers duties. In the mid 90s the work of the department became increasingly computerised and the claimant became confined to a limited range of functions which could not be undertaken manually. The amount of manual work available to the claimant continued to diminish over time.

In November 2002 a vacancy arose for a Staff Officer which is a promotional grade from that of Clerical Officer. She applied for the post and the process of selection required the claimant’s manager to assess her suitability for promotion. The Manager concluded that she “did not have the necessary qualities or knowledge for promotion”. In evidence to the Court the claimant’s manager asserted that the claimant lacked the necessary qualities for the job, adding that he found her to be “uncooperative and unwilling to take on new work which was within her capacity.” However, under cross examination, the manager conceded significantly that he had never formally raised these issues with the claimant. He denied that her disability “influenced his assessment of her suitability for promotion.”

Furthermore, the Department did ask the claimant’s optician about the possibility of providing the claimant with a large VDU screen but the optician advised against this. “Thereafter, no consideration was given to any other initiatives which might allow the claimant to become involved in the range of work appropriate to her grade”.

The Court concluded that the claimant was never informed that her performance was such as to render her unsuitable for progression. In its view, this seriously impairs the weight which the Court can attach to the employers explanation for its refusal to promote the claimant. The Court held that the employer had a duty under Section 16 (3) (b) of the Act to assess the claimant’s position and to at least consider in consultation with her, what if any alleviating measures could be put in place.

Summary Training, Career Development and Promotion

- Employees with disabilities should be provided with equal access to training opportunities.
- Measures should be taken to ensure that employees with disabilities are able to fully access training opportunities including ensuring venues for training are accessible and that training materials are in an accessible format.
- In assigning duties to employees with disabilities, care should be taken to ensure, to the greatest extent possible, that they are given the same opportunities as other staff to acquire the range of skills and experience necessary for future career development.
- Employees with disabilities should have equal access to promotional opportunities.
- Performance issues should be discussed with the employees and appropriate assistance provided to address shortcomings.
6. Safety, Health and Welfare at Work

Under the Safety, Health and Welfare at Work Act, (General Applications) Regulations, 1993 all workplaces are obliged to have a safety statement. The aim of a safety statement is to protect the safety, health and welfare of all employees. The safety statement sets out the arrangements and resources which are in place to eliminate or control the hazards to which employees may be exposed (e.g. needle stick injuries). Safety statements should also specify the appropriate training required by staff to adequately deal with hazards in the workplace.

Adjustments may need to be made to health and safety policies and procedures to accommodate the needs of people with disabilities. It is essential that employers undertake a risk assessment and discuss these procedures with all the relevant parties on a regular basis.

When drawing up a safety statement it is important to:
- Involve the employees concerned;
- Consider all the relevant work place health and safety factors;
- Identify the duration and frequency of the hazardous situations;
- Assess the risk to employees;
- Identify the possible adjustments and implement them;
- Evaluate and review the situation periodically.

Emergency procedures should be pre-planned and should have regard to the needs of all occupants. It is important that special protective measures are put in place to ensure that employees who are disabled through reduced mobility, hearing or sight are able to make a rapid and safe exit. For instance ‘buddies’ may be assigned to people who have reduced vision to assist them during an emergency evacuation.
7. Retention of Staff who Acquire a Disability

Where existing employees acquire a disability while in employment, there is an obligation to provide reasonable accommodation to enable the person to discharge the full range of duties of the job. It is important to maintain regular contact with employees who are absent due to a long-term illness or injury in order to establish whether any assistance can be provided to facilitate the person's return to work and thereby maintain employee morale. The employee should be referred to the Occupational Health department at an early stage having regard to the nature of the illness/injury in order to determine what adjustments may be taken to facilitate the employee e.g. return to work on a part-time basis, modifications to duties.

This process should be undertaken in full consultation with the employee. The Occupational Health Department should be advised of the full range of duties carried out by the employee and the working environment. This will allow the Occupational Health staff to assess whether the employee is fit to return to carry out his or her normal duties and to make appropriate recommendations to facilitate his or her return. Where possible the range of options that may be considered include:

- part-time working to encourage a graduated return
- adjusting starting/finishing times
- restricting certain tasks
- allowing time off for medical treatment/assessment
- changing the location of the work

The Labour Court decisions show that it requires an employer to make enquiries to determine whether or not it is possible for an employer to facilitate a person with a disability. If the employer does not make such enquiry, the Court’s interpretation will be that the employer has failed to meet the test of ‘reasonable accommodation’.

The extent of these enquiries was explored by the Labour Court in the case A Health and Fitness Club v A Worker (ED/02/59 DETERMINATION NO. 037).

**Legal Case Study**  
A Health and Fitness Club v A Worker (ED/02/59 DETERMINATION NO. 037)

The case concern a claim of discriminatory dismissal on the disability ground. The complainant worked as a childcare worker in a crèche facility operated by the respondent. Her duties involved the care of young children. The complainant suffered from anorexia, which later developed into bulimia. The respondent terminated her employment on the basis that she might not be suitable to remain in charge of young children due to her disorder and therefore she was unfit for the duties for which she was employed.

The Labour Court stated that in relation to discriminatory dismissals the nature and extent of the enquiries which an employer is obliged to make will depend on the circumstances of each case. The Court outlined, however, the minimum standard

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4 These provisions are also outlined in the HSE - Employers Agency document “Guidelines for Health Service Employers on Managing Attendance”
of enquiry which it considered adequate in such cases. The first stage involves looking at the factual position concerning the employee’s capability, including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee’s doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable of undertaking the duties of the job the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The cost of such special treatment or facilities must also be considered. Here, what constitutes disproportionate burden will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

The Court found that the respondent came to the conclusion that the complainant could not be retained because of her disability without the benefit of any form of professional advice or assessment of the risks associated with her condition and also without consulting the complainant in the process.

It is important to note that while employers are obliged to seek to accommodate an employee who is unable to fulfil the tasks and duties associated with the job this obligation only extends to those individuals who, with the relevant accommodation, would then be able to discharge the duties of the post fully. However, in this connection it is important that the employer fully establish the nature of the assistance required to discharge the full range of duties of the post.

Legal Case Study
Gannon v Milford Care Centre (DEC-E2004-048)

Ms Gannon worked as a nurse in a hospice for terminally ill patients. The job involved a significant amount of lifting and bending. The complainant suffered a back injury, which meant that she was unable to carry out any tasks of this nature, and was out of work for a long period of time.

The complainant sought alternative duties from her employer and while she was assigned a task in the library for six weeks the employer claimed there were no other duties it could provide for the complainant.

The substantive issue in the case was whether the employer was obliged to accommodate the employee by offering her an alternative job to that which she was originally recruited for. The Equality Officer concurred with the employer in this instance. The recommendation stated that whilst employers should explore possibilities for reasonable accommodation, including alternative work arrangements or attendance patterns, on a case-by-case basis this examination should be conducted on the basis of the position that the employee was originally recruited for.

As stated previously it is important that a record is kept of any reasonable accommodations provided. The employer should monitor the accommodation to see if the adaptation enables the employee to complete the necessary work task(s) and seek feedback from the employee on its effectiveness.
Summary - Retention of Staff who Acquire a Disability

- Where an employee acquires a disability whilst in employment employers must firstly make a proper and adequate assessment of the situation by looking at the medical evidence of the person’s capability to perform the functions of the job.
- Any medical evidence should be discussed with the employee and/or their medical advisers.
- If the employee is found, by virtue of the medical evidence, not to be fully capable the employers must examine what appropriate measures it can take to enable the individual to be fully capable of fulfilling the duties of the post and consider how they might be achieved.
- The provision of special treatment or facilities must result in the person being fully competent and capable of performing the duties attached to the job, otherwise there is no obligation to recruit or retain the person in employment.
8. Appendices

Appendix 1 - Disability Etiquette

Practising disability etiquette is a way of making people with disabilities feel welcome. The following is a list of some basic tips on disability etiquette to smooth the process of meeting and working with people who have specific impairments. The overriding rule is not to be daunted by a list of rights and wrongs. If you are unsure about what to do or say with a person who has a disability ask the individual concerned.

1. Meeting People with Mobility Impairments

There are many types of injuries, diseases and conditions that can cause mobility impairments. Many people who have mobility impairments use adaptive equipment. Mobility aids such as canes, crutches, walkers and wheelchairs are especially common. Prosthetic devices (such as artificial arms or legs) and body braces might also be used.

Consider the following suggestions when interacting with individuals who have mobility impairments:

- When scheduling a job interview or meeting make sure the location is accessible and that potential barriers will not preclude access.
- A wheelchair should be considered part of the person's personal space.
- Never touch or move crutches, canes or walking frames or push a wheelchair without the users consent.
- Offer assistance but do not insist. If the person needs help he or she will accept the offer and explain exactly what will be helpful.
- For prolonged conversations with someone who uses a wheelchair, sit down so as to be at eye level with the wheelchair user.
- Ensure extra manoeuvring pace for the safety of a person who uses crutches or a walker.

2. Meeting People who have a Visual Impairment

The term ‘visual impairment’ may mean either a complete or partial loss of vision. For some persons, only the edges or part of the visual field might be obscured or some persons might have no central vision although side or peripheral vision still exists. A persons visual acuity may also change under different light conditions.

Consider the following suggestions when interacting with individuals who have visual impairments:

- Identify yourself clearly and introduce any other people present. Clearly indicate where people are located.
- Before offering assistance ask the individual how you may be of help. If the person asks for assistance ask ‘May I offer you an arm?’ rather than taking their arm. This enables you to guide rather than to propel the person.
- When entering an unfamiliar area give a brief description of the layout.
- If speaking in a group it is helpful to identify the name of the person you are speaking to. People should introduce themselves before speaking.

5 The information in the Appendix is sourced from The Employers Forum on Disability (2004) 'The Disability Communication Guide'.
Guidelines on Equal Opportunities Aspects of Employing People with Disabilities

- Provide written communication in an accessible format and if possible in the person’s preferred format such as floppy disc, in large print, on audio-cassette or in Braille.
- Never touch or distract a guide dog without first asking the owner for permission. Guide dogs are not pets and generally should not be disturbed while in working mode.
- Tell the individual when someone is leaving the room.

3. Meeting People who are Deaf or Hard of Hearing

There are many different degrees and types of deafness and different ways for deaf people or those who are hard of hearing to communicate. An individual’s choice will have been determined by many factors, to do with school experience and the nature and degree of their hearing loss. Communication methods include:
- Irish Sign Language
- Writing
- Lip-reading
- Finger-spelling
- Signed English
- Lámh

It can be difficult for a hearing person meeting a Deaf person for the first time, not knowing what communication methods they prefer, but the barriers are usually removed once communication through a mutually suitable method is established.

It may be necessary to obtain the services of a qualified sign language interpreter to provide effective communication if the person who is deaf or hard of hearing uses sign language as his or her primary means of communication. Other accommodations which may be necessary include the use of assistive listening devices or computer assisted real-time transcription (CART).

Consider the following suggestions when interacting with individuals who are deaf or hard of hearing:

- Ask the person to tell you how they prefer to communicate.
- Book interpreters or other supports in advance.
- Make sure a deaf person is looking at you before you begin speaking as he or she may need to lip-read. A gentle touch on the shoulder or arm will capture their attention.
- If a sign language interpreter is present speak to the individual, not the interpreter.
- Keep the background noise as low as possible.
- If you cannot understand the person with a hearing impairment do not be afraid to ask him or her to repeat the message. If this approach does not work you can ask if it would be helpful to communicate by writing or using a computer terminal.

4. Meeting People with Learning Disabilities

Learning disabilities are lifelong disorders that interfere with a person's ability to receive, express or process information. Although they have certain limitations, most people with learning disabilities have average or above-average intelligence. You may not realize that the person has a learning disability because he functions so well or you may be confused about why such a high-functioning person has problems in one aspect of his work.

Consider the following suggestions when interacting with individuals who have learning disabilities:
People with dyslexia or other reading disabilities have trouble reading written information. Give them verbal explanations and allow extra time for reading.

Don't be surprised if you tell someone very simple instructions and he requests that you write them down. Because spoken information gets “scrambled” as he listens, a person who has a learning disability such as auditory processing disorder may need information demonstrated or in writing.

Ask the person how you can best relay information. Be direct in your communication. A person with a learning disability may have trouble grasping subtleties.

It may be easier for the person to function in a quiet environment without distractions, such as a radio playing, people moving around or loudly patterned curtains.

5. Meeting People with an Intellectual Disability
An intellectual disability involves a greater than average difficulty in learning. A person is considered to have an intellectual disability when the following factors are present - general intellectual functioning is significantly below average; significant deficits exist in adaptive skills and the condition is present from childhood.

Consider the following suggestions when interacting with individuals who have intellectual disabilities:

- Speak to the person in clear sentences, using simple words and concrete-rather than abstract-concepts. Help her understand a complex idea by breaking it down into smaller parts.
- Don't use baby talk or talk down to people who have intellectual disabilities. Gauge the pace, complexity, and vocabulary of your speech accordingly.
- Remember that the person is an adult and, unless you are informed otherwise, can make her own decisions.
- People with intellectual disabilities may be anxious to please. During an interview, the person may tell you what she thinks you want to hear. In certain situations, such as law enforcement or a doctor's examination, it can have grave consequences if your interview technique is not effective. Questions should be phrased in a neutral way to elicit accurate information. Verify responses by repeating each question in a different way.
- It can be difficult for people with intellectual disabilities to make quick decisions. Be patient and allow the person to take her time.
- Clear signage with pictograms can help a person who has an intellectual disability to find her way around a facility.
- People with intellectual disabilities rely on routine and on the familiar to manage work and daily living. Be aware that a change in the environment or in a routine may require some attention and a period of adjustment.

6. Meeting People with Mental Health Problems
People with mental health problems may at times have difficulty coping with the tasks and interactions of daily life. Their disorder may interfere with their ability to feel, think or relate to others. Most people with mental health problems are not violent. One of the main obstacles they face is the attitudes that people have about them. Because it is a hidden disability, chances are you will not even realize that the person has a mental health condition.

Consider the following suggestions when interacting with individuals who have mental health problems:
- Stress can affect the person's ability to function. Try to keep the pressure of the situation to a minimum.
- Give the person time to make decisions.
- People with mental health problems have varying personalities and different ways of coping with their disability. Some may have trouble picking up on social cues; others may be supersensitive. One person may be very high energy, while someone else may appear sluggish. Treat each person as an individual. Ask what will make him most comfortable and respect his needs to the maximum extent possible.
- A person may require an advocate to help access information or attend meetings or interviews.